



EMPLOYMENT TRIBUNALS

Claimant: Mr J Sandher

Respondent: Hillingdon Hospitals NHS Foundation Trust

Heard at: Watford (By CVP)

On: 3,4 & 5 July 2024

Before: EJ Bansal
Members – Mr A Scott
Mr L Hoey

Representation

Claimant: In person

Respondent: Mr Islam-Choudhary (Counsel)

JUDGMENT having been given orally at the hearing and a judgment been sent to the parties on 23 August 2024, these written reasons have been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013. Therefore the following reasons are provided.

REASONS

Background

1. By a Claim Form presented on 3 April 2022, following a period of ACAS early conciliation which started on 24 January 2022 and ended on 6 March 2022 the claimant brought complaints under the Equality Act 2010 for direct discrimination on grounds of race; harassment related to his race; and failure to make reasonable adjustments due to his disability, namely relating to injury to his right foot (toe).
2. The respondent in their response filed on 20 June 2022 contested the complaints and raised a jurisdictional time bar point. The respondent has conceded that the claimant had a disability from September 2021 onwards.

The Legal Issues

3. At a Preliminary Case Management Hearing held on 2 October 2023 Employment Judge Manley discussed and agreed with the claimant and the respondent representative the legal issues to be determined by the Tribunal. At this hearing, both parties confirmed their agreement to these issues, as set

out at bundle pages 114-118. These are not repeated herein but are attached to these reasons at Annex A.

The Hearing

4. The claimant was not represented and acted as litigant in person. The respondent was represented by Mr Islam Choudhary of Counsel.
5. An agreed bundle of documents of 483 pages was provided. The Tribunal read and considered the documents referred to in the witness statements and those referred to in evidence during the hearing.
6. The Tribunal was provided with a witness statement from the claimant. For the respondent there were statements for Wendy Fiddes (Head of Employee Relations) and Sara Berry. At the start of the hearing, Mr Islam Choudhary confirmed that Sara Berry was not being called as a witness due to ill health and that her statement was not therefore being relied upon. The Tribunal therefore heard oral evidence from the claimant and Wendy Fiddes. Both witnesses were cross examined. The Tribunal also asked questions of the witnesses for clarification.
7. The Tribunal noted the respondent did not call Claire Prior, Jeanette Taylor or Liam Oldale. The Tribunal were informed that J Taylor & L Oldale had left the respondent's employment although no information was provided when this was.
8. At the conclusion of the parties evidence, Mr Islam Choudhary gave his oral submissions and referred to his Opening Note. The Tribunal gave the claimant additional time to present his written submissions, which he did do. Both parties submissions were taken into account in our deliberations.
9. Given that the claimant was a litigant in person, the Tribunal was mindful of this and to ensure the claimant had a fair hearing. At the start of the hearing, the Judge took time to explain the Tribunal procedure; the factual and legal issues the Tribunal had to determine as set out in the agreed List of issues; guidance in relation to cross examination of the respondent witness and presenting final submissions. In particular, the claimant was encouraged to prepare in advance his questions for cross-examination of the respondent witnesses.
10. During cross examination of the respondent witness, the Tribunal found the claimant was not prepared and his cross examination was disjointed and consisted of making lengthy statements rather than asking direct questions. The claimant was given guidance by the Judge to focus on the issues to be determined and was also given some additional time to recollect his thoughts and marshal his questions to the issues.
11. The Tribunal's view was that the claimant had ample time to prepare for this hearing. Nonetheless, the Tribunal was satisfied the claimant was given full opportunity to present his case; make his representations and received a fair hearing.

Findings of Fact

12. Based on the evidence heard and read, the Tribunal made the findings of facts as set out below. Where a conflict of evidence arose the Tribunal resolved the same, on a balance of probabilities. The numbers appearing in brackets is reference to a page number in the hearing bundle.

