



# EMPLOYMENT TRIBUNAL

**Claimant:** Mr L Patricius

**Respondent** The Royal Star and Garter Homes

**Before:** Employment Judge Morton  
Miss N Murphy  
Ms G Mitchell

**Sitting At:** London South                      **On:** 16-19 October 2023

**Appearances:**

**For the Claimant:** In person

**For the Respondent:** Ms Y Barlay, Representative

## JUDGMENT

It is the unanimous judgment of the Tribunal that the Claimant's claims of:

- a. Direct race discrimination (s 13 Equality Act 2010 ('Equality Act'));
- b. Failure to make reasonable adjustments (ss20-21 Equality Act);
- c. Harassment on the grounds of race (s 26 Equality Act);
- d. Victimisation (s 27 Equality Act);
- e. Automatic unfair dismissal (s103A Employment Rights Act 1996 ('ERA'));
- f. Breach of regulation 12 of the Working Time Regulations 1998 ('WTR');
- g. Breach of contract (non-payment of notice money);

are not well founded and are dismissed.

## REASONS

**Provided at the Request of the Claimant**

### Introduction

1. By a claim form presented on 6 July 2020 the Claimant presented to the Tribunal claims of:
  - a. Direct race discrimination (s 13 Equality Act);
  - b. Failure to make reasonable adjustments (ss20-21 Equality Act);
  - c. Harassment on the grounds of race (s 26 Equality Act);

- d. Victimisation on the grounds of race (s 27 Equality Act);
- e. Automatic unfair dismissal (s103A ERA);
- f. Breach of regulation 12 WTR;
- g. Breach of contract (non-payment of notice money).

All of the claims were resisted by the Respondent.

2. A case management hearing took place on 4 March 2022 and a list of issues was decided at that hearing. The agreed list of issues is set out in the Schedule to this judgment.
3. Judge Smith at the case management hearing also noted that the Claimant had a number of disabilities, which he described as dyslexia, dyspraxia, a heart condition, asthma and a mobility disability (as noted later in these reasons, we decided that the reference to 'dyspraxia' was a typographical error and should have been a reference to 'dyscalculia' – this is supported by the Respondent's letter to the Tribunal of 30 May 2022 at page R85). The record of the case management hearing notes that the Respondent had conceded that the Claimant was a disabled person within the meaning of section 6 of the Equality Act 2010 in respect of dyslexia and dyspraxia but not in respect of the other conditions (this too was confirmed by the Respondent's letter at page R85). It also records the Respondent's concession that that it knew or ought to have known of the claimant's dyslexia and dyspraxia and the disadvantages they caused him at the dates of the alleged discriminatory conduct. It was not clear to Judge Smith that the additional disabilities would add anything to the claim.
4. Judge Smith also noted that in terms of reasonable adjustments the Claimant would require an extra 25% time in terms of reading any documents he was taken to during his evidence. The Claimant had said that he would bring his own auxiliary aid (a coloured film) to assist him. The tribunal took account of these matters at the hearing and asked the Claimant to let the Tribunal know if he needed more time or any assistance with documents as the hearing progressed.
5. The panel spent the first part of the hearing reading the witness statements and the documents referred to in them. The Claimant gave evidence on his own behalf and provided a written statement from James Pay, who did not attend the hearing to give oral evidence. The Claimant's statement was very long and somewhat difficult to follow and the Tribunal relied on the list of issues as setting out the matters we needed to determine.
6. The Respondent had six witnesses: Pauline Shaw, Director of Care; Andrew Cole, Chief Executive; Helena Maher, Home Manager at the Surbiton home where the Claimant worked, Malcolm Brown, Learning and Development Manager and Elizabeth Donaldson, Dementia Manager and Martin Goldman, Director of Operations. Pauline Shaw and Elizabeth Donaldson did not give oral evidence. Their evidence and that of James Pay was therefore not given much weight by the Tribunal.
7. The Respondent's bundle of documents comprised 240 pages and there were some additional documents handed up during the hearing. For reasons that were

unclear, the Claimant had a separate bundle, with a different numbering system. Any references to page numbers with an 'R' in these reasons are references to page numbers in the Respondent's bundle. Numbers prefaced by a 'C' are documents from the Claimant's bundle.

8. An oral decision with reasons, dismissing all the Claimant's claims was given to the parties at the end of the hearing and the Claimant made a request for written reasons which are provided below.

