EMPLOYMENT TRIBUNALS

Claimant:	**Ms G Jeffrey**
Respondent:	**South West London and St George's Mental Health NHS Trust**
Heard at:	**London South (Croydon) a hybrid hearing** **On: 13/11/2023 - 16/11/2023**
Before:	**Employment Judge Wright** **Mr W Dixon** **Ms J Jerram**

Representation:

Claimant:	**Mr M Kwame – private individual**
Respondent:	**Ms T O'Halloran - counsel**

REQUEST FOR WRITTEN REASONS

Oral judgment having been given on the 16/11/2023 and further to the respondent's request for written reasons on the 21/11/2023, these written reasons are provided.

WRITTEN REASONS

1. It was the unanimous Judgment of the Tribunal that the claimant's claims under the Equality Act 2010 (EQA) are not well founded, they therefore fail and are dismissed.

2. The claimant presented a claim form on 30/5/2019 following a period of early conciliation which started and ended on 30/4/2019. The claimant is employed by the respondent as an Administrative Assistant and she remains employed.

3. The Tribunal does not have jurisdiction over events which post-date the presentation of the claim. There has been no application to amend the claim.

4. A case management hearing took place on 22/6/2021 and that resulted in an agreed list of issues.

5. Under the Equality Act 2010 (EQA), the claimant claims the protected characteristics of disability (s.6). She relies upon the condition of sarcoidosis. The prohibited conduct upon which she relies is: discrimination arising from disability (s.15); a breach of the duty to make reasonable adjustments for disability (s.20 and s.21); and harassment (s.26). The complaint is detriment (s.39(2)(d) and s.40).

6. The respondent accepted the claimant was disabled from 4/6/2018 (page 115). At the outset of the hearing, it was observed that the claimant's contention that the respondent had knowledge of her disability from the start of her employment (6/6/2014) was not material as there was no allegation which pre-dated the respondent's conceded date. This was not correct. The date of the application of the PCP of working in the newly created Admin Hub was the 18/4/2018 for the purposes of the reasonable adjustments claim.

7. The Tribunal heard evidence from the claimant and from Mr Suresh Desai her Trade Union representative. The claimant produced three other witness statements, however that evidence did not assist the Tribunal. For the respondent it heard from: Ms Tara Knight (she gave evidence via CVP and was the claimant's line manager at the relevant time); Mr David Lee (Director of Corporate Governance); Ms Gurjit Kundhi (Senior Employee Relations Manager); and Ms Nicola Mladenovic (Deputy Trust Secretary). There was also a witness statement produced from Ms Bethan Aston (Associate HR Business Partner), however she is now based in Spain and so was unable to give evidence via video due to the lack of permission given by that state.

8. There was a 660-page bundle. The Tribunal had a hard and electronic copies.

9. Submissions were heard and considered. The respondent provided written submissions and the claimant was given until 9am on day four to provide her

submissions. Mr Kwame did not make an oral submission and Ms O'Halloran made a brief oral submission.

10. The following findings of fact were reached by the Tribunal, on the balance of probabilities, having considered all of the evidence given by the witnesses during the hearing. It included the documents referred to by the witnesses and took into account the Tribunal's assessment of the evidence.

11. Only relevant findings of fact pertaining to the issues and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced in the witness statements/evidence.

Findings of fact

12. The department in which the claimant worked was subject to a re-organisation (referred to as CSR2) which took effect for the claimant on 18/4/2018. The net result of that was that the claimant no longer worked on a one-to-one basis with a Director and furthermore that her office location would move from a shared two-person office, to an administrative hub.

13. The claimant was (and others were) resistant to the change. It was submitted by the respondent and it is accepted by the Tribunal; that this change was the root of all of the claimant's complaints and her disgruntlement with the respondent.

14. Chronologically the first allegation is of a failure to make reasonable adjustments (allegation 15 in the list of issues). The respondent accepts it applied a PCP of requiring the claimant to work in the administrative hub from the 18/4/2018. The claimant contends for a substantial disadvantage of her being more at risk of catching a virus from her colleagues when they were all working together in the Hub; as opposed to the shared two-person office.

15. The Tribunal finds that the respondent did not have knowledge of the claimant's disability until it received the Occupational Health (OH) report on the 4/6/2018 (page 387). The report had been delayed, but it was provided to the respondent on the 4/6/2018. The report stated:

> 'In my opinion, Ms Jeffrey's underlying medical conditions including her respiratory condition would meet the criteria for disability under the Equality Act 2010.'

