EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mrs. D Villiers v Carrington House Surgery

Heard at: Watford Employment Tribunal (in person)

On: 16 to 19 September 2024

Before: Employment Judge French
Members: Mr S Holford
Mr D Sutton

Appearances:
For the Claimant: In person
For the Respondent: Ms Victoria Hall, Litigation Consultant

JUDGMENT having been sent to the parties on 19/11/24 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The tribunal apologises for the delay in providing these written reasons. The tribunal provided oral reasons at the conclusion of the final hearing on 19 September 2024. The claimant did not request written reasons at that hearing, however sent an email to the tribunal that same day (19 September) requesting written reasons. This was chased by the claimant on 3 October 2024 and 6 November 2024. This request was not referred to Employment Judge French until 13 November 2024 who has provided these reasons at the first opportunity.

2. This is a claim presented by the claimant on 11/10/2022. The claimant was employed as an Advanced Practice Nurse by the respondent between 11 November 2020 and 14 April 2022. By an ET1 dated 11 October 2022, she brings complaints of discrimination arising from disability and failure to make reasonable adjustments. In their response, received on 17 November, the respondent denies discrimination and it asserts that they had no knowledge that the claimant was disabled nor should it have known.

The issues

3. There have been two previous case management hearings in relation to this matter. At the hearing on 3 July 2023 before Employment Judge Alliott an agreed list of issues was drawn up which is outlined below using the original numbering.

6. The issues between the parties which potentially fall to be determined by the Tribunal are as follows:

Time limits / limitation issues

6.1 Were all of the claimant's complaints presented within the time limits set out in sections 123 of the Equality Act 2010. Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures: whether time should be extended on a "just and equitable" basis.

6.2 The claim form was presented on 11 October 2022. The claimant's employment ceased either on 14 or 19 April 2022. Given the dates of early conciliation, any event prior to 13 June 2022 appears prima facie out of time.

Disability

6.3 Was the claimant a disabled person in accordance with the Equality Act 2010 ("EQA") at all relevant times because of the following condition:?

4.3.1 Deafness

EQA, section 15: discrimination arising from disability

6.4 Did the following thing arise in consequence of the claimant's disability?

6.4.1 The need to see patient's/colleague's faces in order to lip read.

6.5 It is the claimant's case that between July 2020 and 19 April 2022 the wearing of face masks was mandatory at the practice for patients and colleagues.

6.6 Did the respondent treat the claimant unfavourably as follows?

6.6.1 Causing the claimant to have to ask patients and colleagues to drop their masks so she could understand them which in turn raised a risk of infection?

6.6.2 Failing to undertake an OH Risk Assessment:

6.6.3 Referring the claimant to the NMC for poor infection control due to the claimant having to request patients and colleagues drop their masks in order for her to lip read.

6.7 Did the respondent treat the claimant unfavourably in any of those ways because of any of those things?

6.8 If so, has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

6.9 Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had the disability?

EQA, sections 20 & 21: Reasonable adjustments

6.10 Did the respondent not know and could it not reasonably have been expected to know the claimant was a disabled person?

6.11 Did the respondent have the following PCP:

6.11.1 Between July 2020 And 19 April 2022, the requirement that patients and colleagues wore face masks at the practice.

6.12 Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that: the claimant was unable to lip read and therefore understand patients and colleagues without asking them to drop their masks?

6.13 If so, did the respondent know or could it reasonably have been expected

to know the claimant was likely to be placed at any such disadvantage?

6.14 If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows:

6.14.1 The provision of transparent masks for patients and colleagues.

6.14.2 Allowing the claimant to work in one of the larger clinical rooms to allow plenty of space and air between her and the patients.

6.15 If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

Remedy

6.16 If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded

The evidence

4. The tribunal had a bundle of evidence consisting of 520 pages.

5. For the claimant we heard from the claimant herself, and we also heard from Ms Gallacher. The claimant had also produced a witness statement from a Mr Peter Machin, however, he did not attend. In the absence of the respondent's ability to challenge his evidence, the tribunal considered that that statement carried little weight.

6. For the respondent, we heard from Debbie Comley, Dannielle Comley, Kay Marler and Dr Vinod Dharma.

7. We received written closing submissions from the claimant and heard oral submissions from the respondent and the tribunal have had regard to both parties' submissions.