The Respondent

13. The respondent is an NHS Foundation delivering services from Hillingdon and Mount Vernon Hospitals.

The Claimant

14. The claimant describes himself of Asian origin. The claimant commenced employment with the respondent on 5 September 2011 in the Finance Team in the role of Accounts Receivable Officer. He continues in their employment. At the relevant time, the Claimant's Line Manager was Liam Oldale, (Accounts Receivable Manager.)
15. The Respondent's Finance Team is split into two teams, Account Payable and Accounts Receivable. At the relevant time, the Accounts Receivable Team consisted of 3 staff members – Liam Oldale (Manager), Christine Wilson (Assistant) and the Claimant.
16. In the Account Payable Team were – Lorraine Cook; Tracey Everly, Alena Parker, Claire Prior (Admin Assistant)- who worked part time, Sara Berry (Manager) & Sarah Harris (Deputy Manager) In evidence the Claimant accepted that in the main these two teams do different work, although there is some work done together in setting up new accounts.
17. Until, December 2021, the Finance Dept was based at Hillingdon Hospital. The two teams occupied separate but adjoining offices. In December 2021, the Finance Team was moved to Mount Vernon Hospital.
18. The claimant's employment is subject to the terms and conditions as set out in his contract of employment issued to him around the date of his appointment. In particular, the main terms being, his start date of 5 September 2011; his position being part time doing 25 hours per week over 5 days, working from 9am to 2pm; that he was based at Hillingdon Hospital although there is a requirement for him to work in any other designated location. (p182-196)
19. The Claimant informed the Tribunal that he worked part time hours as he was a single parent and his working hours had to accommodate his children's school hours and childcare responsibilities. We noted from some correspondence in the bundle in Dec 2020/Jan 2021 there was some dialogue and flexibility about the Claimant's working days. (p198)
20. The reporting structure as of April 2020 onwards was that, the claimant's Line Manager was Liam Oldale. He, (Liam) reported to Jeanette Taylor, (Head Of Treasury). The Head of the Dept being Jonathan Ware (Head of Finance)

21. Due to the Covid 19 pandemic, in March/April 2020 the working arrangements for the Finance Dept were changed. Sara Berry was responsible for her team (Accounts Payable) and Liam Oldale for Accounts Receivable.
22. According, to the claimant from April 2020 onwards, he worked 2/3 days a week in the office, and the remaining days at home. The working days were subject to a rota. The claimant maintained that the days he was in the office were the same days that Tracey Everly and Claire Prior (of the Accounts Payable Team) would also be in. He also confirmed that during this period he did not have a work laptop hence he used his own laptop when working from home and that he was mainly doing credit control work.
23. The claimant claimed that on the days he came into the office, in the period April/May 2020 Claire Prior would accuse him of not doing work from home and that he should work in the office 5 days a week. He claimed that these incidents were witnessed by Tracey Everly and his own Manager Liam Oldale; and Sara Berry but no action was taken against Claire Prior. The claimant also maintained that he verbally reported Claire Prior's behaviour to Liam Oldale who did nothing about it and told him to ignore her.
24. In September 2020, the claimant injured his right foot playing football. He was off sick for a week. The claimant alleged that following this Claire Prior would say to him that there was nothing wrong with his foot.
25. The claimant has maintained that he verbally reported Claire Prior's behaviour to Liam Oldale and that he did nothing about it and told him to ignore her. According to the claimant Liam Oldale did not do anything about this until October 2021. This has been disputed by Liam Oldale.
26. On 30 December 2020, the claimant was signed off sick from his doctor due to foot pain, until 12 January 2021. (p208) On 13 January 2021, the claimant notified Liam Oldale about being signed off sick by his doctor to 31 January 2021.
27. It is not clear the date the claimant returned to work following this period of absence although from the email correspondence from Liam Oldale dated 13 May 2021, to Occupational Health it is confirmed that the claimant was working from home since the start of the Year, and was intending to return to work into the office commencing 24 May 2021. (p217)
28. On 14 May 2021 Liam Oldale referred the claimant to Occupational Health and to seek advice on any adjustments to be made. (p217-220)
29. On or about 19 May 2021 the claimant had a consultation with the Occupational Health Nurse. (p223/224) The advice was that the claimant would benefit from flexibility in his hours of work and that he gradually builds up on his attendance at work, namely – Week 1- he does 2 days week in the office & 3 days from home; Week 2 - 3 days in the office & 2 from home; Week 3- 4 days in office & 1 from home and Week 4 - full normal duties and attendance in the office.

30. The Tribunal understood that from May 2021 the claimant worked in the office two days a week.
31. According to the claimant in June/July 2021, he was told by Liam Oldale that Jeanette Taylor wanted him to attend the office five days a week but no other staff member was being requested to do so. He also claimed that later that week Jeanette Taylor told him that Liam Oldale should have asked him to come to the office five days a week. This issue was investigated by the respondent. Both Liam Oldale and Jeannete denied this allegation.
32. According to the claimant another incident occurred sometime in October 2021 involving Claire Prior. In evidence the claimant confirmed it was on 25 October 2021, when he was in the office, when he was taking a face mask for himself, Claire Prior said to him in the presence of Tracey Evelyn , "I hope you're not taking all of them". The claimant showed Claire Prior he was only taking one. He found her remark offensive, which made him feel as he was a thief and scrounger.