16. The claimant did not advance any evidence-in-chief in respect of her contention that the respondent had knowledge of her disability from the outset

of her employment. It is not enough to disclose a condition in paperwork when commencing employment for a respondent to be on notice of it as a disability. Mr Kwame however did make reference to the respondent being aware of the claimant's condition due to this paperwork in submissions.

17. The OH report of 4/6/2018 did not refer to sarcoidosis and the first[1] mention of it by Ms Knight is in the outcome of the Formal Stage 1 absence meeting on 15/6/2018 (page 395).

18. It is the claimant's own case that until she moved to the hub on 18/4/2018 (witness statement paragraph 25):

> [it is] 'important to note that prior to being relocated to the Admin Hub on 18th April 2018, I had no sickness/absence for Sarcoidosis'

19. Even if the respondent was on notice the claimant had sarcoidosis, it did not have knowledge until it received the OH report that the claimant was considered to be disabled.

20. The OH report did not refer to adjustments to the claimant's workstation or refer to any difficulties (such as being more susceptible to viruses) arising from her being in a shared office (the hub). The only specific reference to adjustments arising out of the respiratory condition is that she may need time off to receive treatment if there was a flare up of the condition (page 389).

21. The claimant was assessed in the clinic on the 1/2/2018. The report was despatched on the 15/2/2018, re-despatched on the 20/4/2018 (post-dating the claimant's move to the hub and noting that the claimant said she became ill on her very first day in the hub) and revised and despatched on the 4/6/2018 (the claimant having exercised her right to see the report before it was disclosed to the respondent).

22. The Tribunal therefore finds that the claimant had the opportunity to ask OH to refer to her working environment prior to the actual move, in anticipation of it and to ask OH to amend the report after the move took place. There was therefore nothing to put the respondent on notice via OH of any difficulties with the working environment; other than the complaints the claimant made. The complaints by the claimant were not supported by OH or by medical evidence (such as from her GP).

23. Furthermore, there was nothing in the claimant's presentation to put the respondent on notice of a disability; prior to receipt of the OH report. The

[1] It is accepted the condition of sarcoidosis is referred to in a Long Term Sickness Review Meeting outcome letter dated 9/5/2016, however that is a letter from the Head of the Chief Executive's and Chairman's Office (page 345). The condition was not a disability at that stage. This may however explain the claimant's frustration that she had to remind her superiors of the condition.

claimant had been absent from work form 14/8/2017 to 8/1/2018 due to a fracture to her shoulder. She was absent from 10/5/2018 to 18/5/2018 due to Bacterial Tonsillitis (page 395). There was no medical evidence advanced from the claimant to link the Bacterial Tonsillitis to her respiratory condition and she did not invite OH to make such a link or to alert the respondent to it.

24. The first mention of a review of the claimant's workstation is a reference in a letter to the respondent dated 24/8/2018 (page 421). The claimant's GP referred to sarcoidosis and said that they would appreciate it if the respondent could 'review her work station which hopefully would reduce her contracting further infections'.

25. In response to that the respondent's Trust Secretary emailed the claimant, copied in Ms Knight on the same date (page 422). The email stated:

> 'We will indeed take up the suggestion of [the claimant's GP] and assess your work station – [Ms Knight] **can I please ask you to action this immediately please. I believe this has already been done re Geraldine knee but can you ask them to asses re ventilation.**'

26. The claimant (who was not lacking in assertiveness) did not reply and state that it was not only the ventilation which caused her a problem, but also the location itself. The respondent was clearly taking action to review matters following the claimant's GP's letter. There is however, onus on the claimant, if the respondent has misunderstood and was not taking every *reasonable* step, to draw that to its attention.

27. Notwithstanding that, the respondent's Health and Safety Manager reported back on the 29/8/2018 (page 424). He said that in his view, there was sufficient natural ventilation in the area and no further assessment was necessary.

28. The claimant asserts that the following reasonable adjustments should have been made:

> '18.1 Conducting a risk assessment in respect of C's disability and the impact the relocation would have on her disability
>
> 18.2 Refer to a health professional
>
> 18.3 Implement policies in relation to discrimination, disability or ill health – Disability Leave Policy'

29. The respondent contends these are not reasonable adjustments of themselves, but they are steps which can be taken in respect of making reasonable adjustments.

