EMPLOYMENT TRIBUNALS

Claimant: Mr M Baldaccini

Respondent: Special Ambulance Transfer Service Ltd

Heard at: Watford Employment Tribunal (In public; In person)

On: **12 and 13 February 2024**

Before: Employment Judge Quill; Ms Telfer; Mr Scott

Appearances
For the claimant: In Person
For the respondent: Mr L Baker, legal advocate

JUDGMENT

(1) The complaint of direct discrimination because of religion or belief fails and is dismissed.

(2) The complaint of indirect discrimination (where the relevant characteristic is religion or belief) fails and is dismissed.

REASONS

Introduction

1. At the times relevant to this dispute, the Claimant worked for the Respondent as an independent contractor. It was conceded that his contract with the Respondent fell within the definition in section 83(2) of the Equality Act 2010 ("EQA") and that (therefore), the Tribunal had jurisdiction to consider alleged breaches of section 39(2) EQA.

2. A previous preliminary hearing had determined that the Claimant's ethical veganism was a philosophical belief within the definition in section 10 EQA (and therefore was a protected characteristic) and that the claimant's opposition to the covid-19 vaccine derived from his philosophical belief of ethical veganism.

3. That same hearing had produced the following list of issues (remedy issues omitted), and this final hearing was scheduled to decide those issues.

4. We gave the decision and reasons orally, and we were asked for written reasons (for the liability decisions, and for the case management decision refusing permission to amend the claim).

5. The Claimant asked that we make orders under Rule 50. For the reasons given orally, we declined to do so.

Claims and Issues

1. Direct discrimination on the basis of a belief system (Equality Act 2010 section 13)

1.1 The claimant's protected characteristic is a belief system of ethical veganism. At the preliminary hearing it was determined that practising ethical veganism is a philosophical belief within section 10 of the Equality Act 2010 and that the claimant genuinely held this belief. He compares himself with people who do not hold the philosophical belief of ethical veganism who were vaccinated.

1.2 Did the respondent do the following things:

1.2.1 Not provide the claimant with any driving shifts after 11 November 2021.

1.3 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's. The claimant says he was treated worse than [AW].

1.4 If so, was it because of the claimant's ethical belief?

2. Indirect discrimination (Equality Act 2010 section 19)

2.1 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP:

2.1.1 The respondent was subject to The Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021 which required care home staff to refuse entry to anyone who could not evidence that they had 2 doses of appropriately approved Covid-19 vaccine or that they came within a specified exemption. The respondent shared this provision with self-employed technicians who were not vaccinated on 14 September 2021 and did not allow these technicians to travel in the ambulances.

2.2 Did the respondent apply the PCP to the claimant? The respondent says it applied the practice to the claimant by way of 1-2-1 with him on 11 October 2021.

2.3 Did the respondent apply the PCP to other technicians or would it have done so?

2.4 Did the PCP put technicians who held the claimant's philosophical belief at a particular disadvantage when compared with persons with whom the claimant does not share the characteristic, e.g., "vaccinated technicians", in that the claimant did not receive driving shifts in the ambulance after the legislation was introduced?

2.5 Did the PCP put the claimant at that disadvantage?

2.6 Was the PCP a proportionate means of achieving a legitimate aim?

The respondent says that its aims were:

2.6.1 It was required by law to comply with The Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021 which required care home staff to refuse entry to anyone who could not evidence that they had 2 doses of appropriately approved Covid-19 vaccine or that they came within a specified exemption.

2.6.2 The legitimate aim in not offering shifts to the claimant was to ensure that it was not breaking law and to ensure it was not putting people in the care homes and travelling in the ambulances at risk.

2.7 The Tribunal will decide in particular:

2.7.1 was the PCP an appropriate and reasonably necessary way to achieve those aims?

2.7.2 could something less discriminatory have been done instead? The claimant says that he could have worked in the office in November 2021 or could have been given driving shifts which did not involve a nursing home transfer. The respondent says it did offer the claimant alternative work, which was accepted.

2.7.3 how should the needs of the claimant and the respondent be balanced?

6. During the discussion at the start of Day 1, both sides agreed that the list was accurate. However, later in the day, a dispute arose which is discussed below.

The Evidence

7. Each side submitted a bundle. The Respondent's was 389 pages, and was received both in paper and electronically. The Respondent's bundle included the Claimant's statement from the preliminary hearing (as well as other statements from that hearing). The Claimant's was 216 pages (paper version) with an 82 page extract received electronically.

8. The Claimant called two witnesses, himself and his partner, Magnolia Pinto. Each of them had produced a written statement which they attested to, and each of them answered questions from the other side and the panel.

9. The Respondent called one witness, Mr Andrew Minnis, Managing Director. He had produced a written statement which he attested to, and he answered questions from the other side and the panel.

The Hearing

10. The hearing proceeded entirely in person save that, for the reasons we gave at the time, Mr Baker attended by video on Day 2.

11. The orders for the hearing had stated that there would be an Italian interpreter for the Claimant. We explained to the parties at the outset of Day 1 that, regrettably, it had only been possible for HMCTS to obtain an interpreter for Day 2.

12. We asked if the Claimant wished to seek a postponement on that basis, and he did not. We stated that we would only continue with the hearing if we were satisfied that the Claimant was able to understand sufficiently. The Claimant acknowledged that, and said that, in his opinion, he would be able to. We said that we would keep the matter under review, but, were willing to get underway. In the afternoon, we told the Claimant that the interpreter was still available in principle for the following day, but could be cancelled if not needed. The Claimant said that given his 20 years in the UK, he was content his English was good enough for the remainder of the hearing, and agreed that the interpreter should be cancelled.

13. There was a discussion about bundle and statements. Until entering the hearing room, Mr Baker had not received the Claimant's bundle. One of the copies that the Claimant had handed to the Tribunal clerk for the panel's use was therefore given to him. The Claimant's bundle contained the two witness statements (his and Ms Pinto's) that he intended to rely on. In other words, those statements had not been received by the Respondent and its representatives until after 10am on Day 1, and after the hearing commenced.

14. The Respondent had been ready to exchange statements for some time, and had been pressing the Claimant to do so, but the Claimant had declined. Upon receipt of the Claimant's statements, Mr Baker supplied a copy of the Respondent's statement to the Claimant and to the panel. In other words, that statement had not been received by the Claimant until after 10am on Day 1, and after the hearing commenced.

15. The Claimant stated that his lack of willingness to exchange statements had been because of dissatisfaction with the bundle prepared by the Respondent. That particular issue was resolved (in part by the fact that we suggested that we would allow the Claimant to reserve his position in relation to the admissibility/relevance of [Bundle 381 to 389] until such time as the Respondent sought to refer the panel to those pages).

16. The Respondent had no objection to the Claimant's bundle being used (as well as the Respondent's) during the hearing.

17. We asked each side if they were willing to proceed given that they had each seen the other's statements so late, and they each confirmed that they were.

18. After a break for pre-reading, the Claimant's evidence started and finished before lunch on Day 1. Ms Pinto's evidence was next and was quite brief. Next was the Claimant's cross-examination of Mr Minnis. It was during that cross-examination that the Claimant raised with the panel that, in his opinion, his claim was based on

two different protected characteristics within the definition in Section 10 EQA. As well, as ethical veganism, he said the other was Buddhism. He stated that, in his opinion, EJ Hutchings (who had decided the preliminary issues) had told him that that was the case.

19. We asked that cross-examine of Mr Minnis continue to a conclusion before we would address that issue. Mr Minnis had been the Respondent's representative at that hearing, and we wished to release him from his oath so that he could discuss the matter with Mr Baker prior to our making decisions.

20. At the end of Day 1, we advised the parties that we would hear their respective submissions on that point at the start of Day 2, but that they should be ready to proceed with the submissions on the substantive issues as well, if necessary.

Case Management Order on Day 2

21. At the start of Day 2, having heard from each side, we made the following orders.

21.1 The Claimant's email of 27 May 2023 was not an application for reconsideration of the judgment of 3 April 2023 (sent to parties 29 April 2023).

21.2 The Claimant's email of 27 May 2023 demonstrated a desire to make an amendment to the claim.

21.3 We refused the amendment application.

22. The Claimant asked for written reasons for this decision, and this section of this document provides those written reasons.

23. The Claimant referred us to the email to the Tribunal (at page 82 of his bundle) dated 27 May 2023 which had been copied to the Respondent.