The move to Mount Vernon Hospital

33. In September 2021, the consultation to move to Mount Vernon Hospital commenced. By email dated 18 October 2021, the claimant wrote to Liam Oldale informing him that due to his childcare responsibilities as a single father and his foot injury he would struggle to make the journey to Mount Vernon and that he would consider working 1 day in the week in the office (p236)
34. In an email dated 25 October 2021 sent by Liam Oldale to Narishma Gorsia (p235) and copied to Jeanette Taylor & Jonanthan Ware, he stated, "*I have a team made-up of two members of staff and in order to cover the office site at Mount Vernon I have suggested that we each work two days per week in the office we will each cover set days with myself being on site with one member of my team one week and the other member of my team the following week. There are several reasons I wanted us to cover the office every day we receive several pieces of incoming post including items such as cheques that will need to be dealt with securely and efficiently. I also want us to have a presence in the office so that we can assist any other departments should they have any queries.* (p235)
35. On 30 November 2021, the claimant emailed Liam Oldale informing him that he is not happy about working more than one day a week in the office especially as all of the Depts only work one day a week in the office. He also mentioned he had continuous pain and swelling on his right foot. He also explained that because of his travelling and childcare issues he had strong grounds and that he would be happy to contact Jonathan directly with his concerns. (p241)
36. It is not disputed by the parties that the claimant only worked one day in the office, namely on 23 December 2021.
37. On 16 December 2021 the claimant sent an email to Jonathan Ware, in expressing his dissatisfaction with the move to Mount Vernon. Due to his childcare responsibilities and the injury to his foot which was causing him

issues, he made it clear he wanted to only work 1 day in the office. He also stated that Claire Prior's behaviour stopped about 2 months ago (Oct 21) when he informed Lorraine Cook that if she continued he would escalate the matter to Court. He also stated he had been harassed and discriminated by Claire Prior for over one year, which he claimed all Managers and the Accounts Payable team were aware of.

38. In the email, the claimant alleged that Claire Prior would tell him every day when they both were in the office that he can work from the office 5 days a week, and accused him of not working at home. He complained that she only made these claims to him and not to the others. The claimant also reported that *"a few months back when he was taking a disposable mask Claire said "I hope you're not taking them all"* which made him think that either he was a thief or a scrounger. He claimed this was said in front of Tracey Everly. (p243/244)
39. The claimant found Claire Prior's alleged conduct to be harassment and that she was discriminating against him. He further stated, *" I don't know on what grounds but if you were to tell anyone there's only one obvious difference between me and everyone else"* (p244)
40. In cross examination the claimant accepted that this was the first written correspondence/email sent by him concerning Claire Prior's 's conduct and his complaint. According to the claimant he escalated his concerns because Liam Oldale did not do anything about the issues particularly concerning Claire Prior (p247)
41. It was accepted by the parties that the claimant only attended work on 23 December 2021 at Mount Vernon Hospital.
42. According to Liam Oldale, in his email reply to the claimant dated 5 January 2022 he confirmed that it would be best to refer him back to Occupational Health, and about the issues with Claire Prior, he explained he raised them with Jeanette Taylor, and that she did speak to Claire Prior. He said that this discussion was around October/November 2020 and not October 2021. He also pointed out that he changed the claimant's rota at that time to avoid contact with Claire Prior, hence since then he had not been made aware of any further incidents.
43. In that email, Liam Oldale also asked if the claimant was fit to work from home, and if he will be taking time off as sick leave. There was no pressure for him to continue working from home, if he was not fit. In reply by email of 5 January 2022, the claimant claimed Liam Oldale was lying. He stated that he did not intend to escalate this matter to court but will now do so, as he had sufficient evidence to prove what took place. He also accused him of lying about the dates of the incidents. (p245)

Grievance -17/01/2022

44. On 17 January 2022 the claimant raised a formal grievance about Claire Prior and Jeanette' Taylor's conduct during the period from middle of 2020 to October 2021. The grievance is detailed in content, and sets out issues

which are the subject of the complaints made in this claim. (p252-255)

45. On 4 February 2022, the claimant had a meeting about his grievance with Jonathan Ware, the appointed Case Manager. The claimant was accompanied by his Union rep. Also present was Mrs Wendy Fiddes (Head of Employee Relations) who gave evidence at this hearing. (p266-269) In that meeting the claimant repeated the issues he set out in his grievance. He was adamant that the issues with Claire Prior started in October 2020 and continued until October 2021, when the incident about the face mask occurred. In terms of making contact with ACAS, the Union Rep explained the claimant was advised to do so as they did not want him to be out of time if he wanted to make a claim.
46. Further, the claimant was of the view he had been discriminated against by Claire Prior and Jeanette Taylor because of his colour. In response to a question, he stated, “ *The only difference is my colour. That's what I believe they have not said any racist comment to me it is because I am treated differently I am forced to come to work Claire has bullied others from a different background.* (p268)
47. Following this meeting, Jonathan Ware set out the Terms of Reference for an investigation into the complaints made. The Case Investigator appointed was Stefan Krok-Pasowski (Medical Education Manager) with HR Support. We noted the Terms of Reference set out the concerns made by the claimant, which include the complaints made in this claim. (p279)
48. It is noted that the investigator had the discretion to interview/take statements from any further witnesses if it became evident that they could assist in establishing the facts.