Fact finding

8. By way of a Judgment dated 7 September 2023, the claimant was a disabled person at all times relevant to this claim. The effective date of termination of her employment was 14 April 2022. Further, by way of that same Judgment,

the claims were presented out of time. However, it was deemed just and equitable to extend time and the claim proceeds on that basis.

9. By way of context the claimant started work for and continued to work for the respondent during the covid 19 pandemic. During this time guidance was issued by the government which included the use of face masks. The claimant states that she was disadvantaged by this because of her deafness in that she needed to lip read.

10. Prior to the commencement of her employment the claimant was interviewed by the respondent for the position, and this included Debbie Comley as interviewer. The tribunal has a record of questions asked during that interview at page 208 of the bundle. With regards that interview, the claimant asserts that she stated at the outset that she needed to lip read and requested the removal of face masks to allow her to do so. The respondent contends that whilst the claimant disclosed that she had a hearing impairment during the interview, she did not disclose that she needed to lip read and they did not know that this amounted to a disability.

11. Debbie Comley's evidence in relation to that interview was that everyone removed their masks because the room they were in was of an adequate size to safely socially distance and the windows were open. Her evidence was that this approach was adopted for all interviewees and the removal of masks was done for all and not simply for the claimant's benefit.

12. At page 208 the tribunal can see the claimant's answer in relation to why she became a Practice Nurse, and she refers to 'when [her] hearing went'. This supports that the claimant did disclose her hearing impairment and that is conceded by the respondent in any event.

13. In resolving the dispute between the parties about what exactly was said, the tribunal find that the claimant did not make reference to the need to lip read during the course of this interview and accept the respondent's evidence that masks were removed in any event because it was a large room with windows open and that they did this for everyone.

14. We find this because of the later position adopted by the claimant with regard to the need to lip read, which we address later in our reasons. We also note that Debbie Comley was an experienced Practice Manager and consider that, had the claimant mentioned the need to lip read, this would have been noted in the contemporaneous interview notes.

15. The tribunal do consider that Debbie Comley was alive to disabilities and adjustments because of her evidence that she had both a wheelchair user and another wearer of hearing aids within the practice. She was also responsible for the review of practice policies to include the Disabled Staff Policy that can be seen at age 313. The tribunal therefore concludes that she would have been alive to that issue, and had the claimant stated that she needed to lip read it would have been noted in the same way that her hearing impairment was noted in the interview notes.

16. It is submitted by the respondent that at the beginning of the claimant's employment the claimant was sent a BAME questionnaire, a pre-employment checklist and a covid risk assessment for vulnerable staff which can be seen

at page 493. A copy of the BAME questionnaire and pre-employment checklist have not been provided to the tribunal.

17. The claimant's evidence is that she only received the covid risk assessment which she did not complete because she did not consider that it was applicable to her circumstances.

18. The tribunal find that the claimant was not sent a BAME questionnaire or pre-employment checklist because we have not been provided with those documents nor have we been provided with any correspondence from the respondent to the claimant enclosing or providing the same. Those documents are not in the bundle and had they been provided to the claimant; they were clearly within the respondent's power to provide for the purposes of this litigation. The tribunal therefore concludes that the claimant was only sent the covid risk assessment form.

19. The tribunal acknowledges the claimant's explanation as to why she did not complete this form, namely that it was for staff at increased risk of getting covid, and her hearing, in itself, did not make her clinically vulnerable.

20. The tribunal also acknowledges that within that form a number of specific conditions are referred to, none of which were applicable to the claimant, and deafness is not one of them.

21. However, the claimant's evidence before the tribunal was that she needs to lip read in order to understand what a person is saying. She says this applies to everyone. The circumstances of her completing this form are during a global pandemic where face masks were compulsory and understood to assist in preventing the transmission of the virus. The tribunal considers that in those circumstances, even if there was not a place for it on the form, it should have been in the claimant's mind to raise. Her own case is that the fact that she needed to ask patients and colleagues to drop their masks to understand them put her at an increased risk of catching the covid 19 infection and, therefore, on her account, that risk existed at that time.