30. Notwithstanding that, the respondent did conduct a risk assessment by reason of it asking its Health and Safety Manager to report. Furthermore, the claimant had been referred to OH in February 2018 and Ms Knight subsequently attempted to re-refer the claimant to OH. That second referral led to a complaint of discrimination under s.15 EQA. There was no such Disability Leave Policy. There is a Managing Sickness and Attendance at Work Policy (page 263). That policy refers to making adjustment for disabilities. Again, when the respondent attempted to manage the claimant under this policy, that led to a further complaint of discrimination under s.15 EQA.

31. The remaining adjustments are:

> '18.4 Provide C with a written statement of employment particulars, which might have assisted in dealing with her disability in an appropriate way
>
> 18.5 Moving C into a single room
>
> 18.6 moving C into a room shared with one other person
>
> 18.7 allowing C to remain in her previous room'

32. There is no explanation from the claimant as to how 18.4 would amount to a reasonable adjustment and as such, alleviate any substantial disadvantage. The respondent responded when the claimant's GP highlighted her difficulty with her work-station and had instructed its Health and Safety Manager to provide a report. It also attempted to re-refer the claimant to OH.

33. In respect of the room/office (18.5, 18.6 and 18.7), the respondent contended that it just did not have such a room to relocate the claimant to; and that when it did (when Ms Knight left) it relocated the claimant in May 2019. Prior to that on 6/7/2018 Ms Mladenovic offered the claimant an alternative workstation, which the claimant said she would consider (page 659).

34. The claimant's own position on this adjustment was confusing and contradictory. The respondent offered a two-person office to the claimant which she could share with one other on 6/7/2018. She rejected it on the basis that she would be alone when her co-sharer was at lunch and if she (the claimant) had a 'slump' she would be alone[2]. The position the claimant took at the time was she did not want to be in an office shared with one other, but equally did not want to be in an office shared with a larger group of co-workers. It is not therefore clear what it was she did want.

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[2] The claimant previously worked in a two person office, however this did not seem to be an issue at that time.

35. There was nothing from the claimant's own GP (who did not say the location *per se* was an issue) or from OH to alert the respondent to the adjustment contended for of a smaller or different office. All the respondent had was the claimant's assertion that she required a different working location, the composition of which was not clear in that she needed fewer people to be around, but sufficient to observe her if she were to 'slump'.

36. The allegations of a failure to make reasonable adjustments are out of time.

37. Then going back in time, the first chronological allegation (10.1 in two parts) is that contrary to s.15 EQA, on 15/6/2018 Ms Knight required the claimant to attend a Formal Stage 1 Absence Management Meeting. Also, Ms Knight sent a letter in respect of the meeting reminding the claimant that under the Policy if her absence remained of concern, the matter could progress to stage 2 or 3 (page 396).

38. Factually, this event did occur, save that the letter was an invitation. There was one letter sent to the claimant dated 7/6/2018 (page 392). The letter was entitled 'INVITE – Formal Stage 1 Absence Management Meeting'. The absences which triggered the meeting were the fractured shoulder (14/8/2017 to 8/1/2018 = 106 working days) and the bacterial tonsillitis (9/5/2018 to 18/5/2018 = 7 working days). In the hearing the claimant sought to link the second absence to her disability. There was however no evidence to support this.

39. The letter was sent in accordance with the respondent's Managing Sickness Absence at Work Policy.

40. Even if (which the claimant has not established) the reason for the meeting arose as a result of the claimant's disability, there is nothing unfavourable about this. The respondent is entitled to manage sickness absence, even if the individual is disabled. Furthermore, there is no statutory right to be accompanied to such a meeting. It is open for the respondent to remind an employee of the Policy and that it may progress to stage 2 or 3. There is nothing detrimental about this.

41. The claimant also took issue with the fact there was reference to the meeting being 'Formal' yet she was not entitled to be accompanied. The Tribunal finds that this terminology was to distinguish the meeting from the 'informal stage' of the process under the Policy and the long-term sickness absence review meetings the claimant had previously attended.

42. Whilst the respondent could have varied its Policy and allowed the claimant to be accompanied at the meeting (as it did in November 2017 page 352); the Tribunal accepted its reasons for not so doing.