24. The email acknowledged receipt of the case management orders and reasons from the preliminary hearing. (The judgment had been sent to parties on 29 April 2023 and the case management orders had been sent the same day. The reasons were sent on 25 May 2023). The email continued

> I would like to mention, and if possible, clarify and bring attention to the fact that I am claiming discrimination for 2 protected characteristics: ethical Veganism as well as Buddhism.
>
> I mentioned this to the judge and, I believe unless wrong, I was reassured as this would not have had any impact on any decision or results. I felt the need of clarifying this point as religion is equally important to me as ethical veganism is, and there is no one without the other.
>
> I apologies in advance if this comes across as a nuisance.

25. The email went on to mention that his Schedule of Loss had been sent by "We Transfer". The Claimant confirmed to us that it had only been sent by "We Transfer", not by email, and that there was no covering text, just the document. He relied on his schedule of loss in support of his arguments, because it contained separate headings for "Injury to feelings (Religion discrimination)" and "Injury to feelings (Ethical Veganism discrimination)". [Bundle 358-359 for the item the Claimant regards as accurate and up to date, and [Bundle 55 to 57, for the item the Claimant believes that the Respondent should not have included in the bundle, being an earlier draft].

26. We are satisfied that the Claimant made no attempt to mislead the panel with his account of the preliminary hearing. He, at first, suggested that the judge had told him that she accepted that his claim could go forward as alleging religious discrimination based on Buddhism (as well as discrimination based on ethical veganism). On being asked to try to repeat her exact words, and at what point in the hearing it had happened, he confirmed that, as per the email, his recollection was that she had said it "would not have made a difference", and he was not sure what stage of the hearing it was at. The panel suggested that the past tense seemed to suggest that it was after the decision had been made. We asked the Claimant if he understood the point that we were making about the use of the English language; he said that he did, but he had nothing further to add about when, during the hearing, the comment was made, because he was not sure.

27. The Respondent's position (as conveyed to us by Mr Baker, on Mr Minnis's instructions) was that there had been a discussion with the parties to clarify the claim, and that EJ Hutchings had specifically said (as well as clarifying other elements of the claim) that the allegation made in the claim form was that the protected characteristic referred to in the claim form was philosophical belief (ethical veganism) and not any religious belief, and this was near to the start of the hearing. The Respondent's position was that the Claimant had not sought to persuade her otherwise, and had not made any amendment application. Mr Minnis had no recollection of EJ Hutchings stating "would not have made a difference" or "would not have had any impact" etc.

28. The claim was presented on 7 February 2022. The claim form is clear that the Claimant was alleging "Discrimination by reason of a philosophical belief" (as the second of 3 causes of action named in Part A of his Particulars of Complaint at Box 8.2 of claim form). Throughout the remainder of the form, he made clear that was referring to ethical veganism, including the parts where he alleged what the Respondent knew about his belief, and when. He did not allude to Buddhism. (The panel has no doubt that the Claimant is a Buddhist, or that beliefs which are part of Buddhism can be protected characteristics within the definition in Section 10 EQA; however, it was not referred to in his claim form.)

29. A case management preliminary hearing took place in November 2022 (before EJ Tobin). Throughout his summary and orders, he accurately referenced that the allegation was that the Claimant was an ethical vegan, and that this was a protected philosophical belief. He ordered that, as a preliminary issue, there would be a determination "*whether or not the claimant's opposition to the covid-19 vaccination derived from a philosophical belief as recognised by the EqA*".

30. The Claimant informed this panel that it was some time after that hearing (he was not sure exactly when) that he was advised by a citizens advice bureau that his claim ought to be based on two characteristics: religious belief (Buddhism) and philosophical belief (ethical veganism). He says he was informed that this would mean that (if successful on both) he would receive two awards of compensation.

31. Our decision is that it is plain from both the claim form itself, and EJ Tobin's orders, that, as of the date that the public preliminary hearing was ordered, the Claimant's claim did NOT include any reliance on Buddhism as a protected characteristic. Furthermore and in any event, on the Claimant's own account, of what citizens advice bureau told him, it was not until after the public preliminary hearing was ordered that he first formed the view that it might be advantageous to seek to rely on Buddhism as well. For the avoidance of doubt, we have considered the Claimant's argument that ticking the box for "religion or belief" in the claim form was sufficient, and we reject it. Even if it were hypothetically true that he internally believed, at the time, that he was doing so because his claim was based on Buddhism as well (which is not the case, in our view) then that would not have been sufficient.

32. After the preliminary hearing was ordered, the Claimant did not make an attempt to have the preliminary issue amended (or clarified, on his case) so as to include any "religious belief" as well as "philosophical belief".

33. The hearing before EJ Hutchings commenced on 18 January 2023 and continued and concluded on 3 April 2023. Having carefully read the three documents produced (judgment, reasons, and case management summary/orders) it is clear that she was not asked to amend the preliminary issue (or the claim). Had she considered that one of the issues for her to decide had been about a religious belief, then she would have said so. Either the judgment would have said the matter was resolved in the Claimant's or the Respondent's favour (as the case may be), or there would have been some reference to a decision to defer that issue to a later preliminary hearing, or to the final hearing.

34. The opposite is the case. Apart from the judgment and reasons dealing with the philosophical belief (ethical veganism) only, the list of issues produced [Bundle 39 to 42] was clear and unambiguous about which matters were left to the final hearing: paragraphs 1.1 and 2.4 are particularly significant.

35. As we had explained to the parties, given that the Claimant's email of 27 May 2023 had not, as far as we were aware, been referred to EJ Hutchings for her to decide if it was a reconsideration application or not (and, if so, what to do with it), if we treated it as a (potential) reconsideration application, we would have had to adjourn pending her decision.

36. However, in the circumstances, we were satisfied that it was NOT a reconsideration application. The preliminary issue had been identified by EJ Tobin, and that is the issue which EJ Hutchings determined. She decided it, essentially, in the Claimant's favour, and his email of 27 May 2023 was not seeking that she vary or revoke the decision on the actual preliminary issue that had been before her. Regardless of whether the Claimant's subjective belief was that he was seeking variation (or clarification) of the judgment on the preliminary issue, his request – viewed objectively – actually amounted to a request for a new judgment on a new (and additional) preliminary issue. Furthermore, as a precursor to whether any judgment on this new point (that any complaint could be based on a decision that the Claimant had an additional relevant protected characteristic, namely a religious belief: Buddhism) could be made in his favour, the Claimant first required the Tribunal's permission to amend his claim.

37. We do take into account that the Claimant's witness statement and documents for the preliminary hearing did include references to Buddhism. In the context, those were in connection with his argument that his veganism was based on ethical grounds, rather than health or other considerations. However, and in any event, a tribunal does not become empowered to make a judgment on a particular complaint (that is not one of the pleaded complaints) simply because it is a matter raised in evidence. (Chapman v Simon BAILII Citation Number: [1993] EWCA Civ 37).

38. We therefore proceeded to decide whether to allow the Claimant to amend the claim to add this additional protected characteristic.

Legal Principles relevant to amendment decision

39. When a tribunal has to consider a request for an amendment (in this case made by a claimant), it is a matter to which judicial discretion applies. The Tribunal must take into account all relevant factors and ignore all irrelevant factors. The Tribunal must decide whether the balance of injustice and hardship is in favour of allowing the amendment or of refusing it. Allowing an amendment for a claimant will almost certainly have at least some degree of injustice and hardship to the respondent. Whereas refusing to allow an amendment to the claim is almost certainly going to have some degree of injustice and hardship to the claimant. So the assessment must take into account the specific circumstances of the case, and the stage that it has reached.

40. Selkent Bus Company Ltd v Moore EAT/151/96 set out some of the matters which a tribunal should take into account. As was emphasised in Vaughan v Modality UKEAT/0147/20/BA by the Employment Appeal Tribunal.

    40.1 Firstly, Selkent is still good law and must always be considered.

    40.2 Secondly Selkent did not purport to set down a mere checklist that would supply the tribunal with the outcome, and nor did it contain an exhaustive list of the factors that might be relevant.

    40.3 As per Selkent, it is always important for the tribunal to consider the nature of the amendment application, time limit issues and the manner of the application and the timing and manner of the application itself. However, it is important to bear in mind that doing so is merely part of the overall process of taking into account all relevant matters when deciding where the balance of injustice and hardship lies, and these factors are not, in themselves the test for whether to grant the amendment or not.

    40.4 As per Selkent, the nature of the amendment, time limit issues, and timing and manner of the application are not the only things that might be relevant.