22. In that regard, the tribunal also notes that the claimant is both a senior practitioner with a number of years' experience and also at that time had the role of Infection Control Lead. In relation to that role, her evidence in relation to the separate issue of being asked to self-isolate and work from home when her daughter had tested positive for covid 19, was that she knew the covid guidance and policies well in that role as Infection Control Lead and was aware that she was not required to self-isolate if triple vaccinated.

23. In that role the tribunal consider that the claimant was aware of risk of covid to her and patients by asking to remove masks in circumstances where she was unable to socially distance (based on the size of her room dealt with later in this Judgment) and we do consider that, as a senior member of staff, there was an equal duty on the claimant to have raised the issue with the respondent when they made the enquiry by way of this form.

24. The evidence of all four respondent witnesses was that the claimant did ask them to drop masks on occasion, but it was not always. Specifically, the tribunal has regard to paragraph 2 of Kay Marler's statement where she says it was only occasional removal of the mask. Paragraph 5 of Debbie Comley's

statement where she says it was difficult to hear some conversations. At paragraph 3 of Vinod Dharma's statement where he refers to one occasion where the claimant requested he remove his mask, and then paragraph 4 of Dannielle Comley's statement where she states that the claimant would occasionally answer if you spoke without her seeing your lips.

25. The tribunal also notes the claimant's own witness that was called, namely Ms Gallacher, at paragraph 20 said, "She often asked me to repeat conversations" and that in cross examination accepted that often did not mean always.

26. Paragraph 9 of the claimant's witness statement stresses that she relies on the need to see faces. When questioned in oral evidence she said she nearly always relies on being able to see faces but can get the gist of a conversation if she was aware of the topic being discussed.

27. The tribunal concludes therefore, based on five individuals within the respondent's employment, one of whom no longer works there and indeed attended as the claimant's own witness, is that the claimant did not need to lip read for every conversation.

28. The tribunal notes the Probation Review Meeting at page 358. During that the claimant raises an issue with being able to hear Vinod Dharma only and states that is because of his deep voice and accent. She is raising an issue with hearing here but does not suggest that it involves anyone else or that she needs to lip read.

29. The claimant is not raising concerns at this time in relation to her hearing patients or other colleagues and the tribunal does consider that if she was experiencing significant difficulties, she would have raised it at this time. It was clearly in her mind to do so because she raises the difficulties that she was specifically experiencing with Vinod Dharma.

30. The tribunal also notes at page 360 which is a record of a follow up review meeting with the claimant, where it is noted that the claimant had issues hearing Vinod, but these are noted as having now been addressed. That form is in turn signed by the claimant. The claimant's account now is that she felt forced to sign that document but the tribunal notes that she does not suggest that within her witness statement. Even if the claimant had felt forced to sign it, that is the respondent's understanding as noted on the form. The claimant has not corrected that position with the respondent and has signed the form and the tribunal consider the respondents were correct to assume that there were no other or further issues in those circumstances.

31. This document, also on the tribunal's findings, supports the fact that if Debbie Comley was aware of the need to lip read she would have acted upon it. She is made aware of the issues with Vinod Dharma, and she does take action. Debbie Comley's evidence was that she spoke to him as a result and that is supported by the evidence of Mr Dharma himself. He himself confirms that the issue was raised. This is then supported by the document at page 360 and the understanding of the position at the second probation review. The tribunal considers that that evidence goes to the respondent's actual knowledge of the claimant's need to lip read and the impact her disability was having on her.

32. The claimant's own account was that she did not ask for a transparent mask or a bigger room at any stage and the tribunal considers that that also goes to the respondent's actual knowledge of the disability and the need to lip read.

33. The claimant firstly did not identify any issues but neither did she suggest anything that may have assisted her. The tribunal do find that the claimant's room was small and that she was unable to socially distance within it. That is the claimant's own evidence, and it is agreed by Kay Marler.

34. Again, the tribunal notes that the claimant was the Infection Control Lead, and in those circumstances, the Tribunal considers that there was a degree of responsibility on her to have raised the fact that she was having to ask people to remove their masks when she was unable to socially distance.