43. The claimant's Trade Union representative said that the respondent's sickness absence monitoring was in disarray at this time. Whether or not that was the case, the respondent's evidence was that Mr Desai took the view that the meetings should not be taking place, would vocalise this at the meeting (saying words to the effect of 'this meeting should not be happening' or that his member 'should not be here'). This served to exacerbate an already difficult situation. Whether or not the Tribunal agrees with the respondent's stance, it is understood.

44. The next allegation of discrimination contrary to s.15 EQA is that on 16/11/2019 Ms Knight referred the claimant to OH, when she knew or ought to have known the claimant was too ill to attend OH (10.2).

45. Factually, the claimant had by this time been absent due to 'Fatigue Awaiting further investigations from respiratory team' since 10/9/2018 (page 425). In the medical certificates for the period 10/9/2018 to 2/12/2018 none of them referred to sarcoidosis, or directly to the respiratory condition. The claimant was signed off for the period 10/9/2018 to 23/9/2018 due to 'Fatigue Awaiting further investigations from respiratory team' (page 425). For the period 24/9/2018 to 8/10/2018 for 'Fatigue Under hospital investigation'. For the period 4/10/2018 to 22/10/2018 for 'Fatigue. Under hospital investigation' (page 427). For the period 22/10/2018 to 4/11/2018 for 'Fatigue of unexplained origin-under hospital investigation'. There was then a period of absence not covered by a medical certificate and the last certificate during this period of absence was for the period 20/11/2018 to 2/12/2018 due to 'Fatigue of unknown origin'.

46. There was nothing on the face of these certificates to alert the respondent that the absence was related to the sarcoidosis. There is a reference in the first certificate of a reference to the 'respiratory team', however that does not expressly link back to OH's reference to the condition of 'another underlying medical condition affecting her respiratory system' (page 388),

47. The medical certificates certainly gave the impression that a new and unexplained condition was being investigated.

48. Irrespective of that, Ms Knight sought to manage the claimant's absence. As such, on the 8/11/2018 Ms Knight emailed the claimant and said she would send the claimant a letter to invite her to a meeting on the 16/11/2018 at 2pm (page 432).

49. At 11.59am on the 16/11/2018 the claimant's Trade Union representative emailed Ms Knight to say that he had had a long conversation with the claimant and she was not in a 'fit state of mind' to have a conversation, which included the possibility of progressing to stage 2 of the Policy (page 434). Mr

Desai went onto state that 'I will be grateful if you will note that there can be NO [T]elephone interview this afternoon'.

50. Ms Knight accepted what Mr Desai said and the meeting did not go ahead that afternoon. There was nothing more to it than that.

51. What then happened was that Ms Knight emailed the claimant the same day at 2.25pm attaching an OH referral form, regarding the current sickness issue. There was nothing wrong in Ms Knight doing so and it was not detrimental to the claimant.

52. Curiously, as part of the failure to make reasonable adjustments claim, one of the adjustments the claimant contends for is to refer her to a health professional. Yet, as part of the s.15 allegation of unlawful discrimination contrary the EQA, the claimant complains when Ms Knight did exactly that.

53. Furthermore, it is incorrect to alleged that Ms Knight knew or ought to have known the claimant was to ill to attend OH. All Ms Knight was told was that the claimant was not well enough to attend the scheduled meeting with her on the 16/11/2018. The claimant being well-enough to attend a consultation with OH at some future date was a matter between her and OH.

54. The final allegation under s.15 EQA (10.3) was that on 10/12/2018 Ms Mladenovic sent the claimant a letter enquiring when she would return to work, which made the claimant feel pressurised into returning to work.

55. This allegation misrepresents the facts. Ms Mladenovic was managing the claimant in Ms Knight's absence. There had been an OH assessment on 29/11/2018 which resulted in a report (page 452). The report stated the claimant was likely to return to work in the first week in December 2018. An adjustment was a phased return to work, starting with 50% of normal hours/days rising to 100% by week four.

56. Ms Mladenovic had a discussion with the claimant on the 7/12/2018 and she wrote to the claimant on the 10/12/2018 to follow it up (page 456).

57. Ms Mladenovic proposed a phased return to work of (page 458):

> 'w/c 3.12.18 – 2 half days
> w/c 10.12.18 – 3 part days (50%)
> w/c 17.12.18 – 4 part days (60%)
> Holiday over the festive period previously agreed 27 Dec – 4 Jan
> w/c 7.01.19 - 5 part days (70%)
> w/c 14.01.19 - 5 part days (80%)
> w/c 21.01.19 – 5 part days (90%)
> w/c 28.01.19 – 5 full days (100%)'

58. The proposal exceed that suggested by OH. The claimant did not say to ether OH or Ms Mladenovic that she was feeling under pressure to return to work. She did not for example, as she had previously done, ask Mr Desai to intervene.