Investigation process

49. As part of the investigation process Stefan Krok-Paszkowski held interviews on 17 & 26 May 2022 with the claimant; (p287-292); Sara Berry; Alena Parker; Dipen Madhani; Lorraine Cook; Sarah Harris; Tracey Everly; Claire Prior; Jeanette Taylor; and Liam Oldale (p287-332)
50. This investigation process took much longer than had been initially estimated. On 20 October 2022 Jonathan Ware met with the claimant to provide an update and explain further questions were needed to be asked of some of the witnesses.
51. The outcome of the grievance was confirmed in writing on 30 November 2022. Each of the 6 allegations investigated were not upheld, except for one finding that some comments made by Claire Prior were in part deemed to be unprofessional communication but not harassment. (p345-350)
52. The Claimant appealed the outcome of the grievance. Following a hearing held on 1 March 2023, the appeal was dismissed by letter dated 26 April 2023. (p467;458; 467)

The Legal Framework

53. The Tribunal in their deliberation considered the relevant provisions in the Equality Act 2010 in respect of each complaint; the burden of proof provisions and the caselaw referred to by Counsel in his written submissions. These are summarised below.

Direct discrimination – s13 Equality Act 2010 (EqA)

54. Section 13(1) provides that :
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.

Comparison

55. Section 23 of the EqA 2010 provides that:
(i) On a comparison of cases for the purposes of section 13..... there must be no material difference between the circumstances relating to each case.

Burden of proof (s136 EqA 2010)

56. Section 136 requires the claimant to prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of unlawful discrimination, and it is then for the employer to prove otherwise.
57. The cases of Barton v Investec Henderson Crosthwaite Securities Ltd (2003) ICR 1205 and Igen Ltd v Wong (2005) EWCA Civ 142 provide a 13 point form/checklist which outlines a two stage approach to discharge the burden of proof, namely;
- (a) Has the claimant proved facts from which in the absence of an adequate explanation the tribunal could conclude that the respondent had committed unlawful discrimination?
 - (b) If the claimant satisfies (a) but not otherwise, has the respondent proved that unlawful discrimination was not committed or was not to be treated as committed.
58. The burden is on the claimant to prove, on a balance of probabilities, a prima facie case of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. The claimant must establish more than a difference in status (eg religion in this case) and a difference in treatment before a Tribunal will be in a position where it could conclude that an act of discrimination had been committed.
59. It is not enough for a claimant to show that he/she has been treated badly in order to discharge the burden of proof that he/she had suffered less favourable treatment because of a protected characteristic. The fact that the claimant has been subject to unreasonable treatment is not, of itself, sufficient to shift the burden of proof. (Glasgow City Council v Zafar 1998 ICR 120 HL). It does not matter if the employer acts in an unfair way, provided the reason has nothing to do with the protected characteristic. As Mrs Justice Simler (as she then was) observed in Chief Constable of Kent Constabulary v Bowler EAT0214/16 “merely because a Tribunal concludes that an

explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean that the treatment is discriminatory, since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristic.”

Inferences

60. Tribunals cannot draw inferences from thin air (Shamoon v The Chief Constable of the Royal Ulster Constabulary [2003] House of Lords).
61. The mental processes of the discrimination should also be considered (Reynolds v CFLIS (IL) Limited [2015] Court of Appeal).

Reason why

62. In addition, the Tribunal can take a “reason why” approach and consider the evidence put forward by the respondent and if it is satisfied that the respondent has established the reason for the treatment and that it is not connected with discrimination it can proceed on that basis.

Harassment – s26 Equality Act 2010

63. Section 26(1) of the EqA 2010 provides that;
“A person (A) harasses another (B) if
 - a. A engages in unwanted conduct related to a relevant protected characteristic, and
 - b. The conduct has the purpose or effect of –
 - i. violating B’s dignity, or
 - ii. creating an intimidating, hostile, degrading, humiliating or offensive environment for B

(4) In deciding whether conduct has the effect referred to in (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.
64. In relation to a claim for harassment under Section 26, it is open to a Tribunal to find that conduct was unwanted even if a claimant chooses to stay in employment and even if a claimant chooses not to object whether formally or informally (Munchkins Restaurant Ltd v Karmazyn and others EAT 0359/09).
65. The Equality and Human Rights Commission: Code of Practice on Employment (2011) states as follows:
 - (i) Unwanted conduct covers a range of behaviour, including spoken or written words or imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person’s surroundings or other physical behaviour.
 - (ii) The word ‘unwanted’ means essentially the same as ‘unwelcome’ or ‘uninvited’. ‘Unwanted’ does not mean that express objection has to be

made to the conduct before it is deemed to be unwanted. A serious one-off incident can also amount to harassment.