41. The starting point must always be the nature of the amendment. That is, what specific change is the claimant seeking to introduce. It will usually be appropriate for there to be a written version of the proposed amendment before a decision is made, so that both the judge and the other parties have a chance to properly consider the proposal. Once the proposal is properly understood, the first question is whether it does, in fact, amount to a proposed amendment of the claim, or is merely supplying the type of clarification or background information for the existing complaint(s) that could otherwise have legitimately been supplied at the witness statement stage.

42. Identifying the nature of the amendment will clarify whether any time limit issue arises. It will also clarify whether the final hearing would be significantly different if the amendment were to be allowed: what (if any) extra documents might need to be searched for, disclosed, and form part of the bundle; which (if any) additional witnesses might be required; will the duration of the final hearing be affected; will the final hearing have to be delayed. As was said in Selkent:

> Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action

43. This can lead to a dispute between the parties as to whether what is being proposed is purely a "re-labelling" exercise or not. While it will not be decisive as to whether the amendment is permitted or not, an advantage to the claimant of convincing the Tribunal that the amendment would simply be "re-labelling" is that the Tribunal will not have to decide whether the amendment is brought within the time limit that would apply if that particular claim had been presented by means of a new claim form.

44. To be considered "re-labelling", it is not enough to show that certain observations were made in the claim form which might indicate that certain forms of discrimination had taken place. In order for the proposed amendment to be truly a re-labelling exercise, the claim form must have demonstrated the causal link between the unlawful act and the alleged reason for it. .

45. Identifying the nature of the proposed amendment will also help clarify why the amendment is required. Why, for example, did the claimant fail to present the claim, including the proposed amendment, in the first place. Did they simply make a mistake earlier, or have they changed their mind about the issues that they want to have decided. If the latter, when, and why? One possible reason that the amendment is required might be that the acts/omissions on which it is based only occurred after the claim had been presented.

46. Regardless of whether or not the nature of the amendment is "re-labelling" or correcting an accidental error, the core test is the same and the tribunal must review all of the circumstances to address the balance of injustice and hardship. A new cause of action can, in appropriate circumstances, be allowed to proceed by way of amendment. When addressing such a proposed amendment, the Tribunal must consider the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted if all else is equal (Abercrombie v Aga Rangemaster Neutral Citation Number: [2013] EWCA Civ 1148). That being said, such amendments can potentially be permitted; consideration of the overriding objective will be important.

47. As per Selkent, if a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that complaint is out of time. A decision which allows an amendment is doing so on the basis that time limit issues will be formally decided at a later stage. The requirement as per Selkent is not that the amendment can be allowed if, and only if, the complaint would have in time had it been presented by way of new claim form (or else where time is formally extended at the permission to amend stage). The requirement is for the tribunal to specifically identify what the time limit issues are, and to take them into account as part of addressing the balance of injustice and hardship. There can, potentially, be hardship to a respondent which has to

prepare a defence to a complaint which might eventually be decided, at the final hearing, to have been out of time.

48. At the amendment stage, the likelihood of the tribunal later deciding that the claim was in time (and/or of granting an extension) will be a relevant factor.

49. Consideration of time limit is only part of the overall decision. In principle, the amendment might be granted where the claimant does no more (on this point) than show that they have a prima facie case that the primary time limit was satisfied or that there are grounds for a decision to be made (at a later stage) to extend time. Correspondingly, the mere fact that alone that the proposed new complaint would be in time, if presented by means of a new claim form, does not necessarily mean that the amendment should be granted. There might be good reasons that the new complaint should be dealt with separately, and/or that it would not be proportionate to delay resolution of the existing complaints until such a date as a final hearing incorporating the new complaint(s) can be arranged.

50. In Selkent, in relation to the timing and manner of the application, it was said:

> An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the [tribunal rules] for the making of amendments. The amendments may be made at any time — before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision.

51. This is at the heart of what must be considered. While, in principle, an application can be made at a final hearing, the decision about whether to grant it or not cannot ignore the issue of whether granting it would require the final hearing to be postponed (or, similarly, whether granting the amendment, without such a postponement, would mean that the other side was not receiving a fair trial).

52. To oversimplify, the earlier the application is made, the more chance that the other side will have to prepare and the later it is made the greater the potential for injustice and hardship if the amendment were to be granted. Whereas, if granting the amendment were to be done after witness statements have already been exchanged, then that might mean that several parts of the litigation have to be repeated (new disclosure, new bundle, revised and additional witness statements).

53. It should not necessarily be assumed that a late amendment will, in fact, cause a lot of extra work. The particular case must be considered on its own merits.

54. If granting the amendment would, in fact, cause (some or all) of the preparation to have to be re-done, and/or would require an adjournment or postponement of a hearing, then those are important examples of hardship which must be considered. However, they do not mean that the amendment application must inevitably be refused. The overriding objective will be an important consideration. Further, the EAT gave guidance in Ladbrokes Racing Ltd v Traynor UKEAT/0067/06. The Tribunal will need to consider:

    54.1 why the application is made at the stage at which it is made and why it was not made earlier;

    54.2 whether, if the amendment is allowed, there will be delay will and/or additional costs because of the delay (or because of the extent to which the hearing will be lengthened), and, if so, are these costs unlikely to be recovered by the party that incurs them; and

    54.3 whether delay may have put the other party in a position where evidence relevant to the new issue is no longer available or is of lesser quality than it would have been had the amendment been granted earlier.

55. While the above factors, as identified in Selkent, will always be relevant, there is no limitation on the other factors that might be relevant in a given case.

    Application to this case

56. A significant issue is that while the email of 27 May 2023 was in writing, there was no written application confirming what, specifically, the proposed amendment was.

57. We asked the Claimant directly if he was proposing the amendment on the basis that the existing list of issue would be identical, save that

    57.1 for each of act of alleged direct discrimination, we would also be asked to decide if it was less favourable treatment because of the Claimant's religious belief (Buddhism) and

    57.2 for the indirect discrimination, the same existing alleged PCP would be said to create a Group Disadvantage for persons sharing the Claimant's religious beliefs

58. Each time we asked, the Claimant veered away from a direct response, mentioning instead that it was his opinion that the Respondent knew he was Buddhist, that he had a tattoo which demonstrated his religious beliefs, that there had been a change of attitude and/or bullying by colleagues as a result of the tattoo, and that the religious belief of Buddhism was one which ought to be (and, in his opinion, was) protected under EQA.

59. To the extent, if at all, that the Claimant was implying that, if we allowed an amendment, we would also allow additional acts of discrimination (or harassment) to become part of the claim, there would have been significant time limit problems in relation to alleged treatment after the tattoo and/or alleged bullying by colleagues. Neither the tattoo nor the alleged bullying featured in the claim form. The claim was entirely about the lack of shifts from 11 November 2021 onwards. Thus the Claimant would have been seeking to bring new claims, well out of time (subject to the just and equitable jurisdiction to extend time) which would have required new document searches, and fresh consideration of which witnesses might be relevant. A new list of issues would have had to be drawn up to deal with these issues. The Claimant would have had to provide a lot more information (who did what, and when, and who else was there) before (i) the list of issues could be finalised (ii) the preparation of evidence could take place and (iii) the substantive trial on the merits could take place. There would have had to be a significant adjournment prior this final hearing before this tribunal panel could continue, by which time memories (of the parties and the panel) in relation to the evidence that had already been heard would have diminished.

60. Thus the balance of injustice and hardship was firmly in favour of rejection of the addition of new alleged acts.

61. We went on to consider whether we would allow a more limited amendment, of simply adding an alternative (alleged) protected characteristic to the existing list of issues.

62. Doing that would be unlikely to create any time limit issues.

63. In terms of the manner and timing of the application, we took into account that it was certainly not the Claimant's fault that the email of 27 May 2023 had not received a judicial decision between 27 May 2023 and 13 February 2024. We take him at his word that he had sought to make some phone calls chasing a reply. (Though, it has to be said, that does somewhat undermine the other argument that he initially asked us to consider, namely that EJ Hutchings had told him that religion and philosophical beliefs were both being treated as relevant protected characteristics, and he had prepared his case on that basis).

64. However, while no blame attaches to the Claimant for the period 27 May 2023 to 13 February 2024, on 7 November 2022, EJ Tobin had identified the preliminary issue to be determined. Neither before the start of the preliminary hearing to decide that issue (18 January 2023) nor before its end (3 April 2023) did the Claimant submit this amendment request.

65. If we allowed an amendment to add direct discrimination because of Buddhism (even on the limited basis that the only alleged act was that in paragraph 1.2.1 of the existing list of issues), there would still need to be further evidence. In

particular, we would need to make findings about (i) what were the Claimant's specific religious beliefs and (ii) what did the relevant employees of the Respondent know about those religious beliefs, and when. On the Claimant's case, the comparators would be the same for the direct discrimination complaints, for each of philosophical belief and religious belief, and he was the only Buddhist employee. If we did allow this late amendment, the Respondent would not have the opportunity to consider this aspect of the case and decide whether it had any relevant evidence about how a hypothetical comparator would have been treated.

66. If we allowed the amendment to add the proposed new indirect discrimination complaint, then, again, there would need to be evidence, and a decision, about the Claimant's specific religious beliefs. The evidence that would be needed to establish group disadvantage for that protected characteristic (religious belief) would not be the same as that for the existing protected characteristic (philosophical belief: ethical veganism).

67. The Claimant's opinion is that the further evidence which should be presented to this hearing, and considered by this panel, consists of documents which he says were presented by him at the preliminary hearing, but not contained in either of the bundles (the Respondent's or the Claimant's) brought to this hearing

68. The Respondent does not necessarily agree that that would be the (only) evidence which would be required. Its position is that it cannot fully comment on specific details of which additional documents and/or witnesses might be required, since the late stage at which the application has been made has denied it the opportunity to consider the point and investigate.

69. If we were to grant this amendment, at the start of Day 2, of what has been listed as a 2 day hearing, then there would be a delay in resolution of this matter. But for this amendment application, we were otherwise due to be hearing submissions about what our decisions should be on the liability issues set out by EJ Hutchings around 10 months ago (sent to parties in April 2023). At the start of Day 1, those liability issues had been acknowledged as correct by both parties. We take into account that the Claimant did raise the suggestion that he wished to rely on religious belief, as well as philosophical belief (and had drawn attention to his 27 May 2023 email) on Day 1; however, that was after his own evidence had already been concluded, and Mr Minnis's had already commenced.

70. In submissions, the Respondent raised the point that such a delay might be many months, and possibly it would be 2025 until the hearing could continue (with further evidence from the Claimant, Mr Minnis, and potentially other witnesses). If it were necessary to find a further one day or two days, we are confident that it would be weeks, rather than many months, into the future. However, it would be likely to be at least a few weeks into the future before everybody's and diary could marry up and this would cause prejudice. The prejudice to the respondent would include

that it would be likely to incur additional legal fees, as well as the time and inconvenience of further document searches, and (potentially) witness statement preparation. There would also be a need to prepare new cross-examination and new submissions, even though submissions for the current the list of issues must have been finalised by now.

71. The prejudice to both sides is that the delay will mean a further period of uncertainty until the outcome is known, and the fact that the tribunal's decision-making will be done when the evidence we heard on Day 1 will not be as fresh in our minds as it is now.

72. In our judgment, the claimant is probably not correct that it would make a difference to his remedy in the event that his claims succeeded on two protected characteristics rather than one. Thus, for that particular argument, we do not think that there is prejudice to him if the amendment is declined.

73. At least hypothetically, granting or refusing could make a difference to liability; that is to whether the Claimant is successful in one or more claims. Given the uncertainty about what new evidence and arguments the parties might wish to introduce, it is difficult to say much more than that. As part of the preliminary issue (identified by EJ Tobin), EJ Hutchings decided (in the Claimant's favour) "*whether or not the claimant's opposition to the covid- 19 vaccination derived from a philosophical belief*". If the amendment were granted, then that is part of what we would need to decide in relation to the proposed new protected characteristic (the religious belief which the Claimant would give evidence about).

74. While it is true that the fact that a final hearing would have to be adjourned is not a complete barrier to an amendment being granted, it is an important factor to be considered.

75. Our overall assessment was that the injustice and hardship to the Respondent of granting the amendment outweighed the injustice and hardship to the Claimant of refusing it.

76. We therefore refused it, and proceeded to hear the parties' submissions on liability.

The Law

Equality Act 2010 ("EQA")

77. "Religion or belief" is a protected characteristic, as defined in section 10 EQA.

78. Section 83 EQA states, in part:

> 83 Interpretation and exceptions
>
> (1) This section applies for the purposes of this Part.

(2) "Employment" means—

(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;.

…

(4) A reference to an employer or an employee, or to employing or being employed, is (subject to section 212(11)) to be read with subsections (2) and (3); and a reference to an employer also includes a reference to a person who has no employees but is seeking to employ one or more other persons

79. It is conceded by the Respondent that the Claimant's arrangement with the Respondent fell within the relevant definition and that, therefore, if we find that there was discrimination (within the definitions in section 13 or 19 EQA) that would be a contravention of EQA falling within section 39.

Time Limits for EQA complaints

80. In EQA, time limits are covered in s123 EQA.

81. In this case, the Claimant commenced early conciliation on 7 December 2021, concluded it on 9 December 2021 and presented his claim on 7 February 2022. The alleged discrimination relates to the period on and after 11 November 2021 (and up to date of presentation of claim) and thus all the complaints are in time.

Burden of Proof

82. The burden of proof provisions are codified in s136 EQA and s136 is applicable to all of the contraventions of the Equality Act which are alleged in these proceedings.

(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 the contravention occurred.

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

83. It is a two stage approach.

83.1 At the first stage, the Tribunal considers whether the Tribunal has found facts - having assessed the totality of the evidence presented by either side and drawn any appropriate factual inferences from that evidence - from which the Tribunal could potentially conclude - in the absence of an adequate explanation - that a contravention has occurred.

At this first stage it is not sufficient for the claimant to simply prove that the alleged treatment did occur. There has to be some evidential basis from which the Tribunal could reasonably infer that there was a contravention of the act.

The Tribunal can and should look at all the relevant facts and circumstances when considering this part of the burden of proof test.

83.2 If the claimant succeeds at the first stage then that means the burden of proof is shifted to the respondent and the claim is to be upheld unless the respondent proves the contravention did not occur.

84. In Efobi v Royal Mail Neutral citation: [2021] UKSC 33, the Supreme Court made clear that the changes to the wording of the burden of proof provision in EQA compared to the wording in earlier legislation do not represent a change in the law. Thus when assessing the evidence in a case and considering the burden of proof provisions, the Tribunal can have regard to the guidance given by the Court of Appeal in, for example, Igen v Wong Neutral citation: [2005] EWCA Civ 142 and Madarassy v Nomura International Neutral citation: [2007] EWCA Civ 33.

85. The burden of proof does not shift simply because, for example, the claimant proves that there was a difference in treatment (in comparison to someone whose relevant protected characteristics were different) and/or that there was unwanted conduct and/or that there was a protected act. Those things only indicate the possibility of discrimination or harassment or victimisation. They are not sufficient in themselves to shift the burden of proof; something more is needed.

86. It does not necessarily have to be a great deal more and it could in an appropriate case be a non-response from a respondent or an evasive or untruthful answer from an important witness.

87. As per Essex County Council v Jarrett [2015] UKEAT 0045/15/0411, where there are multiple allegations, the Tribunal has to consider each allegation separately when determining whether the burden of proof is shifted in relation to each one. That does not mean that we must ignore the rest of the evidence when considering one particular allegation. It just means that we assess separately, for each allegation, whether the burden of proof shifts or not, taking into account all of the facts which we have found.

Definition of Direct Discrimination – section 13 EQA

88. Direct discrimination is defined in s.13 EQA.

> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

89. There are two questions: whether the respondent has treated the claimant less favourably than it treated others (“the less favourable treatment question”) and whether the respondent has done so because of the protected characteristic (“the reason why question”).

90. For the less favourable treatment question, the comparison between the treatment of the claimant and the treatment of others can potentially require decisions to be made about whether another person is an actual comparator and/or the circumstances and attributes of a hypothetical comparator. However, the less favourable treatment question and the reason why question are intertwined. Sometimes an approach can be taken where the Tribunal deals with the reason why question first. If the Tribunal decides that the protected characteristic was not the reason, even if part, for the treatment complained of then it will necessarily follow that person whose circumstances are not materially different would have been treated the same and that might mean that in those circumstances there is no need to construct the hypothetical comparator.

91. When considering the "reason why question" for the treatment we have found to have occurred, we must analyse both the conscious and sub-conscious mental processes and motivations of the decision makers which led to the respondent's various acts, omissions and decisions.

92. Where the protected characteristic relied upon falls with section 10 EQA and where the (alleged) less favourable treatment is a response to the claimant's conduct, the Tribunal has to decide whether that conduct was a "manifestation" of the protected characteristic.

93. As per the European Court of Human Rights, in Eweida and others v United Kingdom (2013) 57 EHRR 8:

> "82. Even where the belief in question attains the required level of cogency and importance, it cannot be said that every act which is in some way inspired, motivated or influenced by it constitutes a "manifestation" of the belief. Thus, for example, acts or omissions which do not directly express the belief concerned or which are only remotely connected to a precept of faith fall outside the protection of art.9(1). In order to count as a "manifestation" within the meaning of art.9, the act in question must be intimately linked to the religion or belief. An example would be an act of worship or devotion which forms part of the practice of a religion or belief in a generally recognised form. However, the manifestation of religion or belief is not limited to such acts; the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case. In particular, there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question."

94. In Higgs v Farmors School Neutral Citation Number: [2023] EAT 89, the EAT stated that the question of whether or not there is the requisite link between the conduct and the relevant belief will be a matter for the tribunal to assess, with care taken to recognise the subtleties that might exist in relation to the specific beliefs held. The assessment must be undertaken in respect of the beliefs held by the claimant, not as to how those beliefs might have been interpreted or understood by the respondent.

41. If the claimant's actions have a sufficiently close and direct nexus to an underlying religion or belief, such that they are properly to be understood as a manifestation of that religion or belief, any limitation would need to be such as is prescribed by law and necessary, in one of the ways identified under article 9(2) [of European Convention of Human Rights; & Schedule 1 Part I of the Human Rights Act 1998]

Indirect Discrimination – section 19 EQA

95. Section 19 EQA states, in part:

> **19 Indirect discrimination**
>
> (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

96. "Religion or belief" is one of the protected characteristics listed in section 19(3).

97. The phrase "provision, criterion or practice" is commonly abbreviated to "PCP". It is not separately defined in the Equality Act 2010. Tribunals must interpret it in accordance with guidance in the EHRC Code and in appellate court decisions.

98. In Nottingham City Transport Ltd v Harvey UKEAT/0032/12, the EAT held that the word practice has something of the element of repetition about it, and if related to a procedure, should be applicable to others as well as the complainant.

99. In Onu v Akwiwu; Taiwo v Olaigbe [2016] UKSC 31, the Supreme Court pointed out that a PCP must apply to all employees and that a practice of mistreating workers specifically because of a protected characteristic, or something closely connected to the protective characteristic, would not fall within the definition of PCP because it would necessarily not be applied to individuals who were not so vulnerable. Further, in James v Eastleigh BC [1990] HL/PO/JU/18/250, the policy was, at first sight, neutral between the sexes, but, on proper analysis the qualification criteria was so closely linked to sex that it amounted to direct, rather than indirect, discrimination.

100. The PCP does not have to be a complete barrier preventing the claimant from performing his job for section 19 to be triggered. Furthermore, a PCP might be "applied" even if the employee is not necessarily disciplined or dismissed if they fail to meet the requirement. In Carreras v United First Partners Research, the EAT concluded that an expectation or assumption that an employee would work

late into the evening could constitute a PCP, even if the employee was not "forced" to do so.

101. There are two aspects to the "particular disadvantage" limb of the test for indirect discrimination.

    101.1 that the PCP puts (or would put) persons who share the claimant's protected characteristic at a particular disadvantage when compared with persons who do not share it.

    101.2 that the claimant must personally be placed at that disadvantage.

102. The word "disadvantage" is not specifically defined in the Equality Act 2010. The Code of Practice suggests that disadvantage can include denial of an opportunity or choice. A person might be able to show a particular disadvantage even if they have reluctantly complied with the PCP in order, for example, to avoid losing their job.

103. In some cases, where a "group disadvantage" is sufficiently notorious, judicial notice may be taken of it. The relevant principles about when judicial notice may be taken, and the need for caution, were discussed by the EAT in Dobson v North Cumbria Integrated Care NHS Foundation, UKEAT/0220/19/LA.

104. If the PCP is shown to exist and to place persons with the relevant protected characteristic, and the claimant himself, at a particular disadvantage, the burden of proof switches to the respondent to show that the PCP is nevertheless a proportionate means of achieving a legitimate aim.

105. The "legitimate aim" of the PCP should not be discriminatory in itself, and must represent a real, objective consideration. The health, welfare and safety of individuals may qualify as legitimate aims provided that risks are clearly specified and supported by evidence.

106. Reasonable business needs and economic efficiency may be legitimate aims. However, a discriminatory rule or practice will not necessarily be justified simply by showing that the less discriminatory alternatives cost more.

107. Once a legitimate aim has been established, the tribunal must consider whether the discriminatory PCP is a proportionate means of achieving that aim.

108. In Homer v Chief Constable of West Yorkshire [2012] UKSC 15; at paras 22 - 23 of Baroness Hale's judgment:

> Although the regulation refers only to a "proportionate means of achieving a legitimate aim", this has to be read in the light of the Directive which it implements. To be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and (reasonably) necessary in order to do so. Some measures may simply be inappropriate to the aim in question: thus, for example, the aim of

> rewarding experience is not achieved by age related pay scales which apply irrespective of experience (Hennigs v Eisenbahn-Bundesamt (Joined Cases C-297/10 and C-298/10) [2012] 1 CMLR 484); the aim of making it easier to recruit young people is not achieved by a measure which applies long after the employees have ceased to be young (Kücükdeveci v Swedex GmbH & Co KG (Case C-555/07) [2011] 2 CMLR 703)....
>
> 23 A measure may be appropriate to achieving the aim but go further than is (reasonably) necessary in order to do so and thus be disproportionate.

109. Tribunals considering whether a PCP is a proportionate means of achieving a legitimate aim must undertake a comparison of the impact of the PCP on the affected group as against the importance of the aim to the employer. The tribunal must make an objective determination and not (for example) apply a "range of reasonable responses" test to the decision to apply the PCP.

110. The tribunal must consider whether there are less discriminatory alternative means of achieving the aim relied upon. However, the existence of a possible alternative non-discriminatory means of achieving the aim of a measure or policy does not, in itself, make it impossible for the respondent to succeed in justifying a discriminatory PCP. The existence of an alternative is only one factor to be taken into account when assessing proportionality.

111. The defence to a section 19 claim can, in principle, rely on a legitimate aim which was not in fact the reason for imposing the PCP at the relevant time.

Facts

112. The claimant started working for the respondent in around August 2019. For the period relevant to this dispute, the contract between the parties [Bundle 58] was for a 12 months fixed term from 11 May 2021 to 10 May 2022.

113. There was no obligation on the Respondent to provide work to the Claimant. When shifts were offered then, as per the contract, they were likely to be 12 hour shifts.

114. The Respondent is operates an ambulance service, providing a service for the transfer of patients within both the public and private healthcare sectors under non-emergency patient transport contracts.

115. Prior to the start of the Covid pandemic (in March 2020), the respondent had multiple 12 hour ambulance shifts per day. So each ambulance (and its crew) went on duty at a particular start time, and finished 12 hours later. The start times were staggered throughout the day, and so in the middle of the day, and in the afternoon, the Respondent had several ambulances (and their respective crews) operating at the same time.

116. Although some jobs were pre-planned, the full list of jobs to which a particular ambulance and its crew would be allocated during their shift was not known at the

start of the shift. The work which the Respondent was required to perform was allocated to it by its customers/clients on an as and when required basis. For example, a hospital's decision to discharge a patient, or to transfer the patient between buildings or between hospitals, created the contractual obligation on the Respondent to make an ambulance available.

117. The Respondent's contractual obligation was to provide a "bed to bed" transfer. In other words, its staff were (potentially) required to enter the location from which the patient was being collected and were (potentially) required enter the location to which the patient was being delivered. This was not always necessary. Some of the time, for example, nursing staff might perform the role of assisting the patient between "bed" and ambulance, or the patient might not require it.

118. Where a patient was on a stretcher, the ambulance doing the job would have to be one with two crew members, and both crew members would potentially be required to enter the collection/delivery locations (subject, as just mentioned, to the fact that nursing staff might sometimes bring the patient all the way to the ambulance). Where the patient was in a wheelchair, potentially one crew member was sufficient.

119. The work sometimes included: taking people between different hospitals; taking people from home to hospital or vice versa; taking people to or from care homes, as well as other transfers. None of the work was "emergency" or "blue light" work.

120. The respondent had contracts to do work for a number of private hospitals. In some cases, the ambulance crew would take the patient between different buildings at the same hospital. In particular, it had a contract with the Wellington Hospital (or a sub-contract with Wellington's main provider) and there was an arrangement whereby the Respondent would keep (from around 8am to 6pm) an ambulance parked near to the hospital to be ready and able to transfer between different buildings.

121. One of the locations to which patients might be taken from the Wellington Hospital was the associated hospice, and that hospice was a location which met the statutory definition of a care home.

122. The respondent had several employees, as well as using the services of a number of individuals who, like the claimant, were regarded self employed independent contractors.

123. The Claimant was offered shifts as an emergency medical ambulance technician. The Respondent did not have employees in that role. All the staff that it called upon to undertake that particular function were, like the Claimant, working on independent contractor terms and conditions, rather than contracts of employment.

124. As mentioned above, the specific details of which specific jobs would be referred to the Respondent on a particular day were not (all) known in advance because

some arose from a hospital's decision to discharge a particular patient at a particular time. It was important to the respondent that it was able to carry out all the jobs that were referred to it because failing to do so could lead to criticism from its clients and potentially ultimately losing the contract. Thus, one of the measures it took to ensure that it could satisfy demand was to have enough ambulances on duty, that were crewed appropriately. The crews were either 1 person or 2 people, and the Respondent knew which qualifications each crew member had (and, in the case of employees, what their job title was). Whether a particular ambulance was suitable to be allocated a particular job would depend on (as well as its availability, and geographical proximity to where the work was required) which crew it had on board.

125. As a result of the effects of the covid pandemic, the respondent had much less work to do than previously and as a result it did not need to have as many ambulances on duty at any given time. For that reason, it had fewer shifts to offer to its workers (both employees and independent contractors).

126. The reasons for this were that, in the earlier stages of the pandemic, people were not as keen to go to hospital and because various types of appointments were cancelled. As the pandemic continued, hospitals became full of covid patients, and the capacity to receive the type of patients that the Respondent had been transporting prior to the pandemic diminished. Outpatient units were either allocated to deal with covid work, or surgical work, and the Respondent was less likely to be called upon to deliver patients to or from those locations. The overall demand for the Respondent's services reduced significantly.

127. The claimant regularly did the 5pm to 5am slot. He regularly did it five times per week. This particular shift was not popular. It was therefore regularly available for the Claimant to do, despite the Respondent not having many day time shifts to offer to crew. The Respondent was very grateful that the Claimant was willing to do this shift, as other staff did not wish to do it.

128. All of the self-employed contractors had the option to simply decline to do the night shifts if they wanted to. Apart from having the contractual freedom to decline, the Respondent had no bargaining power to (for example) state that unless they did some night shifts, they would not be offered day shifts either. This is because the other contractors (doing shifts, like the Claimant, as EMT) were potentially able to get daytime shifts from other providers, and so could simply decline to work at all for the Respondent if the work was not offered at acceptable times of day.

129. The respondent did have some employees. It had employees in the role of ECA, for example. In principle, those employees could be instructed by management that they were compelled to do night shifts. The Respondent required at least one EMT on the night shift so that that ambulance would be able to perform all of the jobs that might potentially be required of it during the night shift. This was to be

the Respondent's only ambulance on duty for several of the hours of its shift, and so, if the crew allocated to it on a particular night was not suitable for a particular job, then the Respondent would have had to decline the job.

130. By October 2021, we accept - as per page 115 of the Respondent's bundle and as per Mr Innis's oral evidence - that the respondent only had three remaining ambulance shifts, not including the one for the Wellington Hospital. One of those was the night shift (5pm to 5am) which the claimant regularly did, the other two were 7am to 7pm and 11am to 11pm.

130.1 In other words, there was a small part of the day (between 5pm and 7pm), when there were three ambulances on duty.

130.2 There were also other parts of the day (from 7pm to 11pm and from 11am to 5pm), when there were two ambulances on duty.

130.3 From 11pm to 5pm, it was just the night shift ambulance.

130.4 From 7am to 11am, there was also just one ambulance (not counting the one dedicated to the Wellington Hospital).

131. It became known that the government was planning to introduce new legislation which would have the effect of preventing individuals from entering care home premises unless they were either vaccinated or else medically exempt.

132. The claimant was informed about this in September 2021. As per page 114 of the Respondent's bundle, Mr Minnis wrote to the Claimant to give full details of the legislation and its likely it effects. He asked for the Claimant to provide proof of vaccination if he had that, and told him that the government would be publishing details of the medical exemption route in due course.

133. There was a discussion between the Claimant and Mr Minnis on around 11 October 2021. We accept that the claimant did express interest in doing other shifts other than the night shift. In particular, he expressed willingness to (and suggested he had an ability to do), the Wellington Hospital shift.

134. The respondent carried out a risk assessment as shown on page 115 of the bundle. We accept that that was carried out in good faith and the documents states the respondent's genuine opinions accurately.

135. The Claimant was one of 5 staff who had been identified as not being vaccinated. As a result of discussions, 2 of those 5 became vaccinated. Apart from the Claimant, the other two unvaccinated were JS and NW. NW was the Claimant's regular fellow crew member on the night shift.

136. The Claimant was the only one of the 12 available EMTs who did not become vaccinated. A medical exemption would have been sufficient to comply with the legislation, but none of the others relied on medical exemption. [Bundle 83].

137. In early November, the claimant informed the respondent that his ethical vegan beliefs would prevent him from having the vaccine. The respondent provided him with details of how to seek medical exemption. The claimant did not provide any medical exemption to the respondent.

138. Neither NW nor JS (nor any other person without having either vaccination or medical exemption) were allocated driving shifts after the 11 November 2021 during the period that relevant to this claim (up to 7 February 2022).

139. The claimant's suggested comparator, as per the list of issues is AW. AW was not an EMT and AW was not unvaccinated.

139.1 AW was sometimes allocated shifts on an ambulance, but with different duties and lower payrates than the Claimant.

139.2 Around May 2021, AW became father to a new born baby. Starting around that time, to assist with his childcare arrangements, he sometimes swapped shift swap with another ECA who was also a controller.

139.3 This arrangement was in place prior to the announcement of the new legislation and was not because of the new legislation and was not because of AW's vaccination status.

140. Prior to the legislation coming into force, one of the Respondent's workers, DS, was pregnant. The respondent made adjustments to DS's duties, in particular, the arrangements for manual handling. The adjustments that it made, included, that from time to time, other crews might be called out to assist her on a particular job.

141. The new legislation came into force from 11 November 2021. As of that date, the Claimant was not vaccinated and had not provided the Respondent with proof of a medical exemption (and the reason he had not provided that proof to the Respondent is that he had not obtained such proof).

142. The respondent formed the opinion that it could not offer any shifts to the claimant in these circumstances. Not every job that the Respondent allocated to a particular ambulance would require the crew to attend a care home. However, some of the jobs that were referred to the Respondent by its customers did require that the crew would attend a care home and go inside. We reject the Claimant's assertion that a combination of the other crew member pushing wheelchair by themselves, or the availability of nursing staff, would avoid that. The Respondent's contractual obligation was for a bed to bed service, and while that did not always

entail both crew members entering the care home every single time, sometimes both were required to do so, in order to comply with that contractual obligation.

143. The Respondent formed the opinion that if it staffed its night shift ambulance (or the 7am ambulance, or the 11am ambulance, or the Wellington Hospital ambulance) with the Claimant as the EMT, there would not necessarily have been sufficient flexibility to ensure that all the jobs that were referred to it by its customers could be fulfilled. Its assessment was that the limited number of ambulances on duty (even at the maximum) plus the fact some of the time there was only one ambulance on duty meant that they could not put a crew on any of their ambulances that could not be allocated a care home job. Put another way, if one of its crews was unable to do a care home job (without a breach of the legislation) then the Respondent was running the risk of having to turn down a care home job and not being able to meet its contractual obligation to its customers, or else of causing significant delay and disruption which might endanger its relationship with its customers (hospital and/or main contractor). The Wellington Hospital contract, in particular, was one which the Respondent regarded as requiring prompt attendance to carry out particular jobs, including when transporting to the hospice (to which the new legislation applied).

144. The respondent sought to follow ACAS guidance, and in particular discussed other alternative work with the claimant.

145. The respondent did not have any office-based work to supply to the claimant.

146. The Respondent considered the Claimant's willingness to do the Wellington Hospital shift. It decided that it was no more able to put him on the Wellington Hospital dedicated ambulance than on any of the other shifts (because of the potential need to have to take somebody to the hospice). Doing so would either have meant:

146.1 Accepting the hospice job and being in breach of the legislation

146.2 Accepting the job, but without the Claimant being able to enter the hospice when performing that job, placing the Claimant in breach of its contractual obligations (and possibly duty of care to patient) and risking complaints and dissatisfaction from the patient, the patient's relatives, and the Wellington Hospital

146.3 Refusing the job

146.4 Waiting until one of its other ambulances was free, which ran the risk of delays, and of complaints and dissatisfaction from the patient, the patient's relatives, and the Wellington Hospital

147. The Tribunal accepts that the majority of the Wellington Hospital work did not require attendance at the hospice; it was around 5% according to Mr Minnis's

estimate. However, we accept Mr Minnis's evidence that even turning down a small percentage of the Wellington hospital jobs would have been unpalatable as it would have potentially led to significant dissatisfaction from its client.

148. The claimant was offered the opportunity to do eight-hour shifts at particular events. These were at a range of football matches for professional clubs: some Premier league and Under 21 level, and some for more junior age group matches.

149. This would have been a very large reduction in the Claimant's average hours. The Respondent had usually offered, and he had usually accepted, 60 hours per week (five 12 hours shifts). This would have been much fewer, with a limited number of 8 hours shifts being potentially available each week.

150. The Respondent offered 27 such shifts that it was aware of, spread out over the remainder of the football season. It informed the claimant that they were potentially willing to offer him as many shifts as possible and to prioritise him, while the situation (which they hoped would be temporary) continued. It was suggested that potentially there might be more than 27 available in due course. The Claimant initially signed up for just 5 out of 27 (though it was his opinion that he might be able to sign up for some of the others closer to the time).

151. The claimant has an offered reasons that he did not ultimately take up the respondent on these offers. They include that even doing as many as were potentially available would have been a significant drop in pay. He also says that he was unwilling to comply with any requirement to do a lateral flow test. He says, and the Respondent accepts, that, in due course, it was made clear that all of the event work did require a lateral flow test.

152. The Claimant seeks to place reliance on an assertion that the Respondent knew – or should have known – about the lateral flow test requirements when they proposed the events work shifts to him. In our view, nothing turns on this; the fact is that they offered him the work, and the lateral flow test requirement was out of their hands.

Analysis and conclusions

Direct Discrimination

153. In relation to our direct discrimination, we have not been satisfied that the burden of proof has shifted.

154. As per paragraph 40 of the case management summary, EJ Hutchings decided, as part of the preliminary issue, that

> the claimant's opposition to the covid-19 vaccine derived from his philosophical belief of ethical veganism.

155. Our decision is that his decision not to take the vaccine was not a "manifestation" of his belief, even though it was a decision which he took as a result of his belief.

156. Since we do not regard it as a manifestation, we do not need to address the requirements of Article 9(2) of European Convention of Human Rights and Schedule 1 Part I of the Human Rights Act 1998.

> Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

157. However, had we had to do so, our analysis would have been that the Respondent had shown that the limitation (not offering the Claimant shifts) was done in order to comply with its statutory obligations, its contractual obligations and to protect public safety, and was necessary for reasons similar to those mentioned below in relation to the indirect discrimination complaint.

158. The only actual comparator named by the claimant in the list of issues is not an actual comparator. Section 23(1) EQA requires that, on a comparison of cases for the purposes of section 13 (or 19) EQA there must be no material difference between the circumstances relating to each case. There were material differences here.

158.1 Part of the reason for this is that AW did not have the same job as the claimant.

158.2 Furthermore, AW was vaccinated.

159. An appropriate hypothetical comparator would be somebody who had the same or similar duties to the claimant and who was also, like the claimant not vaccinated and without a medical exemption, but who did not share the Claimant's philosophical belief in ethical veganism.

160. As far as the Claimant is aware (and the Respondent has not disputed) the Claimant was the only ethical vegan who worked for the respondent. So, in principle, any of the respondent workers could potentially be relied on as evidence for how a hypothetical comparator might have been treated.

161. However, the information we were given about the arrangements made for DS does not cause us to think that there are facts which cause the burden of proof to shift. DS's situation (as a pregnant employee to whom the Respondent had statutory and common law health and safety obligations) was so different to the Claimant's situation that we do not think it provides us with any evidence of how a hypothetical comparator to the Claimant would have been treated in November 2021. The same applies to the fact that the Respondent allowed AW to do shift swaps shortly after his baby was born.

162. Neither AW nor DS were unvaccinated and given EMT driving shifts between November 2021 and February 2022.

163. The claimant also referred to the fact that another worker was on the Wellington Hospital contract and in the claimant's opinion was not sufficiently qualified as an EMT and therefore in the claimant's opinion should not of been on that contract.

164. To the extent that the Claimant seeks to argue that that individual was kept on the contract in order to prevent their being a vacancy for him, we do not accept that assertion (which is unsupported by evidence). The respondent's evidence, which we accept is that in actual fact Wellington Hospital were made aware of that individual's qualifications (when it was discovered that they were potentially less than the Respondent had previously believed) and specifically approved that he could stay on the contract.

165. However, and in any event, and this individual was not a nonvaccinated individual and is treatment provides no evidence about how a hypothetical comparator to the Claimant would have been treated.

166. The only other nonvaccinated people - other than the claimant - were not treated differently than the Claimant. They also were not given EMT driving shifts after 11 November 2021.

167. So, from the list of issues, for direct discrimination, our answers are:

1.1 He compares himself with people who do not hold the philosophical belief of ethical veganism who were vaccinated.

168. We have considered BOTH hypothetical comparators who were vaccinated and who were not vaccinated.

1.2 Did the respondent do the following things: 1.2.1 Not provide the claimant with any driving shifts after 11 November 2021.

169. The Respondent does not dispute that it offered no driving shifts after 11 November 2021.

1.3 Was that less favourable treatment?

170. It was less favourable than the treatment given to the EMTs who were vaccinated.

171. It was less favourable than the treatment that would have been given to EMTs who were not vaccinated but who did have a medical exemption (though there were none of those).

172. It was not less favourable than the treatment of any EMT who was not vaccinated (and there were no such persons). In our judgment, having considered the burden

of proof provisions, and having taken account that even an unconscious motivation is sufficient, and even if it was only part of the reason, there are no facts from which we could conclude that a hypothetical comparator would have been treated differently.

1.4 If so, was it because of the claimant's ethical belief?

173. Having heard the evidence and submissions from both sides, we are entirely satisfied that the reason for the claimant's treatment was that the respondent believed it could not – at the relevant time – offer shifts to an EMT who was nonvaccinated (and who did not have a medical exemption) because doing so would have left it unable to meet its contractual obligations (without breaking the law). We are satisfied that the claimant's philosophical belief played no part whatsoever, even unconsciously, in the decision making.

Indirect Discrimination

174. We accept that the respondent had the PCP described at paragraph 2.1.1 of the list of issues page 40 of the bundle. Both sides state that the Respondent had this PCP. In full, it is stated:

> The respondent was subject to The Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021 which required care home staff to refuse entry to anyone who could not evidence that they had 2 doses of appropriately approved Covid-19 vaccine or that they came within a specified exemption. The respondent shared this provision with self-employed technicians who were not vaccinated on 14 September 2021 and did not allow these technicians to travel in the ambulances.

175. The particularly relevant part is, as per the last sentence, that the respondent did not allow technicians who were not vaccinated to travel in the ambulances. The first sentence is part of the background information, and refers to the legislation which (as both sides accept) was not created by the Respondent.

2.2 Did the respondent apply the PCP to the claimant? The respondent says it applied the practice to the claimant by way of 1-2-1 with him on 11 October 2021.

176. Yes, it did apply the PCP to the Claimant. It did not allow him to travel in ambulances (unless vaccinated or with a medical exemption) from 11 November 2021 onwards, having warned him of the requirements by email in September and at face to face meeting around 11 October 2021.

2.3 Did the respondent apply the PCP to other technicians or would it have done so?

177. Yes, it did apply it to all the EMTs. The other EMTs were all vaccinated, and so the PCP did not prevent them being allocated shifts. Any EMT who was not vaccinated, and who did not have a medical exemption, would, like the Claimant,

have been in the situation that, because of the PCP, they were not allowed to be allocated shifts as ambulance crew.

178. It made no difference whether the EMT was an ethical vegan or not. The Respondent applied the PCP.

179. It was applied to technicians with or without the claimant's philosophical belief.

2.4 Did the PCP put technicians who held the claimant's philosophical belief at a particular disadvantage when compared with persons with whom the claimant does not share the characteristic, e.g., "vaccinated technicians", in that the claimant did not receive driving shifts in the ambulance after the legislation was introduced?

180. As we stated during closing submissions, in our view the shared characteristic has to be "ethical veganism" and so those who do not share the characteristic are "people who are not ethical vegans" or "technicians who are not ethical vegans". The characteristic is not vaccination status, and so the group with whom the Claimant does not share the characteristic is not defined by the criterion that group members are vaccinated (whether technicians or not).

181. The PCP did NOT disadvantage those who either were vaccinated or who had medical exemptions, because those people were allowed to travel in ambulances and be allocated shifts as EMTs.

182. The PCP did disadvantage those who were NOT vaccinated (without medical exemption), because those people were NOT allowed to travel in ambulances and be allocated shifts as EMTs.

183. So our view was the appropriate question to ask was whether the proportion of ethical vegans in the disadvantaged group was significantly higher than in the group which was not disadvantaged.

184. It was in the course of our asking the Claimant to highlight the evidence that he thought that we should take into account on this issue that, for the only time during the hearing, the Claimant mentioned that an interpreter might have been of assistance.

185. We do accept that the Claimant was disadvantaged in comparison to vaccinated EMTs in that they received shifts, and he did not.

186. However, in terms of addressing the evidence on the group disadvantage issue that we believe we need to decide, the evidence provided by the parties is very limited.

187. As per the Supreme Court's decision in Essop v Home Office [2017] UKSC 27, the question is not why there exists a disparity between the proportions of those disadvantaged by the PCP sharing/not sharing the protected characteristic in

question. In some cases, the reason why might be fairly obvious (men and women have different average heights, for example), but that is immaterial.

188. So statistical evidence is the best way of proving group disadvantage, and will often be required where it is not possible to rely on judicial notice.

189. We agree with the Respondent that we cannot rely on judicial notice to decide the group disadvantage issue in this case. We take judicial notice of the fact that there were groups of people who objected to taking the vaccine for one reason or another, but we would need evidence to be able to say what the breakdown of those objectors was.

190. We also agree with the Respondent that the Claimant has the burden of proving that section 19(2)(b) EQA is satisfied. However, we do not agree with the Respondent that the Claimant has put forward no, or no sufficient, evidence on the point.

191. The most relevant evidence is the letter on page 183 of the bundle, which is to the claimant about from the Vegan Society. The letter does not necessarily support the view that a significant proportion of vegans share ALL of the Claimant's reasons for objecting to taking the vaccine. However, the letter states that all of the available Covid-19 vaccines were tested on that were tested on nonhuman animals. We do not need to make a decision about whether that claim is factually accurate or not. We are satisfied by the evidence that a high enough proportion of ethical vegans were likely to believe it and, therefore, to be disadvantaged by the PCP for that reason.

192. The disadvantage can be established were someone complied with the requirement because they felt that they had no choice.

193. It would have been preferable had we had some evidence of specific numbers, or percentages, of vegans who refused to take the vaccine (or who were significantly distressed by being forced by circumstances to comply). However, we accept that both groups (ethical vegans and non-ethical vegans) are likely to have contained similar proportions of individuals who had some sort of objection to taking at the vaccine for reasons other than animal testing (such as general opposition to governments requiring people to put something in their bodies; suspicion over motivations; non-acceptance of the necessity; health concerns, and so on). Our decision is, that the additional concern about opposition to products that have been tested on animals (or which are believed to have been tested on animals) in the ethical vegan group is likely, on the balance of probabilities, to have meant that the group of people who were not vaccinated, and who did bot have a medical exemption, contained a higher proportion of ethical vegans than the group who were not prevented – by the PCP – from being offered driving shifts.

194. In other words, we are persuaded that the group disadvantage is made out and section 19(2)(b) is satisfied.

2.5 Did the PCP put the claimant at that disadvantage?

195. Yes. Because of the PCP (and the fact that the Claimant was not vaccinated), he was not offered shifts from 11 November 2021.

2.6 Was the PCP a proportionate means of achieving a legitimate aim?

196. The respondent refers to two legitimate aims at 2.6.1 and 2.6.2, and there is some overlap between them: 2.6.1 refers to its legal obligation and 2.6.2 refers to the legitimate aim of ensuring it was not breaking the law. The latter also goes on to say that it must avoid putting people in care homes and travelling in the ambulances at risk.

197. For the indirect discrimination analysis tribunals must actively assess the legitimacy of the employer's purported "legitimate aims" for the PCP (in this case for the refusal to offers shifts) to see if the PCP can be objectively justified.

198. Having an apparently legitimate aim as its reason for refusing to allocate shifts is not sufficient in itself. The issue is whether the importance of achieving the aim is enough to overcome the fact that its PCP has had a discriminatory impact. In particular, we have to analyse whether any alternative measures to the PCP might have achieved the same aim without being as disadvantageous to the Claimant.

199. It is clear to us from both of the alleged legitimate aims, as written in paragraph 2.6 of the list of issues, that the respondent was asserting it could not put the claimant on jobs in which the ambulance crew was required to attend a care home. We are satisfied that it is sufficiently clear that the assertion being made is that as between the choice of sending the Claimant on a care home job, and turning the job down, it would have been left with no choice other than to turn those jobs down, because sending the Claimant would have been a breach of a legal obligation.

200. The assertion is that not offering the Claimant shifts was to achieve the legitimate aim of not breaching the legislation (and of not having to turn jobs down to avoid doing so).

201. The PCP of not offering shifts to persons who were not vaccinated (and who did not have a medical exemption) had a discriminatory effect on the claimant. It meant that he could not travel in ambulances and could not be offered shifts by the respondent and could not work the 60 hours per week that he had typically been doing during this contract (from May 2021). His earning potential from this self-employed work was massively reduced.

202. The Claimant was offered some replacement work (the events work) but that was for far fewer hours.

203. We accept that it was of critical importance to the Respondent that it did not send out crews for care home jobs (collecting or receiving patients) who were neither vaccinated nor in possession of a medical exemption, because doing so would have either resulted in a breach of the law (if the crew entered the care home) or a breach of its contractual obligations (if the crew, or part of it, declined to do so, or were refused entry).

204. We accept that it was of critical importance for the Respondent that it did not imply to its customers that it was available to supply an ambulance, only to turn down the job when it discovered that it required attendance at a care home (including at the hospice associated with the Wellington hospital).

205. In terms of the latter, we accept that, as a result of the Claimant's non-availability to do the night shift (also the non-availability of his colleague, but the Claimant's role as EMT in particular) and the inability to get anyone else to do the EMT function on the night shift, it was no longer able to offer a night shift ambulance crew at all, and had to give up that part of its contract. That is, to maintain its overall relationship with its customers, it was necessary to confirm that it could not do ANY jobs overnight, rather than turn some down on an ad hoc basis, as that was the only way of avoiding damaging the relationship.

206. The Respondent's legitimate aim (of avoiding breaching its legal obligations, and of doing so without unexpectedly having to let its customer down) was very important to it. There was no realistic alternative to refusing to offer the Claimant the shifts. Moving him to a day time shift, or to the Wellington Hospital ambulance would not have solved the problem. On the Claimant's own account, the day time ambulances were more likely to have care home work; in any event, the Respondent could not be sure that it could avoid a situation that the ambulance that he was on would be required for a care home job. The Respondent did offer the Claimant some alternatives (the events work) even though that would not have been as well-paid, and even though the Claimant did not find it acceptable because of the lateral flow test requirement. Other than the events work, it did not have other work available that it could offer to the Claimant. In any event, the Claimant was not an employee, but rather was a self-employed EMT, and he was the provider of a scarce resource. Other ambulance services also wanted EMTs and were in competition with the Respondent for those which the Respondent used. The Claimant was not prevented from taking up work with other providers (if they were willing to offer it to him); this would not be a breach of his contract with the Respondent. The Claimant asserts that he would have been willing to do office work, but the Respondent had no requirement for such work, and the Claimant was not an employee to whom it owed an obligation to provide work.

207. The Respondent has demonstrated to us that its PCP was a proportionate means of achieving a legitimate aim.

Conclusion

208. For the reasons mentioned, all the complaints of direct and of indirect discrimination have failed. It is therefore not necessary to consider remedy issues.

Employment Judge Quill

Date: 19 February 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON

07/03/2024

FOR EMPLOYMENT TRIBUNALS