59. The claimant's sickness certificate of the 20/11/2018 expired on the 3/12/2018 (page 439).

60. The action taken by Ms Mladenovic was not unfavourable treatment nor was it detrimental. There was nothing to alert the respondent to the fact that the claimant felt under pressure to return to work. On the contrary, Ms Mladenovic was entirely supportive and flexible over the return to work arrangements (page 465).

61. The Tribunal finds that the claimant referred to being under financial pressure, such that Ms Mladenovic suggested that the claimant take accrued annual leave alongside her phased return to work to alleviate that pressure. It is likely the claimant felt under financial pressure to return to work; not pressure from the respondent.

62. All the allegations under s.15 EQA are out of time.

63. The claimant then made four allegations of harassment. The first (19.1) is that on 10/1/2019 at a stage 2 meeting under the Policy, Ms Kundhi spoke to the claimant in a 'demeaning and belittling' way.

64. The allegation is vague in that it does not say what was 'demeaning' or 'belittling' at the meeting. It is accepted that what the claimant was referring to was Ms Kundhi taking issue with the claimant's eye contact.

65. Ms Kundhi agrees that at that meeting, she asked the claimant to look at Ms Knight when she was talking to her (Ms Knight). Ms Kundhi felt that the claimant was behaving unprofessionally towards Ms Knight.

66. Even if the claimant's version of events is accepted, she has not satisfied the burden of proof to show how Ms Kundhi's comment was related to her disability.

67. At the hearing, Mr Kwame attempted to run this allegation as a s.15 EQA complaint. He put to Ms Kundhi that the claimant's behaviour may somehow be as a result of discomfort arising from her disability. To which Ms Kundhi replied that the claimant did not seem to have a problem with making eye contact with her.

68. Furthermore, when it was put to the claimant that Ms Kundhi's comment was nothing to do with her disability, she said 'not that comment'.

69. This allegation is out of time.

70. The second allegation of harassment (19.2) is that on 11/2/2019 in a supervision meeting, Ms Knight and Ms Mladenovic did not take her illness seriously. Again, this is a vague allegation and it lack specificity.

71. Ms Mladenovic joined the supervision meeting, which was normally a one-to-one meeting between the line manager (Ms Knight) and member of staff, as support for Ms Knight.

72. Unlike the claimant's complaint and grievance which she raised the following day after the 10/1/2019 meeting (pages 470 and 478) the claimant did not complain following this meeting.

73. In fact, the claimant followed up her complaint and grievance in respect of the meeting on the 10/1/2019 on the 19/2/2019, yet she did not refer to any additional complaint in respect of the 11/2/2019 meeting.

74. All the claimant had to say by way of articulating this allegation, was that Ms Mladenovic appeared surprised to hear of the claimant's illness and it was as if she was hearing about it for the first time (claimant's witness statement paragraph 94).

75. The Tribunal finds on the balance of probabilities that Ms Mladenovic was aware of the claimant's disability. She had managed the claimant's return to work in December 2018 in Ms Knight's absence. She had considered the OH report and had suggested a phased return to work, which exceeded that suggested by OH. She had corresponded with the claimant in the first weeks of the claimant's return to work. The Tribunal does not accept that in the meeting Ms Mladenovic did not take the claimant's illness seriously. Although the allegation includes Ms Knight, the claimant did not make any specific allegation against her. For the sake of completeness and based upon the evidence, the Tribunal does not accept that Ms Knight also did not take the claimant's illness seriously. For both Ms Mladenovic and Ms Knight, the opposite is demonstrably true.

76. The third allegation of harassment is that on 12/4/2019 in a meeting with Ms Mladenovic and Ms Aston (of HR) her 'concerns were brushed aside'. There is nothing in the vague allegation to link this to or to refer to the claimant's disability. The purpose of the meeting was to discuss the claimant's grievance of the 16/1/2019 (page 478).

77. At the meeting, there was a discussion about the claimant's desire to leave the respondent; she stated she wanted to be made redundant and to be paid compensation.