66. When considering whether a comment was “related to” a protected characteristic under Section 26 Equality Act 2010, a broader enquiry is required involving a more intense focus on the context of the offending words or behaviour (Bakkali v Greater Manchester Buses (South) Limited t/a Stage Coach Manchester [2018] UKEAT/0176/17).
67. In order to assess the “purpose” of the alleged conduct, the Tribunal must consider the alleged harasser’s motive or intention.
68. In considering whether the conduct had the specified effect, the Tribunal must consider both the actual perception of the complainant and the question whether it is reasonable for the conduct to have that effect. That entails consideration of whether, objectively, it was reasonable for the conduct to have that effect on the particular complainant. If a complainant is hypersensitive and unreasonably prone to take offence, there will have been no harassment within the meaning of the section (Richmond Pharmacology v Dhaliwal (2009) IRLR 336 at paragraph 15).
69. In assessing whether the conduct met the required threshold by producing the proscribed consequences, Tribunals should not place too much weight on the timing of any objection (Weeks v Newham College of Further Education UKEAT/0630/11).
70. Whether it was reasonable for a claimant to regard treatment as amounting to treatment that violates his/her dignity or has an intimidating, hostile, degrading, humiliating or offensive environment is a matter for factual assessment of the Tribunal having regard to all the relevant circumstances, including the context. In the case of Richmond Pharmacology v Dhaliwal (2009) IRLR 336, the EAT said at paragraph 22: *“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. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct ... it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase”*.
71. In speaking of the statutory language in Section 26(1), Elias LJ in Land Registry v Grant (2011) ICR 1390 said (at paragraph 47): *“Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment”*.

Reasonable adjustments – s20 & s21 EqA 2010

72. Section 20 of the EqA 2010 states:
“(1) Where this Act imposes a duty to make reasonable adjustments of 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 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 take to avoid the disadvantage.
- (4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
- (5) The third requirement is a requirement, where the disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid”.

73. Paragraph 20 (1) of Schedule 8 provides:

“ 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) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;
- (b) in any other 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.”

74. Under sections 20 and 21, discrimination by reason of a failure to comply with an obligation to make reasonable adjustments, the approach to be adopted by the Tribunal was as set out in Environment Agency v Rowan [2008] ICR 218, where it was indicated that an Employment Tribunal must identify the provision, criterion or practice (“PCP”) applied by or on behalf of the respondent and also the non-disabled comparator/s where appropriate, and must then go on to identify the nature and extent of the substantial disadvantage suffered by the claimant. Only then would it be in a position to know if any proposed adjustment would be reasonable.

75. For this complaint to succeed we had to have evidence that not only did the respondent know the claimant was disabled, but also that it knew, or ought to have known that he had been subject to a substantial disadvantage in relation to each of the alleged practices, criteria and provisions (PCPS).

76. To prove a failure to make a reasonable adjustment the claimant need to show that the respondent applied a PCP which put him, as a disabled person, at a particular disadvantage. He must then show that the adjustment he seeks in relation to any PCP is reasonable and that the application of such an adjustment would remove the disadvantage.

Conclusion

77. The Tribunal in reaching its decision took into account the findings of facts and applied the relevant law. In doing so, the Tribunal took each complaint as set out in the list of issues.

78. In our deliberations, the Tribunal rejected the claimant's contention that employees had lied or conspired against him, and the respondent had fabricated emails as contended by him during his evidence. The claimant did not provide any evidence to support his contention that emails have been fabricated by the respondent. The claimant made a serious accusation based on his belief without providing any supporting information. Also the fact that the respondent witnesses and employees did not have recollection of the discussions does not mean they were lying. The tribunal accepted that memories fade over time and to recollect incidents which are not documented is not always easy. Also the Tribunal dismissed the claimant's view that the employees have conspired against him. Again such assertion was without substance and was substantiated in evidence.

79. Race Discrimination – 2 allegations

- a. *In June/July 2021 – the Claimant was told by his Line manager, (Liam Oldale, that Jeanette Taylor wanted him to attend the office 5 days a week, but no other staff member was being requested to do so., and*
- b. *Jeanette Taylor later that week told the Claimant directly, that Liam Oldale should have asked the Claimant to come to the office 5 days a week from next week.*

80. The approach the Tribunal took in dealing with these complaints was to first consider the time point, given that in accordance with the timeline all acts relied upon which occurred prior to 24 October 2021 are out of time. The law is clear, s123(1)(a) of the Equality Act 2010 provides that proceedings on a complaint within section 120 of the Equality Act 2010 may not be brought after the end of

- (a) the period of three months starting with the date of the act to which the complaint relates or
- (b) such other period as the employment tribunals thinks just and equitable.

81. The burden is on the claimant to persuade this Tribunal that it is just and equitable to extend time. The Tribunal's discretion is broad and it can only be challenged where it is wrongly exercised or is perverse.