35. The claimant's position is that the respondents were aware of the disability, so it is for them to have carried out a risk assessment. The respondent accepts that they are aware of the impairment but not that this was a disability. The tribunal acknowledges the duty on the respondent to make enquiries, however not all people who have a disability require adjustments. A balance must be struck between making enquiries and the duty on the respondent to do so but also not to make assumptions that there is a need to make an adjustment where there may not be a need to make one.

36. This is in the context of the claimant wearing hearing aids and not raising any additional difficulties. The evidence of Debbie Comley was that she understood the hearing aids had corrected the impairment and the tribunal accept that evidence. The tribunal notes the Disabled Staff Policy at pages 313 to 315 which states that the party's employee/employer should work together, and the tribunal notes the claimant's own evidence in cross examination that it was a 'two-way thing'. The tribunal also notes at page 315 of the same policy that, if a risk assessment is carried out with no good reason, that might amount to discrimination in its own right which on the evidence was also in the respondent's mind.

37. This is a case where the tribunal finds that the claimant has not disclosed the need to lip read always. There is no dispute that she has disclosed a hearing impairment, but the understanding of respondent is that the hearing aid has corrected her hearing. The claimant has not raised any further issues save for the one issue concerning Vinod Dharma which was addressed and confirmed by the claimant as having been resolved.

38. This is not a case where the claimant has failed to mention anything at all. She was forthcoming regarding the difficulties with Vinod and that was acted upon. The claimant at no stage asks for a risk assessment or suggests that she is having difficulty. To the respondent, people are able to engage with the claimant with their masks on. She is doing her job without issue, and they are unaware of any difficulties.

39. The tribunal has heard evidence about the room from which the claimant worked at the surgery and as stated above conclude that this was a small room in which the claimant was unable to socially distance because that was the undisputed evidence of all witnesses.

40. The tribunal does find that the claimant was offered a bigger room in which

to work from. Kay Marler's evidence was clear on that point that it was offered and that was supported by Vinod Dharma who could not remember when or which room was offered but was very clear that one was offered. The tribunal considers that both witnesses were candid in this respect. If fabricated, the tribunal considers that they were likely to have tried to suggest that they could recall exact details of the conversation when and where it took place, but both accepted that they could not and could only remember that the room was indeed offered.

41. The tribunal notes that the evidence of both respondent witnesses on the point was that the offer coincided with someone else leaving which would free up the room and which the tribunal considers adds plausibility to their evidence. The tribunal finds therefore that a larger room was offered, and that the claimant declined this offer.

42. Within the claimant's witness statement, she has also raised the issue of being made to work from home and effectively self-isolate when the claimant's daughter tested positive for covid. In that regard she asserts that as Infection Control Lead, she was aware of government guidance and was not required to isolate at that time due to her daughter's positive test. This is not listed within the list of issues or the claimant's pleadings as unfavourable treatment, however the tribunal does note that the claimant's witness statement addresses the fact and at paragraph 65 states this caused her a disadvantage as she could not hear on her landline. The tribunal also notes that it was the subject of a grievance against Debbie Comley raised by the claimant. We address it on that basis.

43. The respondent's position in this regard, which the tribunal accepts, was that regardless of government guidance being relaxed (which may have meant that self-isolation was no longer a government requirement), the respondent was applying their own policy which did still require self-isolation. The tribunal finds that the respondent was entitled to have such a policy. The claimant states that this did not exist until afterwards (paragraph 61 of her witness statement) and takes the tribunal to page 327 in that regard. The tribunal considers whether it existed as a written policy or otherwise at the time, that was the policy of the respondent. This is also in the context of covid 19 and the guidelines changing rapidly.

44. The tribunal does note in this regard that the claimant was aware of the grievance procedure and utilises it. The grievance can be seen at page 376 to 377. Within that grievance she does not make any reference to the difficulty working from home being because she was unable to hear and rather states it is due to internet problems. She reiterates her understanding of the covid 19 guidance and that she need not self-isolate. The tribunal considers this grievance demonstrates that the claimant was clearly aware of the procedure and within the grievance she does not raise that the respondent has failed to carry out a risk assessment or make reasonable adjustments for her. There is no mention of her experiencing any issues with lip reading and the mask wearing and the tribunal considers this goes to the respondents actual or constructive knowledge of the disability, in circumstances where the claimant has felt it appropriate to complain about other matters.

The law

Discrimination

45. The prohibition on discrimination against employees is found in section 39(2) Equality Act 2010. Employers must not discriminate:

a. in the terms of employment;

b. in the provision of opportunities for promotion, training, or other benefits;

c. by dismissing the employee;

d. by subjecting the employee to any other detriment.

46. The claimant relies on disability as her protected characteristic which is covered by s6 of the Equality Act.

Discrimination arising from disability - Section 15 Equality Act 2010

47. Section 15 Equality Act 2010 ("EQA") provides:

"(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

48. An employer has a defence to a claim under s15 if it did not know that the claimant had a disability. This stipulates that subsection (1) does not apply if the employer shows that it 'did not know, and could not reasonably have been expected to know', of the employee's disability.

49. The Equality and Human Rights Commission's Code of Practice on Employment (2011) ('the EHRC Employment Code') states that an employer must do all it can reasonably be expected to do to find out whether a person has a disability (see para 5.15).

50. The Code suggests that "Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a "disabled person"" (para 5.14). The Code gives an example, at paragraph 5.15, of where a sudden deterioration in an employee's time-keeping and performance and change in behaviour at work should alert an employer to the possibility that these were connected to a disability and lead the employer to explore with the worker the reason for the changes and whether difficulties are because of something arising in consequence of a disability, in this example, depression.

51. Further, paragraph 6.19 of the Code says:

"The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend upon the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.

Example: A worker who deals with customers by phone at a call centre has depression which sometimes causes her to cry at work. She has difficulty dealing with customer enquiries when the symptoms of her depression are severe. It is likely to be reasonable for the employer to discuss with the worker whether her crying is connected to a disability and whether a reasonable adjustment could be made to her working arrangements."

52. Further, if a Tribunal concludes that an employer could reasonably have made enquiries, it must also consider what the result of those enquiries would have been. In A LTD v Z [2020] ICR 199 the claimant would have concealed the true facts about her mental health condition and therefore the employer succeeded in the knowledge defence even though it had not made reasonable enquiries.

Failure to make reasonable adjustments – Section 20 and 21 Equality Act 2010

53. EQA section 39(5) provides that a duty to make reasonable adjustments applies to an employer.

54. The duty itself appears in section 20. Section 21 provides that a failure to comply with any of the three requirements in section 20 is a failure to comply with the duty to make reasonable adjustments. That amounts to discrimination against the disabled person.

55. An employer will only come under the duty to make reasonable adjustments if it knows not just that the relevant person is disabled but also that the relevant person's disability is likely to put him or her at a substantial disadvantage in comparison with non-disabled persons. Knowledge, in this regard, is not limited to actual knowledge but extends to constructive knowledge (i.e. what the employer ought reasonably to have known).

56. In view of this, the EAT in Secretary of State for Work and Pensions v Alam 2010 ICR 665, EAT, and McCubbin v Perth and Kinross Council EATS 0025/13 has held that a tribunal should approach this aspect of a reasonable adjustments claim by considering two questions:

    •first, did the employer know both that the employee was disabled and that the disability was liable to disadvantage the employee substantially?

    •if not, ought the employer to have known both that the employee was disabled and that the disability was liable to disadvantage the employee substantially?

    It is only if the answer to the second question is 'no' that the employer avoids the duty to make reasonable adjustments.

57. While knowledge of the disability places a burden on employers to make reasonable enquiries based on the information given to them, it does not

require them to make every possible enquiry, particularly where there is little or no basis for doing so. In Ridout v TC Group 1998 IRLR 628, EAT, the EAT added that 'people must be taken very much on the basis of how they present themselves'.

58. The approach taken by the EAT in the Ridout case regarding the extent to which an employer has a duty to take proactive steps to establish whether an employee is disabled, and, if so, the functional effects of the disability, was subsequently endorsed by the Appeal Tribunal in both Secretary of State for Work and Pensions v Alam 2010 ICR 665, EAT, and Peregrine (deceased) v Amazon.co.uk Ltd EAT 0075/13.