78. Following the meeting which started at 1pm, at 2.21pm, Ms Aston sent an email to Mr Lee and to HR attaching the notes of the meeting, referred on the claimant's request and confirmed she had explained to the claimant that redundancy was not relevant as there was still a requirement for the claimant's role (page 514).

79. Notwithstanding in evidence the claimant maintained that she had not complained about Ms Aston, it is difficult to understand how the claimant maintains that her concerns were brushed aside. They were not and Ms Aston took immediate action following the meeting.

80. The fourth and final allegation of harassment (19.4) is that at a meeting on 25/4/2019 Mr Lee shouted at the claimant and said 'I don't want anyone on my team who doesn't want to be here' and that he also challenged the claimant when she informed him she had been told that as a Band 4 member of staff, she could not apply for a Band 5 role and that Mr Lee shouted 'who told you that'?

81. The claimant did not advance any evidence as to how specifically these comments were related to her disability.

82. Mr Lee accepts the gist of the comments attributed to him. He does however dispute that he shouted the words at the claimant.

83. Following the meeting, Mr Lee wrote to the claimant on the 26/4/2019 (page 520). The claimant was then absent from work from 10/5/2019 to 24/5/2019 (page 522). She responded to Mr Lee's email of the 26/4/2019 on the 10/6/2019 (page 523). She said she had discussed the meeting on the 25/4/2019 with Mr Desai. Unlike the meeting on 10/1/2019 the claimant did not raise any issue or complain about Mr Lee's behaviour in the meeting. She did however confirm that she wished to pursue her grievance in reply to Mr Lee. In response, Mr Lee said that he fully recognised the root cause of the claimant's concerns were the CSR2/reorganisation process, and that process was being reconsidered. In fact the CSR2 process was reversed in due course.

84. Although this allegation does specify what it is Mr Lee said and what the claimant found to be objectionable (on her case the fact he shouted); it does not set out how this was related to her disability. Mr Lee admits that as a statement of principle, he does not want people in his team who do not want to be there. The claimant has not advanced or suggested that the reason he held this view, is related to her disability.

85. Similarly, Mr Lee agrees that he was frustrated with the misunderstanding over staff at Band 4 level not being able to apply for Band 5 roles and he

referred to a repeated rumour or misrepresentation of that position. The Tribunal finds that even if Mr Lee did express his frustration with the misrepresentation, it was due to the incorrect rumour. The claimant has not satisfied the burden of proof which is upon her to suggest that Mr Lee's frustration was related to her disability.

86. Based upon the Tribunal's assessment of the evidence and the findings which have been made, the Tribunal does not accept that Mr Lee shouted; rather than he expressed his frustration in the meeting.

87. Apart from the last three allegations of harassment (19.2, 19.3 and 19.4), the remaining allegations are out of time.

88. The claimant did not address this in her evidence and Mr Kwame made a brief reference to it in his closing submissions. He did set out the basis for his contention that it was just and equitable for the Tribunal to exercise its discretion to extend time or to reach the conclusion the allegations formed part of conduct extending over a period of time. Mr Kwame however simply stated the legal principles and he did not set out any justification.

89. Other than the actions were taken upon behalf of the respondent; they were carried out by different people, on different occasions and under different forms of allegations of prohibited conduct.

90. In the absence of any direct evidence from the claimant, there is nothing to conclude that for example, Ms Knight inviting the claimant to attend a Stage 1 Absence meeting as an allegation of discrimination arising from disability; to Mr Lee holding a meeting on the 25/4/2019 to discuss the claimant's exit proposal and grievance; formed part of conduct extending over a period. To make such an assumption would render time limits or the basis upon which the Tribunal can extend the time limit irrelevant.

91. The claimant agreed that she had the support of her Trade Union representative throughout, Mr Desai accompanied the claimant to the meeting on the 25/4/2019 and indeed attended this hearing to give evidence for the claimant.

92. In the absence of any express reason for exercising its discretion to extend the time limit and/or any suggestion as to how the allegations are linked such that they can amount to conduct extending over a period of time, allegations 10.1, 10.2, 10.3, 15 and 19.1 are out of time.

The Law

93. S.136 EQA provides:

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.
…

(6) A reference to the court includes a reference to-

(a) an employment tribunal;…

94. Under s.6 EQA the definition of disability provides:

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

95. Schedule 8 of the EQA provides:

Work: reasonable adjustments

Part 1

Introductory

Preliminary

1 This Schedule applies where a duty to make reasonable adjustments is imposed on A by this Part of this Act.

…

Part 3

Limitations on the duty

Lack of knowledge of disability, etc.