82. Counsel, in his submissions, referred the *Court of Appeal decision in Adedeji v University Hospitals NHS Foundation Trust. (2021) EWCA Civ27* We also had regard to Court of Appeal case of Robertson v Bexley Community Centre (2003) IRLR 434 which confirmed that the exercise of discretion is the exception rather than the rule, and British Coal Corporation v Keeble (1997) IRLR 336 EAT.

83. The Tribunal can extend time if it is just and equitable to do so. The Tribunal must exercise its discretion judicially by weighing all relevant factors.

These factors include:

- (i) the length of the delay;
- (ii) the reason for the delay: the longer the delay the more cogent the reason is expected to be;
- (iii) the merits of the case may be relevant;
- (iv) whether the cogency of the evidence is likely to have been affected by the

- delay;
- (v) what advice or information the claimant received or could have sought, and
- (vi) the balance of hardship.

84. The Tribunal weighed each factor carefully, as set out below;

(i) The delay

85. The delay is lengthy. It is nearly 3 months. The claimant has not provided a cogent reason or explanation for this delay. Even after he obtained his EC Certificate, on 6 March 2022 he did not act promptly as the Claim Form was not presented until 3 April 2022. The claimant was a member of the Union at that time, he could have sought advice. The claimant is an intelligent individual who should have been capable of undertaking his own research about his potential claims and time limits.

(ii) Hardship & prejudice

86. The Tribunal acknowledged the prejudice to the claimant in not being able to pursue his complaints, which he considers has some merit. The respondent has been caused prejudice by this late claim, as both Liam Oldale and Jeanette Taylor have left the respondent employment. Hence the ability to call these individuals has been prejudiced and the respondent evidence is limited. The Tribunal therefore was required to determine the complaint on the correspondence and the record of the interview notes. In this situation, the claimant bears the responsibility for bringing evidence to persuade the Tribunal to exercise its discretion. The claimant has not discharged that burden. Consequently, the Tribunal determined that it lacked jurisdiction to hear this complaint and is therefore dismissed.

87. In the alternative, even if the complaint was in time, or the Tribunal had decided to extend time, the Tribunal considered the merits of the allegations and came to the conclusion as set out below, based on the findings of fact.

Comparator

88. In relation to the comparator which is relevant for the direct discrimination claim, the Tribunal accepted the respondent's position that Christine Wilson was the appropriate comparator.

89. In determining whether the claimant was requested to work 5 days a week in June July 2021, the Tribunal considered the interviews of Jeanette Taylor and Liam Oldale. (p331 & 324) In his interview Liam Oldale said he had no recollection of asking the claimant to come to the office 5 days a week. He recalls asking the claimant to come into work leading up to Christmas. (p331) Jeanette Taylor in her interview had no recollection of asking the claimant to work in the office 5 days a week. She confirmed that having checked her emails, the only time that the claimant would have been asked to work 5 days was to cover leave before Christmas 2020.

90. Against this, the Tribunal noted the claimant's evidence that after this he spoke with Jonathan Ware and also Dipen Madhani. (Financial Accountant)

The Tribunal was not provided with any evidence from Jonathan Ware. However, the Tribunal was surprised that the claimant did not either keep a contemporaneous note of this conversation or followed this with an email either to Jonathan and/or Jeanette Taylor. The Tribunal also noted the email from Dipen Madhani,(p352) dated 6 March 2023, which appears to have been written in support of this claim. This email simply confirmed what is alleged to have been said by the claimant to him. It is not direct evidence. Accordingly, the Tribunal attached no weight to this email. The Tribunal also noted that Tracey Evelyn was not asked the question directly and therefore there was no evidence.

91. The Tribunal found as a matter of fact that the alleged request was not made by Jeanette Taylor or Liam Oldale. Given the working arrangements at that time following the Covid pandemic, there was no business reason for the claimant or any other staff members to work in the office 5 days a week. The office was adequately covered during the 5 days. Had this request been made, and there was a need, given the nature of the request, there would have been some correspondence confirming this from Jeanette Taylor. The Tribunal therefore concluded the claimant has not established a prima facie case for the burden to shift to the respondent. Therefore this complaint was dismissed

Harassment

92. In respect of this head of complaint – the claimant relied on the specific allegations, as set out below;
- a. *From April/May 2020 – Claire Prior making comments that the claimant should work five days in the office and all she wasn't doing any work at home*
 - b. *From September 2020 Claire Prior making comments that there was nothing wrong with his foot;*
 - c. *October 2021 - Liam Oldale failing to address Claire Prior's continuing behaviour until October;*
 - d. *25 October 2021 – Claire Prior's comment to the Claimant, about the face masks "hope you're not taking all of them"*
93. The Tribunal approached this complaint, first to consider the time point. For the reasons given above, which are not repeated, the Tribunal determined that the allegations a & b (in 2020) are out of time. The Tribunal did not consider it just and equitable to exercise its discretion to extend time. Therefore the Tribunal determined it had no jurisdiction to determine these. However, the Tribunal determined that allegations c & d to be in time.
94. However, in the alternative and as a matter of completeness the Tribunal made the conclusions as set out below;
- (i) Firstly, on the evidence presented by the claimant, The Tribunal did not as a matter of fact find that Claire Prior made the alleged comments from April/May 2020 that he should work five days in the office or that he was not working at home, or about his foot in September 2020, as alleged.

- (ii) The Tribunal concluded that had Claire Prior been doing so, the claimant would not have waited to flag these complaints until his first email to Jonathan Ware sent on 16 December 2021.
- (iii) The Tribunal also concluded there is was evidence to conclude that Liam Oldale failed to address the issues with Clare Prior until October 2021. In the absence of any supporting evidence from the claimant, the Tribunal preferred Liam Oldale's representations given at the grievance interview and his email reply to the claimant dated 5 January 2022 (p246) in which he confirmed he changed the rota sometime in November 2020 so that the claimant did not work on the same days as Claire Prior and/or that their interaction was kept to a minimum. From that date the claimant did not report any further incidents with Claire Prior.
- (iv) In relation to the mask incident, the Tribunal noted that Claire Prior has denied all of the allegations made by the claimant, and that it would be in Claire Prior's own interest to deny the allegations. Based on some of the observations made about Claire Prior's personality and her interactions with some other members of staff, the Tribunal concluded on a balance of probabilities that Claire Prior did make a comment about the face mask, as alleged.

Was there unwanted conduct?

- (v) Therefore, even if Claire Prior did make the comments as alleged, the Tribunal concluded these would have amounted to unwanted conduct.

Was the conduct related to the claimant's race?

- (vi) In considering this question the Tribunal was not satisfied that any such conduct related to the claimant's race. The mere fact that the claimant attributed such conduct because of his Asian background is not enough. The Tribunal noted that Claire Prior's behaviour was not just confined to the claimant. She was known to be loud and interfering and her behaviour towards other colleagues who were not Asian was no different. The fact that she did not single out the claimant adds weight to the point that her conduct was less likely to be related to the claimant's race. Accordingly, the Tribunal did not find there is any evidence to find that either consciously or unconsciously Claire Prior was motivated by the claimant's race.
95. On the basis the Tribunal concluded the conduct was not related to the claimant's race, the Tribunal did not consider it necessary to consider the purpose or effect of the conduct.
96. Finally, on the issue of the discrimination complaints, the Tribunal observed that in this hearing and as was evident from the claimants emails and documentation his perception was and continues to be that the treatment he claimed to have suffered was unfair and because of his race. The Tribunal observed that unlawful discrimination cannot be inferred from unreasonable or unfair treatment as there has to be "something more" which is suggestive of a racist motive. On the facts the Tribunal found no such evidence either

direct or by inference to show that the claimant's race was an issue at all.

Failure to make reasonable adjustments

97. For this complaint to succeed, the Tribunal was satisfied that
- (i) not only did the respondent know that the claimant was disabled at the relevant time, but also that
 - (ii) it knew, or ought to have known that he had been subject to a substantial disadvantage in relation to the alleged (PCP).
98. To prove a failure to make a reasonable adjustment the claimant needed to show that the respondent applied a PCP which put him, as a disabled person, at a particular disadvantage. The claimant was then required to show that the adjustment he requested in relation to the PCP, (i.e to work from home) was reasonable and that the application of such an adjustment would have removed the disadvantage.

The PCP

99. The claimant relied upon the PCP namely;
- (i) That he was required to attend the office twice a week.

Did the respondent applied the PCP relied upon.

100. The Tribunal found, on the basis of the respondent's admission that it required the claimant to work 2 days a week at Mount Vernon Hospital from 28 October 2022. This amounted to a PCP.
101. However, it was common ground between the parties that the clamant only attended work on 1 day from 28 October 2022, and that was on 23 December 2022. Once the claimant confirmed his difficulty in being able to travel as of 5 January 2023, the PCP was not applied to the claimant as he was allowed to work from home. On this undisputed finding of fact, the claimant failed to establish that as from 5 January 2023 the PCP was applied to him. Accordingly, no duty arose on the respondent to make reasonable adjustments.
102. If the Tribunal erred on that point, then even if the PCP was applied until 5 January 2023, the fact is the respondent made the required adjustment for the claimant to work from home, if fit to do so, and if not, not to work at all. Accordingly, this complaint was not made out and dismissed.

Conclusion

103. For the reasons stated the Tribunal concludes the claimant's complaints were not well founded and therefore dismissed.

**Employment Judge Bansal
Date 21 October 2024**

JUDGMENT SENT TO THE PARTIES ON

23 October 2024

FOR THE TRIBUNAL OFFICE

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ANNEX A
AGREED LIST OF ISSUES

1.1 The Claimant's claims are as follows:

- 1.1.1 Direct Race Discrimination - Section 13 of the Equality Act 2010 ("EA 2010");
- 1.1.2 Harassment related to Race - Section 26 of the EA 2010; and
- 1.1.3 Failure to make reasonable adjustments - Section 21 of the EA 2010.