### **Findings of fact**

9. The Tribunal makes the following findings of fact on a balance of probabilities based on the oral and written evidence presented to it. We have not made findings on every matter of dispute between the parties, but only on those that are relevant to the issues we needed to decide.
10. The Respondent is a registered charity care home provider that provides round the clock care to its service users who are ex-servicemen and their partners who live with disability and dementia. The Claimant started work on 25 February 2019 as a Registered Nurse, working on a dementia ward (Lister) at the Respondent's home in Surbiton. He worked on each shift alongside one other registered nurse and approximately 10-12 carers looking after 26 residents. He resigned from his employment on 29 May 2020.
11. The Claimant declared when he applied for the role that he had dyslexia. This was recorded on his job interview record at page R93, which also stated that the condition made him more observant and did not really affect his work. There was no evidence before the Tribunal that the Claimant gave any further information to the Respondent about this condition or any other condition, or that he sought or suggested that the Respondent make reasonable adjustments as a result of any disadvantage at which dyslexia placed him.
12. As noted, the Respondent conceded that the Claimant was disabled by reason of dyslexia and dyscalculia although the case management order referred to 'dyspraxia' which we take to be a typographical error. No further evidence was put forward about the Claimant's dyscalculia although the Claimant himself refers to it in a letter to Mr Cole (page R221) and it was referred to in the grievance outcome letter at page R204, albeit as something of the manager dealing with the grievance hearing, Mr Goldman, had been unaware.
13. At the hearing the Claimant was still putting his case forward on the basis that he was also relying on a number of other conditions, namely a heart condition, asthma, sleep apnoea and a mobility disability and the Respondent was continuing not to concede that these conditions were disabilities at the relevant time. We find as a fact that the Respondent was aware that the Claimant had had a myocardial infarction as this caused him to postpone his start date and to seek a part time contract in the initial period of his employment. The Respondent agreed to this. It was the Claimant's case that all of his medical records had been made available to the Respondent's occupational health physician, Dr Bray and that it therefore had constructive knowledge of all of his health conditions. However, at page R128

there was an email from Dr Bray dated 14 February 2019, certifying the Claimant fit to work. There is no mention of any adjustments in that email and we find that on a balance of probabilities if adjustments had been necessary in respect of any of the additional conditions the Claimant relied upon they would have been referred to by Dr Bray. We therefore find that even if the Claimant was a matter of fact disabled by any of the additional conditions at the time the Respondent did not have knowledge of how those conditions placed him at a disadvantage compared to non-disabled employees. The Respondent did not therefore did not know what, if any adjustments, might be needed. The Tribunal noted that within a matter of months of his starting work he was working two 12.5 hours shifts and from time to time additional overtime shifts, which suggests that the effects of any additional disabilities were in any event limited at that time.

14. The Claimant 's claims arise from the period between February and May 2020. The Home Manager at that time was Helena Maher who had joined in August 2019. The Claimant alleges that he made two protected disclosures in this period and that the conduct of the Respondent towards him following the making of those disclosures caused him to resign from his employment. He thus argued that he was constructively dismissed by means of the treatment he received having made those disclosures the disclosures having been the reason for that treatment.
15. The sequence of events is as follows: On or about 8 February 2020 concerns came to light about whether cupboards and fridges in the medication room were being kept locked by the Claimant as the Respondent said they should have been. On 14 February 2020 Mr Brown was asked by Mrs Maher to look into this. (He was also asked to address a second issue about the Claimant's interactions with the cleaners which was not relevant to the issues before the Tribunal in the case). He therefore approached the Claimant without any prior warning, accompanied by a colleague – his administration assistant – and proceeded to conduct a conversation with the Claimant about this issue, which he recorded. It was his case that the Claimant had given his consent to the recording.
16. Pausing there, the Tribunal wishes to note that we considered this to be extremely poor practice in a number of respects. Firstly, an investigatory meeting should not have been sprung on the Claimant without prior warning. He should have had an invitation letter. This was not a situation in which prior warning of the meeting would have potentially prejudiced the investigation. Secondly Mr Brown should not have been accompanied by someone who was not a member of HR and as he was recording the interview it is not clear why he needed to be accompanied at all. Thirdly, it is not clear that the recording of meetings is common practice at the Respondent and in the circumstances the Claimant is likely to have felt that he had no real choice in the matter of whether the meeting was recorded. This too should have been made clear to him in advance, so that he had time to reflect.
17. The Claimant was understandably unhappy about the way this meeting was conducted. He also complained in his evidence to the Tribunal that Mr Brown had entered a room that was designated for nursing staff only and contained confidential resident information. On that point we found as a fact that Mr Brown, as a senior manager did have authority to enter all parts of the premises and his access was not restricted in the way the Claimant suggested.

18. On 29 February 2020 the Claimant raised this incident with Pauline Shaw, the Director of Care in an email at page R164. What it seemed to the Tribunal that this email was communicating was:

- a. That he was unhappy about the meeting being recorded and felt put under pressure and in a difficult position;
- b. That he felt he ought to have been accompanied during the meeting;
- c. That there was a junior member of staff there, but 'I did not mind...she is learning';
- d. He felt he was being pressurised into saying 'statements which looked to be unfair in front of trainee';
- e. Mr Brown seemed to be on a fault-finding mission;
- f. He felt singled out;
- g. Mr Brown 'fail to understand I am recovering heart attack and has a disability of dyslexia and has not given the right adjustments during his questioning and made me very stressed. However he kindly did offer me to go home early understanding my feelings, but i will always finish my shifts and i will finish the day'.

19. The Claimant relies on this part of the email as his first protected disclosure. The Tribunal however did not consider this part of the email to contain a qualifying disclosure because it lacked the necessary element of public interest. The Claimant was complaining about treatment that was meted out to him personally by Mr Brown. The Tribunal considered that Mr Brown's approach was oppressive and could potentially have amounted to a breach of the implied term of trust and confidence. However, there we could discern no public interest element in this complaint and the Claimant did not, for example, suggest that this was an issue affecting a group of people in the workplace. The Claimant said that he raised the same concerns at a meeting with Helena Maher, which Mrs Maher, somewhat confusingly, also described as an investigation meeting. This took place on 5 March 2020 and there was no documentary evidence of what took place or of the outcome. However, there was no dispute that the Respondent decided that there should be no disciplinary action following Mr Brown's investigation.

20. As regards the Claimant's reference to his disability and a failure by Mr Brown to make adjustments at the meeting in question, the Claimant gave no explanation of what he considers those adjustments ought to have been or indeed what it was about the meeting in question that placed him at a substantial disadvantage because of his dyslexia. There was no documentary evidence however that the reference to disability was picked up either by Ms Shaw or by anyone else at the Respondent at the time although we do not consider that our finding that to be the case assists the Claimant in establishing the claims he wished to put forward. Pausing here, we also wish to record that in our view it was with some justification that the Claimant felt, as he expressed from time to time during the hearing, that the Respondent's preparation of this case was careless at times, which he experienced as disrespectful to him. Ms Shaw did not attend to give evidence and the written statement she prepared was lacking in detail and contained a number of inaccuracies. Whilst this has no impact on our conclusions on the issues in the case, we considered that the Claimant would have been justified in finding the

Respondent, in some respects, to have treated his claim somewhat dismissively.

21. Ms Shaw's witness statement did however make reference to the second issue that the Claimant raised in the email at page R164 and relies on as his second protected disclosure. This was an incident in which Liz Donaldson, the Respondent's Dementia Manager at the time had spoken to a resident who had dementia and was at times behaving inappropriately, in a way that caused the resident to become very upset. The Claimant attached a written account of the incident to the email at page R164. The Claimant's written account was at times difficult to follow, but the Claimant explained in his evidence to the Tribunal that Ms Donaldson had taken the resident into a room with no-one else present, spoken to him in very firm terms, caused him to cry and had then reported on what she had done to the assembled staff, suggesting that she was modelling behaviour that she considered others could adopt. The Claimant was very concerned about this and regarded it as safeguarding issue, a view he also expressed to Mrs Maher. We were satisfied that although the Claimant expressed himself in a complicated way, that it was clear that he was disclosing information and what that information was about. The Respondent took a different view about whether this was a safeguarding issue, although accepted that Ms Donaldson had been unwise to speak to the resident with no-one else present.
22. The Tribunal considered that when he disclosed this information, the Claimant held a reasonable belief that this was a breach of the Respondent's duties to the residents in that the conduct had been harsh and upsetting and the resident was a vulnerable service user. Irrespective of the Respondent's decision that this was not a safeguarding matter, clearly there was a public interest element in the information that was disclosed. It was disclosed to the employer and it concerned matters that it was reasonable for the Claimant to believe indicated a potential breach of a legal obligation or that the health and safety of an individual was being jeopardised. We therefore find that this was a protected disclosure within the meaning of s 43(1) (b) ERA.
23. The next matter referred to by the Claimant was the initiation of an investigation into his compliance with the Respondent's system for scanning medication. The Tribunal finds that the Respondent, had largely replaced a system of manual records of the administration of medication ('MAR charts') with an electronic system that is used by prescribers, dispensers and nursing staff to ensure that the correct medication is reliably administered to the correct resident at the correct time. It was the Respondent's policy that this system should be used to enable it, amongst other things, to demonstrate to the CQC and the NMC that there was compliance with required standards in the administration of medicines. Training on the system was by means of three e-learning modules. At the time these were accessible to the Respondent's own staff, but not to agency nurses (the Respondent has since changed this although agency nurses are not paid for undertaking the training). Ms Maher discovered in February 2020, as a result of scrutinising reports that the system was capable of generating, that there was at that time widespread non-compliance with the system within the Surbiton home. She therefore sent an email to all registered nurses within the home on 25 February 2020 (R155), attaching the report and saying:

Dear All

Please see attached the report I have just started receiving from the Wellpad system. It shows that only 35 out of 122 medications were scanned through the system in Lister, 20 out of 113 Richmond (A), 77 out of 101 Richmond (B) and 110 out of 118 in Sandgate. All medications administered have to be scanned so I am unsure why the compliance is so low. Could you provide some explanation asap please. Also the training hasn't been completed via the Wellpad for a number of you. Can I ask that you complete this by the 30th March please.

24. Following that email compliance rates improved significantly except in the case of the Claimant and another registered nurse, James Pay, who was an agency worker who had been deployed at the Surbiton home for some years and worked with the Claimant on the Lister floor. We were shown a bar chart (CDoc22) that showed this difference in compliance rates clearly.
25. Mrs Maher decided that this ought to be investigated and she contacted Mr Brown again to ask him to conduct the investigation. Mr Brown adopted the same problematic approach in this instance as he had adopted in February when asking the Claimant about the issue of locking cupboards and fridges. There was no invitation letter, and the Claimant was therefore taken unawares, which we consider to be unfair and potentially oppressive and not justified on the facts at the time. Again, the meeting, which took place on 7 May 2020, was recorded, but in a way that did not indicate freely given consent. It is not clear where in the Respondent's policies it was contemplated that meetings would be recorded.
26. There was a note of the meeting at page R157-163 (albeit with the wrong date as a previous meeting template had been used and the date not updated). Mr Brown put the allegations to the Claimant carefully and asked him to explain the discrepancies and other members of staff who were working on the same ward in the same circumstances. The Claimant's explanation was not particularly clear, but appeared to be based on the nature of the work and the demands of looking after dementia patients. Mr Brown pointed out that other members of staff coping with the same demands had better statistics. Mr Brown also asked (page R161) whether there were any health issues affecting the level of the Claimant's compliance and the Claimant was adamant that there were not. There was an opportunity here for the Claimant to explain that one of the disabilities he relies on had affected his performance and or that he would have performed better if certain adjustments had been made. However, he did not do so and reiterated that he was fully fit and well.
27. Mrs Maher had been sitting in the adjoining room during the meeting and she gave evidence that the Claimant had raised his voice. She held a debrief meeting with Mr Brown who reported that the Claimant had been unrepentant about the issue and that he was concerned about the Claimant and his ability to reflect and learn from mistakes. The Claimant's demeanour had been angry. Mrs Maher considered that this apparent lack of understanding of the importance of compliance and the Claimant's conduct and demeanour during the meeting justified suspending him with immediate effect. She asked a member of staff to collect him from the ward and bring him to her office, adding that he should bring his bag and jacket with him. She said that she thought it would have been worse if she had fetched him in person. She informed him of his suspension and arranged for him to be transported

home by the minivan that the Respondent was using at the time for the purposes of getting their staff to and from work safely in the early weeks of the pandemic. The suspension letter followed the next day, 8 May 2020 (page R179).

28. Mrs Maher also wrote to Mr Pay's agency on the same day saying that he would not be able to continue to work shifts for the Respondent until the agency had investigated the matter of his non-compliance with the barcode scanning system.
29. Mr Brown produced a report after that meeting (R181). He concluded from his meeting with the Claimant that the Claimant had not provided satisfactory explanations for his poor rates of barcode scanning, he did not fully understand the range of colours generated by the system according to the stage of medication administration reached and that he was 'reckless, shows no remorse and is a significant risk to patients'. He recommended that a disciplinary procedure should follow.
30. The Tribunal was concerned about the severity with which these conclusions were expressed, which did not appear to be fully justified on the facts available to Mr Brown at the time. It appeared to the Tribunal that the Claimant did genuinely care about his patients, and it was not fair to describe him as 'reckless' or a 'significant risk'. It was clear that the Lister floor had been operating safely with low levels of compliance with the Wellpad system for some time before Mrs Maher's email of 25 February. On the other hand it was also clear that the Claimant had been resistant to the suggestion that he ought to be adopting the new system, and there was some evidence that he did not fully understand how it worked or how to operate it safely. We find that Mr Brown was justified in deciding that there questions about the safety of the Claimant's practice that ought to be considered further, but that he ought to have expressed these in concerns in less emphatic terms.
31. The Claimant then went on sick leave due to an 'anxiety state'. The Respondent referred him to Occupational Health on 26 May 2020 (R189). The Claimant resigned from his employment on 29 May 2020 (R190). The reasons he gave for his resignation were wide-ranging but the principal matters were:
  - a. The manner in which he was suspended;
  - b. The fact that he did not anticipate that a fair process would follow;
  - c. Concern for colleagues becoming involved in an investigation;
  - d. No prior warning that the non-compliance could become a disciplinary issue;
  - e. The way in which Mr Brown had conducted his investigation;
  - f. Concerns about the relationship between nursing staff and carers in the ward;
  - g. The cancellation of annual leave;
  - h. Being set standards without any adjustments for his disability – there is an express reference to dyslexia and dyscalculia on page R194;
  - i. Being required to work without breaks due to short staffing;
  - j. A concern about his rota;
  - k. The fact that he had raised a complaint about Ms Donaldson's conduct which he considered to have motivated subsequent actions against him;
  - l. Various concerns about health and safety and infection control during the early stages of the pandemic;



- m. A series of further complaints that do not form part of the issues in this case.
32. The Occupational Health doctor wrote to the Respondent on the same day saying that he had received a message to the effect that the Claimant had resigned and that Ms Campbell, HR BP responded that an NMC referral was likely, this having been a point made by Dr Bray. In practice the Respondent referred the Claimant to the NMC shortly afterwards. We find that the reason that it did so were the concerns about the Claimant set out in Mr Brown's investigation report.
33. The Respondent's Director of People, Ms Silver wrote to the Claimant on 1 June expressing surprise at his resignation and asking him whether this really was what he wanted to do as he appeared to have resigned in the heat of the moment. She said that the matters he had raised would be considered at a grievance hearing to be conducted by Martin Goldman, Director of Operations, who had had no prior dealings with the Claimant. The grievance hearing had been arranged for 8 June 2020 and Ms Silver asked the Claimant to confirm what he wanted to do (page R185). The Claimant did not retract his resignation and the grievance hearing nevertheless proceeded in his absence and an outcome letter was sent to him on 19 June (page R187). The letter dealt with the concerns he had raised under four headings:
- a. Concerns about how the investigation into the alleged medication error was conducted;
  - b. Concerns about the actions the charity has taken during the coronavirus period;
  - c. Concerns about the Claimant's disability and health;
  - d. Allusions to concerns about/for other members of staff.
34. The grievance was not upheld. In relation to the Claimant's disability and health M Goldman said:
- '3. Concerns about your disability and health.**  
Your letter makes repeated reference to your disability which I deduce from your letter is dyslexia and dyscalculia. Your letter of resignation was the first time I was made aware that you had a disability. I have spoken to your Line Manager enquiring if she was aware you had a disability (without disclosing what it is) or if she was aware you needed adjustments in order to be able to work effectively. She states she was not aware. I also spoke to the Home Manager who recalls you mentioning that you are dyslexic in passing but not that you had expressed the need for adjustments. It should be noted that all occupational health information given to our occupational health service on appointment is confidential so if you had declared it then it would not have been passed on without your agreement. It should also be noted that both your Line Manager and the Home Manager were appointed after you and therefore were highly unlikely to be aware of any previously declared information. In situations such as these the charity will make any reasonable adjustments however we do need the individual to make us aware of the need. It should also be noted that many of our systems, such as the medication scanning system, include features which support those with dyslexia by providing prompts and using colour to highlight issues.'
35. The Claimant wrote a letter dated 26 June that the Respondent decided to treat as appeal, which was dealt with by Mr Cole. In short the Claimant was not able to attend the scheduled appeal hearing but did not send an alternative date within the timescale set by Mr Cole, who therefore dealt with the matter on the papers and

wrote on 15 July 2020 (page R224) declining to uphold any aspect of the appeal.

36. The Claimant had already approached ACAS on 29 June and presented his claim to the Tribunal on 6 July 2020.

### **The relevant law**

#### **Constructive dismissal**

S95 ERA provides as follows:

95 Circumstances in which an employee is dismissed.

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2). . . , only if)—

....

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

#### **Protected disclosures**

37. Section 43A ERA provides that a 'protected disclosure' means a qualifying disclosure (as defined by section 43B ERA) which is made by a worker in accordance with any of sections 43C to 43H ERA. Section 43B(1) ERA 1996 provides:

(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

38. Section 103A ERA 1996 provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

#### **Disability**

39. S 6 Equality Act provides that A person has a disability if they have a physical or mental impairment, and the impairment has a substantial and long-term adverse

effect on their ability to carry out normal day-to-day activities.

### **Direct discrimination**

40. S 13 Equality Act prohibits direct discrimination. Under s 13(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. The circumstances of the claimant and the chosen comparator must be the same or not materially different. S 4 Equality Act sets out the protected characteristics. These include race.

### **Reasonable adjustments**

41. The duty to make reasonable adjustments arises under section 20 and Schedule 8 Equality Act. Section 20, subsections (3) to (5) imposes on the Respondent a duty with three possible requirements:

**(3) 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.**

**(4) The second requirement is a requirement, where a physical feature 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.**

**(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.**

### **Harassment**

42. S 26 Equality Act prohibits harassment related to a protected characteristic, including age or race.

(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.

### **Victimisation**

43. A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

- (2) Each of the following is a protected act—
- (a) bringing proceedings under this Act;
  - (b) giving evidence or information in connection with proceedings under this Act;
  - (c) doing any other thing for the purposes of or in connection with this Act;
  - (d) making an allegation (whether or not express) that A or another person has contravened this Act.

### **Burden of proof**

44. It is also relevant to consider the law on the burden of proof which is set out in section 136 of the Equality Act. In summary, if there are facts from which the tribunal could decide in the absence of any other explanation that the Claimant has been discriminated against, then the tribunal must find that discrimination has occurred unless the Respondent shows the contrary. It is generally recognised that it is unusual for there to be clear evidence of discrimination and that the tribunal should expect to consider matters in accordance with the relevant provisions in respect of the burden of proof and the guidance in respect thereof set out in *Igen v Wong and others* [2005] IRLR 258 confirmed by the Court of Appeal in *Madarassy v Nomura International plc* [2007] IRLR 246. In the latter case it was also confirmed, albeit applying the pre-Equality Act wording, that a simple difference in status (related to a protected characteristic) and a difference in treatment is not enough in itself to shift the burden of proof to the Respondent; something more is needed.

### **Submissions**

45. At the end of the evidence the Tribunal explained to the Claimant that he could now sum up his case, but was not expected to make legal submissions. He was given some time to prepare and was also able to hear Ms Barlay's submissions before making his own. The Tribunal considered what both parties had said and the evidence we had heard in private deliberations that began at the end of the third day of the hearing and continued through most of the fourth day. We gave the parties our decision at the end of the afternoon of the fourth day.

### **Conclusions on the issues**

46. Given our overall conclusions on the issues raised the Tribunal decided to approach the case on the basis that the Claimant was disabled by reason of all the conditions he relied on, even though the evidence to this effect was not comprehensive. It did not seem to us that given the evidence we heard overall, our conclusions would differ in any way if the additional conditions were accepted to be disabilities.

47. Taking each claim in turn, the Claimant resigned with immediate effect and is not therefore entitled to any notice pay. That would have been different if he had been constructively dismissed because he had made a protected disclosure, but we concluded that he was not constructively dismissed for that reason, as we explain in the next paragraph. As he resigned without working his notice period he was not entitled to be paid for it.

48. We have concluded that the Claimant did make one protected disclosure in relation to the incident with Ms Donaldson and the resident (who was referred to as NN). We find however that there was no causal link between that disclosure and the events that led to the Claimant's resignation. Putting this another way and focusing on what was in the minds of the Respondent's decision makers when they took the various steps about which the Claimant complained in his resignation letter, including initiating and conducting the disciplinary investigation into the Claimant's compliance with the Wellpad system, which seems to have been the main trigger for his decision, we conclude that there was no evidence that the Claimant having made that disclosure formed any part of the Respondent's reasons for acting as it did. The disclosure would have had to have been the principal reason for a number of actions on the Respondent's part, including the investigation, for the Claimant to succeed in his constructive dismissal claim under ss95 and 103A ERA. This is a high threshold and the Claimant did not come anywhere near convincing the Tribunal that his having made a protected disclosure was the principal reason for the Respondent's actions. The claim of automatically unfair constructive dismissal therefore fails.

49. As regards direct race discrimination :

- a. It was not the case that Mr Pay was not removed from his duties as a result of his low scanning score on the Wellpad system and the claim that in this respect the Respondent discriminated against the Claimant by comparison with Mr Pay because of his race fails on its facts. Mrs Maher asked the agency not to provide Mr Pay with any more shifts until he was in a position to comply and the Claimant was not therefore treated less favourably by being removed from his duties.
- b. As regards Mr Pay's referral to the NMC, Mr Pay was an agency worker and therefore not a proper comparator for the purposes of this element of the claim – he was not in materially the same circumstances as the Claimant in relation to his employment status and how and by whom he was managed and how and by whom matters related to his professional regulation should be dealt with. In fact, Mrs Maher referred her concerns to his agency and left it to the agency to decide whether or not to make the referral;
- c. We find as a fact as Ms Donaldson, who did not give evidence, did make the remark concerning the Claimant and others 'running round like headless chickens', but we did not consider that this was a remark related to race. If it was the Claimant's case that Ms Donaldson only made this remark to ethnic minority staff, the Claimant did not establish that on the facts.

The claim of direct race discrimination therefore fails.

50. As regards the duty to make reasonable adjustments, we find that the Respondent did not know and could not reasonably have been expected to know the nature of any disadvantage at which the Claimant was placed by the disabilities he relies on. Accordingly it could not have been aware of any adjustments that the Claimant might have needed at the relevant times. He only began to properly articulate the ways in which he regarded himself as potentially having been at a disadvantage because of his dyslexia and dyscalculia after he had been suspended. By resigning from his employment when he did, he made it impossible for the Respondent to explore this issue with him and consider whether any adjustments would be

appropriate. The issue of disability was expressly dealt with in the grievance outcome letter (page R204). Mr Cole also referred to it in his letter of 30 June (R219). In answer to that the Claimant simply said that the Respondent had been in possession of his health records and should therefore have been able to deduce the adjustments that were needed. For reasons we have already addressed the Respondent could not have been expected to ascertain the nature of the disadvantage without further information from the Claimant. There was no evidence that the Claimant ever sought the specific adjustments set out in the list of issues (leaving aside the question of whether such adjustments could have been reasonable).

51. As regards the harassment complaint under s 26 Equality Act:

- a. We have made our findings of fact as regards Mr Brown's investigation meetings. We find no evidence however that the manner in which he conducted those meetings was related to race.
- b. Similarly the Claimant has not produced any evidence to suggest that the manner of his suspension was related to race.
- c. We have already stated that Ms Donaldson's comment was not related to race.

52. As regards the alleged breach of the WTR, we accepted the Claimant's evidence that there occasions when he was unable to take a break because of the pressures of work on a particular shift. However by virtue of WTR Reg 21(c)(i) the Tribunal did not think that Reg 10(1) applied to the Claimant given the nature of the work done by the Claimant and the nature of the Respondent's business, which required continuity of service to the residents in the home.

53. As regards the victimisation claim, the Claimant's letter of 29 May 2020 did contain allegations of breaches of the Equality Act as regards disability and race. That letter therefore constituted a protected act. The Respondent did investigate the Claimant's grievance as far as it was able to do so given his limited participation in the process. We find that it did not fail adequately or at all to investigate it.

54. In our view the decision to report the Claimant to the NMC had been taken before the letter of 29 May 2020 and could not therefore have amounted to retaliation for writing it. Even if we are wrong about the sequence of events however, we were satisfied that the Claimant having raised issues in his resignation letter about disability and race discrimination formed no part of the Respondent's reasons for making the NMC referral. We consider that the Respondent had developed concerns about the Claimant's professional practice, and that the Claimant resigned before the Respondent had had the chance to explore its concerns with the Claimant. It considered itself bound to make the referral in the circumstances for reasons that were in no way influenced by the fact that the Claimant had made allegations of discrimination. The referral to the NMC came about because of the Respondent's concerns about the Claimant's practice and not because he had complained about discrimination.

55. For all these reasons the Claimant's claims cannot succeed and it is not necessary for us to consider whether and to what extent the Claimant brought his claims within

the statutory time limits.

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Employment Judge Morton

Date: 21 November 2023

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# SCHEDULE

## The Issues

### 1. Time limits

1.1 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.1.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.1.2 If not, was there conduct extending over a period?

1.1.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.1.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.1.4.1 Why were the complaints not made to the Tribunal in time?

1.1.4.2 In any event, is it just and equitable in all the circumstances to extend time?

### 2. Wrongful dismissal / Notice pay

2.1 Did the respondent dismiss the claimant?

2.2 What was the claimant's notice period?

2.3 Was the claimant paid for that notice period?

### 3. Protected disclosure

3.1 Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The tribunal will decide:

3.1.1 On or about 06 March 2020 did the claimant by email to Ms Pauline Shaw complain that Mr Michael Brown the respondent's training and development officer entered into the nursing room without prior permission and then recorded his conversation with the claimant without the claimant's permission. (Disclosure one)

3.1.2 On or about a date in early March 2020 did the claimant tell Ms Helen Maher that Ms Elisabeth Davidson had taken an elderly resident into her room, shouted at him that if he did not behave he would be removed and made him cry (disclosure two)

3.1.3 Did he disclose information either in disclosure one or disclosure two?

3.1.4 Did he believe the disclosure of information was made in the public interest?

3.1.5 Was that belief reasonable?

3.1.6 Did he believe it tended to show that:

3.1.6.1 a criminal offence had been, was being or was likely to be committed; (disclosure one GDPR)

3.1.6.2 a person had failed, was failing or was likely to fail to comply with any



legal obligation; (disclosure one GDPR)

3.1.6.3 the health or safety of any individual had been, was being or was likely to be endangered (disclosure two);

3.1.7 Was that belief reasonable?

3.2 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the Claimant's employer.

3.3 Was the claimant dismissed?

3.4 Was the reason or principal reason for the claimant's dismissal that he made a protected disclosure?

#### **4. Disability**

4.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The tribunal will decide:

4.1.1 Did he have a physical or mental impairment: of a heart condition, asthma and a mobility challenge?

4.1.2 Did it have a substantial adverse effect on her ability to carry out day-to-day activities?

4.1.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

4.1.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

4.1.5 Were the effects of the impairment long-term? The tribunal will decide:

4.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

4.1.5.2 if not, were they likely to recur?

#### **5. Direct race discrimination (Equality Act 2010 section 13)**

5.1 Did the respondent do the following things:

5.1.1 Suspend the claimant on or about 07 May 2020 for a low ATLAS score when no such action was taken against his comparator Mr James Pay;

5.1.2 Report the claimant to the NMC when no such action was taken against Mr James pay;

5.1.3 Did Ms Liz Donaldson, floor manager say on an unknown date that the claimant was 'running around like a headless chicken'

5.2 Was that less favourable treatment?

5.3 In respect of the first two allegations the claimant relies upon Mr James Pay as an actual comparator and in respect of the third allegation on a hypothetical comparator.

5.4 If so, was it because of race?

5.5 Did the respondent's treatment amount to a detriment?

## **6. Reasonable Adjustments Equality Act 2010 sections 20 & 21)**

6.1 A 'PCP' is a provision, criterion or practice. Did the respondent have the following PCPs:

6.1.1 A requirement to complete all the claimant's contractual duties during his shift (PCP 1);

6.1.2 A requirement to make no errors in terms of the administration of medication (PCP 2).

6.2 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that the claimant required additional time due to his dyslexia/ dyspraxia and the pressure of work coupled with his admitted disabilities made it more likely that he would make medication errors.

6.3 What steps could have been taken to avoid the disadvantage? The claimant suggests:

6.3.1 Allow the claimant an additional 25% time in reading any documents or writing any such documents

6.3.2 When dispensing medication ensured the claimant was at all times supported by a second nurse.

6.3.3 Provide the claimant with a mentor who would be on shift at the same time as the claimant.

6.3.4 Provide regular supervision and feedback as to performance on a monthly basis.

6.3.5 Provide the claimant with shorter shifts, not exceeding seven hours.

6.4 Was it reasonable for the respondent to have to take those steps and when?

6.5 Did the respondent fail to take those steps?

## **7. Harassment related to race (Equality Act 2010 section 26)**

7.1 Did the respondent do the following things:

7.1.1 On or about the date in March 2020 did Mr Michael Brown the respondent's training and development officer enter the nursing room without prior permission and then record his conversation with the claimant without the claimant's permission.

7.1.2 On or about 07 May 2020 suspend the claimant in the middle of the nursing floor.

7.1.3 Did Ms Liz Donaldson, floor manager say about on an unknown date that the claimant was 'running around like a headless chicken' (in the alternative if not direct discrimination)

7.2 If so, was that unwanted conduct?

7.3 Did it relate to race?

7.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

7.5 If not, did it have that effect? The tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

## **8. Working Time Regulations 1998**

8.1 Was the claimant's daily working time in excess of six hours?

8.2 Was there in force a collective agreement or workforce agreement?

8.3 Was the claimant afforded an uninterrupted period of not less than 20 minutes break per daily working shift in excess of six hours?

## **9. Victimisation (Equality Act 2010 section 27)**

9.1 Did the claimant do a protected act as follows:

9.1.1 Lodge a grievance containing a complaint of discrimination on or about 29 May 2020.

9.2 Did the Respondent do the following things:

9.2.1 Fail to investigate, adequately or at all the claimant's grievance.

9.2.2 Report the claimant to the NMC.

9.3 By doing so, did it subject the Claimant to detriment?

9.4 If so, was it because the Claimant did a protected act?