Conclusions

59. Turning to our conclusions and we will deal with each complaint in turn.

S15 discrimination arising from disability

60. The first question that the tribunal addresses is whether the respondent knew, or could it have reasonably been expected to know that the claimant had a disability. We address that first because if that succeeds it is a defence to the complaint.

61. The tribunal concludes that the respondent did not know that the claimant was disabled. On the tribunal's findings, she did not raise the need to lip read for everyone with the respondent and, whilst the respondent and the tribunal accept that she had disclosed a hearing impairment, it was not known to the respondent that this was a disability. This is supported by the findings that we have made above. The mere fact that the claimant has a hearing impairment, which was known to the respondent, does not mean that they knew she had a disability in circumstances where their understanding was that her hearing aids had corrected it.

62. The tribunal therefore goes on to consider whether the respondent could have reasonably been expected to know. On the respondent's own evidence they do know that there is a hearing impairment and that would support the fact that they could have reasonably been expected to know that the claimant had a disability. In that regard the tribunal acknowledges the EHRC Employment Code, and that employers must do all that they can reasonably be expected to do to find out whether a claimant has a disability, which of course would indicate that reasonable enquiries should be made.

63. However, this is a claimant who, on the respondent's evidence, does not always require dropping of the masks when speaking to colleagues and has at no point raised that this is causing an issue with patients for which the consultations take place privately. The claimant's own witness supported this in that she said "often" needed to drop masks did not mean always.

64. The claimant was asked whether she raised the fact that she could not hear patients or colleagues without dropping masks and she said that she did not as she found Debbie Comley unapproachable. The tribunal considers that, if she found Ms Comley to be unapproachable, she could have gone to other

members of staff; there was a Deputy Practice Manager or indeed, one of the other partners. This would also be inconsistent with the fact that during her probation review meeting she did raise that she had difficulties hearing and understanding Vinod Dharma.

65. The claimant was also aware of the grievance process as she used it against Ms Comley regarding the working from home issue when her daughter had a positive test for covid 19 and it is of note that the claimant does not raise any issues in relation to her hearing, lack of risk assessment or failure to make adjustments within that.

66. This is also against a background where the claimant is performing her job daily without issue; indeed, Mr Dharma said she was one of their most valued members of staff. There are therefore no indicators which would suggest it was impacting her performance. The practice does not receive any complaints from patients in relation to the claimant requesting them to drop their masks or not being able to hear them.

67. The tribunal draws a distinction between this claimant and one of the examples given in the ECHR Employment Code. This is not a case where there are any signs that the claimant is underperforming, for example, to prompt a need to make further enquiries. No issues are being raised by colleagues or patients. The tribunal has regard to the case of Ridout v TC Group [1998] IRLR 628 EAT, which says that:

> "Whilst knowledge of a disability places a burden on employers to make reasonable enquiries based on the information given to them, it does not require them to make every possible enquiry particularly where there is little or no basis for doing so."

68. In that case, the EAT added that people must be taken very much on the basis of how they present themselves, and this is not a case where the claimant is presenting as having difficulties.

69. The claimant does raise the issue of not hearing Vinod Dharma and that is addressed by the respondent. When the claimant raised that issue, she had the opportunity to raise any other issues she was experiencing with patients or colleagues, and she does not. The tribunal considers that there seems to be little basis for the respondent to make an enquiry where, on all accounts, it does not seem to be an issue.

70. The claimant's position is, that once the respondent knew she was disabled it was for them to carry out a risk assessment. Whilst the respondents knew she had a hearing impairment and was wearing hearing aids, the tribunal has made a finding that that was the extent of their knowledge. There is a duty to make reasonable enquiries, but the tribunal does not consider that the mere fact that they knew she had a hearing impairment which they understood was corrected by her hearing aids, there is an automatic requirement to carry out a risk assessment.

71. In that regard, the tribunal does note page 364, being the record of the first appraisal, and the claimant was asked if there was anything that the respondent could do to assist her. She does not disclose any concerns with mask wearing and her hearing at that time. She is also asked what she

finds difficult in her role and whether there are any barriers. Again, she makes no reference to mask wearing or her hearing. The tribunal concludes on that evidence that even if the respondent had made specific enquiries, it does not appear that the claimant would have raised matters as an issue. That is supported by the fact that she does raise an issue in relation to one person, Vinod Dharma, but does not raise any other concerns.

72. The tribunal concludes that in the circumstances known to it the respondents carried out a reasonable enquiry. They had asked the claimant to complete the covid 19 risk assessment form and questions on the appraisal and review prompted further discussion as to any issues or barriers. Applying the case of Ridout the Tribunal considers that the respondent was entitled to take the claimant as she presented and that no further enquiry was required in the circumstances. As such the Tribunal do not consider that the respondent ought to have known the claimant was disabled.

73. The tribunal does go on to consider that even if the respondent had made additional enquiries, it seems unlikely, given the claimant's response to the questions that were raised, that she would have disclosed the issues in any event.

74. On the tribunal's findings therefore, the respondent did not know, nor could it reasonably have been expected to know that the claimant had a disability, and the s.15 Equality Act (discrimination arising from disability) complaint therefore fails on that basis and is dismissed.

Unfavorable treatment

75. The claim fails at this stage however the tribunal have heard all of the evidence in this case and for completeness, make the following observations on the complaint even if the respondent had known or ought to have known of the disability.

76. Firstly, the claimant states that the something arising from her disability was the need to see patients/colleagues faces in order to lip read and that she was treated unfavourably as a result of that.

77. On the evidence before us, we question the extent to which there is a need to see a person's face in order to lip read and that is because, on the evidence of the five witnesses, the claimant did not always require this to communicate.

78. If there is a need to lip read as a matter of fact the claimant would, of course, have to ask patients to drop their masks in order to do so. The claimant states that this is one of the acts of unfavourable treatment she experienced because having to ask patients to remove masks in turn raised the risk of infection (issue 6.6.1).

79. The tribunal do note that, as to the risk of infection, clinically the claimant has to ask patients to drop their masks in any event in order to examine some patients (which was her own evidence) and so, there is an increased risk of infection in those circumstances in any event.

80. The tribunal also notes that the claimant had access to other personal protective equipment as held on the respondent's premises which included visors and was evidenced by Debbie Comley and the photographs of the stored equipment at pages 343 and 344 of the bundle. Indeed, the claimant did not dispute this. The claimant was therefore able to provide a visor to patients by way of alternative protective equipment. The tribunal therefore concludes that there was not unfavourable treatment in this regard.

81. In relation to the complaint the claimant must prove facts from which the tribunal could conclude that the reason they treated her unfavorably was because of the "something arising" from her disability. So, in effect, the reason for the treatment was because she needed to see patients faces in order to lip read. That is the "something" that arises from the disability.

82. The tribunal further conclude that the claimant has not proved facts from which we could conclude that the reason the respondent did not refer her to Occupational Health risk assessment (issue 6.6.2) was because of her need to see patients faces in order to lip read. It is for entirely different reasons and that is because no issue was raised, in their mind, to trigger a referral. They did not fail to undertake an Occupational Health risk assessment because she needed to see patients faces in order to lip read.

83. In relation to the referral to the NMC for poor infection control and dropping the mask to lip read (issue 6.6.3) the tribunal acknowledges how distressing it would have been to the claimant to have received such a referral. The tribunal however notes the actual complaint was for bullying and not offering a visor where she asked patients to drop a mask. The referral was not the mere fact that she asked them to drop their masks but that she did not offer a visor in the alternative and that can be seen at the complaint itself at page 413. Therefore, again, the tribunal considers that the claimant has not proved facts from which we could conclude that the referral was made because of the claimant's need to lip read but rather, because she did not offer a shield in the alternative and for alleged bullying.

84. As such, even if disability had been known, we consider that any unfavourable treatment does not arise as a consequence of the claimant's disability and that claim would have failed in any event.

<u>Failure to make reasonable adjustments – s20 and s21 EqA</u>

85. The tribunal find for the reasons given in relation to the s.15 complaint above, which are equally applicable to this claim, that the respondent did not know, nor could it reasonably have been expected to know, that the claimant was a disabled person.

86. We have the additional factor with this complaint namely whether the respondent knew, or could it have been expected to know, that the claimant was likely to be placed at a disadvantage.

87. The respondent accepts that it had a practice, criteria or provision (PCP) of requiring the wearing of face masks.

88. Whether that put the claimant at a substantial disadvantage is a question of whether she was unable to lip read and therefore understand patients and

colleagues without them dropping their masks.

89. In that regard the tribunal notes that the claimant does raise the issue of not hearing Vinod Dharma and that is addressed by the respondent. When the claimant raised that issue, she had the opportunity to raise any other issues be that with patients or colleagues, and she does not. The tribunal considers that that also goes to support the fact that this was not a substantial disadvantage.

90. The tribunal do acknowledge that individuals with disabilities can be reluctant to share details of a disability and that is why there is an obligation on respondents to make enquires but here, the claimant has volunteered difficulties in relation to hearing Vinod Dharma. The tribunal find that in circumstances where the tribunal concluded that the claimant does not need to lip read for everyone, and that is on the evidence presented before us, and that is the respondent's understanding, the respondent did not know that the wearing of masks placed the claimant at a substantial disadvantage.

91. The tribunal do go on to consider whether the respondent ought to have known and conclude that they should not.

92. As the tribunal has already addressed, the respondent has witnessed the claimant continue to work without concerns and without the need to lip read on every occasion. Debbie Comley and Kay Marler gave evidence that the claimant had never requested transparent masks and, indeed, the claimant made no suggestion that she had requested these.

93. The tribunal does consider that it was more incumbent on her in the particular circumstances to manage the risk and raise the issues where she was a senior member of staff and the Infection Control Lead. She also carried out patient consultations in private where the respondent would not necessarily be observing the same.

94. The respondent knew the claimant had an impairment but understood it to have been corrected by the claimant's hearing aids. The claimant did not raise any difficulties in her grievance, nor did she raise it in her appraisal or any other occasion. The tribunal repeats its conclusions above as to the extent of the required enquiry by the respondent in those circumstances.

95. For those reasons the tribunal does not consider that the respondent knew the claimant was at a substantial disadvantage or that it ought to have known.

96. Teh complaint of failure to make reasonable adjustments therefore fails on that basis and is dismissed.

Adjustments

97. Again, this complaint fails on that basis however in this case the tribunal have heard all of the evidence and for completeness make the following observations on the complaint even if the respondent had known or ought to have known of the disability and that the claimant was at a substantial disadvantage.

98. We therefore do look at whether it would have been reasonable for the respondent to take the steps as identified by the claimant by way of reasonable adjustments (issues 6.14 and 6.15).

99. In relation to the transparent face masks, we heard evidence from the respondent that the clear masks were not available to GP surgeries. That was not challenged by the claimant, other than that she suggested that they were available on the government website, but the tribunal was not provided with any documentation to that effect. Indeed, when the tribunal asked the type of mask and whether it was a surgical mask with a transparent section, her response was, “sort of like that” and so it appears that it was unclear in her own mind what was required. In all of those circumstances, the tribunal does not consider that it would have been reasonable for the respondent to have provided those when it appears they were unavailable to them.

100. This was not listed in the list of issues as a suggested adjustment but during the course of the evidence there was a suggestion that all staff should have worn visors instead of surgical masks. In that regard the evidence before the tribunal was that they were not compliant with the government guidance which required a certain type of surgical mask. The respondent's evidence was that visors were not an acceptable alternative as they did not comply with the guidance. As such the tribunal concludes that a blanket policy for all staff or patients to wear visors would not have been a reasonable adjustment because of the greater risk of spread of covid 19. It may have been appropriate for use of visors on occasion because they may offer some additional protection (and indeed that is relevant to our conclusion that there was not unfavourable treatment under issue 6.6.1), however not as a blanket policy as suggested by the claimant to apply to all staff and all patients at all times.

101. Finally, turning to the adjustment of allowing the claimant to work in one of the larger clinical rooms, we rely on our findings above that this was offered to the claimant and turned down by her. As such that was offered to the claimant and there has been no failure to offer her that adjustment.

102. As such, for those reasons, the failure to make reasonable adjustments complaint would have also failed in any event.

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Employment Judge French

Date: 5 December 2024

Judgment sent to the parties on

10 December 2024

For the Tribunal office

Recording and Transcription
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