2 Direct Race Discrimination

2.1 The Claimant sets out in his Claim Form that he is of Asian origin.

2.2 Did the following take place as alleged by the Claimant:

2.2.1 In June/July 2021, the Claimant was told by his Line Manager, Liam Oldale that Jeanette Taylor, Head of Treasury wanted him to attend the office 5 days a week, but no other staff member was being requested to do so;

2.2.2 That Jeanette Taylor later that week, told the Claimant herself that Liam Oldale should have asked the Claimant to come to the office 5 days a week from next week.

2.3 If so, does this amount to less favourable treatment against the Claimant compared to how the Respondent treated or would treat an actual or hypothetical comparator? The Claimant identifies the following:

- 2.3.1 Christine Wilson
- 2.3.2 Loraine Cook
- 2.3.3 Tracey Everly
- 2.3.4 Sara Berry
- 2.3.5 Sarah Haris
- 2.3.6 Liam Oldie
- 2.3.7 Alena Parker
- 2.3.8 Claire Prior

2.4 Are these valid comparators for the Claimant's race discrimination complaints?

2.5 If so, was such less favourable treatment because of the Claimant's race?

3 Harassment related to race

3.1 Did the Respondent engage in unwanted conduct? In particular, did the Respondent do the following as alleged by the Claimant and, if so, did such things amount to unwanted conduct:

3.1.1 From April/May 2020 did Claire Prior talk to the Claimant in a loud tone when they were in the office together, telling him that he should work in the office 5 days a week, that he didn't do any work at home and from September 2020, that there was nothing wrong with his foot;

3.1.2 That Liam Oldale was aware what was happening with Claire Prior, but made no effort to stop it until October 2021; and

3.1.3 In October 2021, when the Claimant was taking a face mask, Claire Prior said: "you're not taking all of them".

3.2 Insofar as any of the alleged acts above are deemed to have taken place as alleged by the Claimant, and amount to unwanted conduct, were any such acts related to the Claimant's race?

3.3 If so, did such unwanted conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

3.4 If not, did such unwanted conduct have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant? If so, was it reasonable for the conduct to have had that effect?

4 Disability

4.1 The Respondent admits that the Claimant meets the definition of 'disabled' under Section 6 of the EA 2010 by virtue of his 'long-term injury on his foot' only for the period from September 2021 onwards.

4.2 Did the Respondent have actual or constructive knowledge of the Claimant's Disability for the purpose of his Section 21 EA 2010 claim.

5 Failure to make reasonable adjustments (Section 20, 21 and 39(5) of the EA 2010)

5.1 What PCP(s) does the Claimant allege the Respondent applied to him?

5.1.1 Requiring the Claimant to attend the office twice a week.

5.2 Did the Respondent in fact apply the PCP to the Claimant?

5.3 Did the PCP put the Claimant at a substantial disadvantage in comparison to persons who are not disabled?

5.4 What was the disadvantage alleged?

5.4.1 His foot injury worsening as a result of having to travel into the office.

5.5 At the time the PCP was applied, did the Respondent know or could it reasonably have been expected to know, that the Claimant was likely to be placed at the alleged disadvantage by the PCP?

5.6 What reasonable steps does the Claimant allege the Respondent should have taken and did not?

5.6.1 Allowed the Claimant to work from home full-time.

5.7 Were such steps reasonable and if so, when did it become reasonable to take any such step?

5.8 Did the Respondent in fact fail to take any such reasonable step at the appropriate time?

6 Jurisdiction

6.1 Are any of the Claimant's claims out of time, if they occurred on or before 24 October 2021? If so:

6.1.1 Do such acts/omissions constitute part of conduct extending over a period for the purposes of s.123(3)(a) Equality Act 2010 which ended after 24 October 2021?

6.1.2 If not, would it be just and equitable to extend time in respect of such acts/omissions pursuant to s.123(1)(b) Equality Act 2010?

6.2 The Claimant presented his Claim Form to the Employment Tribunal on 3 April 2022

6.3 According to the ACAS Early Conciliation Certificate, ACAS received the Early Conciliation Notification on 24 January 2022 and the Early Conciliation period ended on 6 March 2022.

6.4 The Respondent therefore avers that to the extent to which the Claimant's complaints are based upon acts or omissions of the Respondent said to have taken place on or before 24 October 2021, the Claimant's complaints have been brought out of time and the Employment Tribunal has no jurisdiction to hear such complaints.

7 Remedy

7.1 If any of the Claimant's claims are upheld, what remedy, if any, should the Claimant be awarded? The Claimant currently seeks a recommendation only