20 (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(a) …;

> (b) in any case referred to in Part 2 of this Schedule that an interested disabled person **has a disability and is likely to be placed at the disadvantage** referred to in the first, second or third requirement.

[emphasis added]

96. S.15 discrimination arising from disability provides

(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.

97. S.20 EQA provides:

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

(2) The duty comprises the following three 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…

98. S.21 EQA provides that:

…

(2) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(3) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

99. Tribunals should take a structured, step-by-step approach to the consideration of whether there was a duty to make reasonable adjustments. The duty does not arise in every case of disability.

100. Firstly, identify the provision, criterion or practice ('PCP') being applied?

101. Secondly, does that PCP put the claimant to a substantial disadvantage compared with a person who is not disabled?

102. Thirdly, has the employer taken reasonable steps to avoid that disadvantage? This is an objective question, the focus being on the practical result. There must be a prospect (some cases say a 'real prospect') of the step being effective.

103. Paragraph 7.29 of the Code[3] sets out factors that may be relevant in deciding what is reasonable. The size and resources of the employer; what proposed adjustments might cost; the availability of finance or other help in making the adjustments; the logistics of making the adjustment; the nature of the role; the effect of the adjustment on the workload of other staff; the other impacts of the adjustment; the extent it is practical to make. Another factor is the likely effectiveness of the step: the chance that it is likely to be successful.

104. The duty to make adjustments arises in respect of those steps that it is reasonable for the employer to take to avoid the disadvantage experienced by the disabled person.

105. The first factor listed in paragraph 6.28 of the EHRC Employment Code that an employer may wish to consider when deciding what is a reasonable step to have to take is the extent to which taking a particular step would be effective in preventing the substantial disadvantage caused to the disabled person. In practice, it is most unlikely to be reasonable for an employer to have to make an adjustment that involves little benefit to the disabled person.

106. The PCP is not the application of the absence management policy itself; but the requirement to maintain a certain level of attendance at work in order to avoid the risk of sanction (Griffiths v Secretary of State for Work and Pensions 2017 ICR 160).

107. S.26 EQA provides:

(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

[3] Equality Act 2010 2010 Code of Practice - Employment

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) …

(3) …

(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…

108. In respect of violating a person's dignity: '[n]ot every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended' (Richmond Pharmacology v Dhaliwal 2009 ICR 724, EAT).

109. EAT also observed that 'the word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence' (Betsi Cadwaladr University Health Board v Hughes and ors EAT 0179/13).

110. In Madarassy v Nomura International plc [2007] ICR 867, CA, Mummery LJ stated that: 'The bare facts of a difference in status and a difference in treatment only indicates a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent has committed an unlawful act of discrimination'.

111. If a claimant establishes a *prima facie* case of discrimination, then the second stage of the burden of proof test is reached, with the consequence that the burden of proof shifts onto the respondent. According to the Court of Appeal in Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases [2005] ICR 931, CA, the respondent must at this stage prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever based on the protected ground.

112. In respect of the vagueness of the allegations, it is important to establish that the treatment was because of a protected characteristic it must be shown that a named individual (or a number of individuals) who subjected

the claimant to a detriment was consciously or subconsciously influenced by the protected characteristic. Unless the claimant identifies the alleged discriminator(s), that exercise cannot be conducted and the claim will fail Reynolds v CLFIS (UK) Ltd [2015] IRLR 562.

113. S. 123 EQA provides:

(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

…

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period; …

114. The exercise of discretion is not a foregone conclusion and 'there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.' (Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA)

115. In Concentrix CVG Intelligent Contact Ltd v Obi 2023 ICR 1 the EAT referred to Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194 CA and the principle that the absence of an explanation does not, as a matter of law, mean that a just and equitable extension must automatically be refused. Failure to consider the length of and reasons for, the delay would be an error of law, but that is not the same as saying that if, upon consideration, no reason is apparent at all from the evidence, then in every case the extension must, as a matter of law, be refused.

Conclusions

116. The respondent did not have knowledge of the claimant's disability of sarcoidosis until the OH report of the 4/6/2018; albeit that report did not state the disability was sarcoidosis. A duty to make reasonable adjustments did not arise until this point.

117. After the 4/6/2018, there was no adjustment suggested by OH in respect of the office location and there was very little suggested in respect of the respiratory condition, other than time off for treatment should the condition flare up. There was no failure by the respondent to comply with its duty to make reasonable adjustments.

118. Furthermore, when the claimant's GP raised an area of concern, the respondent addressed it and did so promptly on the same date. It cannot be said that the respondent failed in its duty or ignored its duty.

119. That the claimant contended for other adjustments (without the benefit of medical evidence) or adjustments which were not reasonable, does not result in the respondent failing in its duty.

120. Furthermore, the allegation was out of time and the Tribunal was not persuaded to exercise its discretion to extend time.

121. The s.15 EQA claims of discrimination arising from disability do not demonstrate unfavourable treatment nor are they detrimental.

122. The respondent is entitled to ask an employee to attend an absence meeting in accordance with its Policy. Notwithstanding Mr Desai's reservations about the respondent's (or more particularly HR) conduct at the time. The claimant was not required to attend the meeting, she was invited to attend and did so. Furthermore, there was nothing detrimental in informing the claimant the outcome may be that the matter may proceed to Stage 2 or 3 in future.

123. There is nothing unfavourable or detrimental in referring an employee who is on long-term absence to OH. Indeed, the claimant complained about a lack of referral to a health professional, when that is exactly what Ms Knight did. The respondent required the input of OH in order to be properly informed of the adjustments the claimant required and OH's report was relied upon by Ms Mladenovic when she structured the phased return to work.

124. It is also relevant to note that the respondent required the input of OH when making reasonable adjustments in order that it can justify why it has made those adjustments.

125. The claimant was not pressurised to return to work in December 2018 and there was nothing untoward in Ms Mladenovic's letter of the 10/12/2018. OH were of the opinion that the claimant was able to return to work on a phased basis and Ms Mladenovic put that process in place. Again, there was nothing unfavourable or detrimental in her doing that.

126. The s.15 EQA allegations are out of time and the Tribunal was not persuaded to exercise its discretion to extend time.

127. In respect of the harassment allegations, the Tribunal concluded that 19.1 is too vague an allegation. Furthermore, Ms Kundhi asking the claimant to look at Ms Knight when she was speaking to her (Ms Knight) is not related to the claimant's disability. The reason for Ms Kundhi's request was that in her opinion, the claimant was behaving unprofessionally. The claimant said she did not believe the comment was related to her disability. There is no evidence from the claimant of the proscribed conduct[4] and the allegation is out of time.

128. It is not accepted that anyone at the respondent, not least Ms Knight and Ms Mladenovic did not take the claimant's illness seriously, or did so in particular at the meeting on the 11/2/2019 (allegation 19.2). Demonstrably the opposite is evidenced. There is no evidence from the claimant of the proscribed conduct.

129. Notwithstanding the claimant said allegation 19.3 is not directed at Ms Aston, the claimant's concerns were not brushed aside. Ms Aston emailed Mr Lee after the meeting had concluded and it cannot be said that either Ms Mladenovic or Ms Aston brushed any concerns aside. The allegation is not linked to the claimant's disability and it does not set out how it is related to her disability. There is no evidence from the claimant of the proscribed conduct.

130. The final allegation of harassment (19.4) relates to Mr Lee's comments in the meeting on the 25/4/2019. He accepted that he said something akin to the comments attributed to him, but not that he shouted at the claimant. The claimant has not satisfied the burden which is upon her to show how these comments related to her disability. The motivation for the comments was Mr Lee's view that he did not want anyone to be on his team that did not want to be there and his frustration that a misleading rumour was circulating in respect of Band 4 staff applying for Band 5 roles. There is no evidence from the claimant in respect of the proscribed conduct.

131. An act of harassment if proven is extremely damaging. The Tribunal reminds itself that it is important not to encourage a culture of hypersensitivity when dealing with such allegations. In this case, the Tribunal noted the position of the respondent's witnesses in respect of allegations of unlawful discrimination they have been under for a considerable period of time. The witnesses should reflect on the fact the conclusion is the allegations were unfounded for the reasons given.

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[4] The phrase proscribed conduct refers to the respondent's conduct having the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her, s.26(1)(b) EQA.

132. For those reasons, the claimant's claims are not well-founded and are dismissed.

13/12/2023

Employment Judge Wright

JUDGMENT SENT TO THE PARTIES ON
10th January 2024

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS