Case Number: 3310202/2022

EMPLOYMENT TRIBUNALS

Claimant: Ms Gemma Farquharson

Respondent: Milton Keynes College

Heard at: Watford Employment Tribunal **On:** 3-6 March 2025

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

Representation:

For the Claimant: Litigant in person
For the Respondent: Mr K Zaman (Counsel)

JUDGMENT

(1) The Claimant's complaint of direct discrimination on the grounds of the Claimant's disability under section 13 Equality Act 2010 is not well founded and is dismissed.

(2) The Claimant's complaint of discrimination because of something arising in consequence of disability under section 15 Equality Act 2010 is not well founded and is dismissed.

(3) The Claimant's complaint of harassment related to disability under section 26 Equality Act 2010 is not well founded and is dismissed

REASONS

Introduction

1. The Claimant worked as a Flexible Lecturer in the English Department of the Respondent, a further education college, which operates from two main campuses across Milton Keynes and Bletchley. The Claimant initially worked for the period of 7 January 2019 until 31 October 2019 where due to ill health she left the Respondent. The Claimant then worked for the Respondent again

from 22 January 2020 until 16 March 2022, the last time the Claimant carried out work for the Respondent. Early conciliation started on 12 May 2022 and ended on 23 May 2022. The claim form was presented on 15 June 2022.

Hearing and Evidence

2. The hearing took place over 4 days. The Respondent provided an updated bundle of 290 pages and an updated counter schedule of loss was provided by the Respondent on day 2 of the hearing.

3. We heard evidence from the Claimant who provided a witness statement and a Supplemental witness statement. We received written witness statements and heard evidence from Ms Anne Allen, formerly and at the relevant time the Chief People Officer for the Respondent and Ms Rachel Wilson formerly and at the relevant time the Head of English at the Respondent.

4. On day 1 (Monday 3 March 2025), the Claimant raised the issue of the Respondent having not provided a copy of the bundle in accordance with the Employment Tribunal's orders that the bundle be provided on 12 February 2025 [53.15]. The Respondent accepted that they did not provide the final bundle to the Claimant until 25 February 2025, but they did apologise to the Claimant when providing the bundle. The Respondent contended that the lateness of the bundle was due to competing deadlines. However, the Claimant accepted that the additional documents that were added to the bundle were her documents and that she did not want to make an application about the matter.

5. At approximately 14:55 we took a break for 20 minutes (until 15:15) as the Claimant had become tearful whilst giving evidence on events that lead to the cessation of her work for the Respondent.

6. On day 2 of the hearing (Tuesday 4 March 2025), the Claimant attended with a friend Ms Melanie Edgal. The Claimant provided a copy of an ER hospital document that detailed that the Claimant had attended that evening. On enquiring of the Claimant, the Claimant explained that it was a long day the previous day and on the break, she had a little nose bleed. The Claimant said that she took a couple of Nurofen at the time and later on, by the evening the nose bleed still would not stop. She consulted the doctor, and he told her attend the Emergency Room. The Claimant attended in that evening and had a CAT scan. The Claimant told the Employment Tribunal that the doctor told her to drink lots of water and that the nose bleed was probably as a result of stress. The Claimant confirmed that she was ok to go ahead with the proceedings and that she did not want an adjournment.

7. The Claimant explained that Ms Edgal was in attendance to support her and was a helper. She was there to take notes. The Claimant explained that she felt so overwhelmed by the previous day's experience and she thought that she could not come again unsupported. The Claimant was reminded that she should let us know if she felt overwhelmed again. The Claimant confirmed that she would, but that she was hot yesterday in the witness stand. The Employment Tribunal opened the windows and kept them open and utilised a floor fan.

8. When the Claimant returned to the witness stand, Ms Edgal was permitted to join her to assist in navigating the bundle. Ms Edgal confirmed that she would not be taking notes.

9. The Claimant informed the Employment Tribunal that the Respondent had sent her an amended counter schedule of loss. The Respondent had not sent this document to the Employment Tribunal. The Claimant told the Employment Tribunal she had spent the evening working on that counter schedule of loss rather than the written submissions she had indicated that she was proposing to provide to the Employment Tribunal.

10. We heard oral submissions from both parties and were provided with written submissions from both parties.

Reasonable adjustments

11. The Claimant is a disabled litigant in person and was regarded by the Employment Tribunal as a vulnerable witness in accordance with the Equal Treatment Bench Book (ETBB). The Claimant attended on day 1 by herself when she gave the majority of her evidence. The Employment Tribunal explained the process and procedure of the hearing and that it would allow for the Claimant to be able to read documents that she was taken to a number of times. The Employment Tribunal directed that the Respondent always take the Claimant to a page first that they were going to refer to and allow the Claimant to read the page before asking a question. The Claimant was also given as much time as was needed in order for her to reach the page that she needed to get to. The Claimant was encouraged to use pen and paper to write down anything that she thought that she may not remember and was provided with paper for this purpose whilst on the witness stand.

12. On day 2, the Claimant was permitted to consult her notes whilst on the witness stand in respect of matters that she struggled to remember. The Respondent was permitted to see the Claimant's notes before she returned to the witness stand and gave evidence on matter.

13. Mr Zaman was also directed to provide his written submissions to the Claimant as early as possible and in any event by lunchtime on day 2, so that the Claimant would have an opportunity to read the submissions over night before she was required to provide her submissions.

14. The Claimant was also given the hour lunchtime break to consider whether there was any re-examination that she wished to undertake of herself. The Claimant did not undertake any re-examination and did not have anything that she wished to clarify.

Claims and Issues

15. The Claimant presented claims of discrimination arising from disability, direct discrimination on grounds of disability and harassment related to disability.

16. The issues in the case were as follows:

1.Direct disability discrimination (Equality Act 2010 section 13)

1.1 Did the Respondent do the following things:

1.1.1 The Respondent did not provide work to the Claimant after 29 April 2022

1.1.2 Did Ms Wilson say in a phone call on 3 May 2022 “it would not be viable for the business if [the Claimant] was to have radio therapy and chemotherapy to work at the college anymore”.

1.2 Was that less favourable treatment?

The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant’s.

If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated.

The Claimant says they were treated worse than Ann Marie Horricks in respect of the offer of work. The Claimant has not named anyone in particular who they say was treated better than they were in respect of the alleged comments of Ms Wilson.

1.3 If so, was it because of disability?

2. Discrimination arising from disability (Equality Act 2010 section 15)

2.1 Did the Respondent treat the Claimant unfavourably by:

2.1.1 Not providing the Claimant with hours of work after 29 April 2022

2.2 Did the following thing arise in consequence of the Claimant’s disability:

2.2.1 Cancer treatment?

2.3 Was the unfavourable treatment because of that thing?

2.4 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:

2.4.1 There was no requirement of to offer the Claimant work due to the nature of the Claimant’s contract & business need

2.5 The Tribunal will decide in particular:

2.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

2.5.2 could something less discriminatory have been done instead;

2.5.3 how should the needs of the Claimant and the Respondent be balanced?

2.6 Did the Respondent know, or could it reasonably have been expected to know

that the Claimant had the disability? From what date?

3. Harassment related to disability (Equality Act 2010 section 26)

3.1 Did the Respondent do the following things:

3.1.1 On 3 May 2022 in a phone call at around 13:47 did Ms Wilson say, "it would not be viable for the business if [the Claimant] was to have radio therapy and chemotherapy to work at the college anymore".

3.2 If so, was that unwanted conduct?

3.3 Did it relate to disability?

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

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

4. Remedy for discrimination or harassment

4.1 Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

4.2 What financial losses has the discrimination caused the Claimant?

Findings of Facts

17. We have had careful regard to all the evidence that we have heard and read about concerning the Claimant's personal circumstances. It was not necessary for us to rehearse everything that we were told in the course of this case in this judgment, but we have considered all the evidence in the round in coming to make our decision. Only findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence and considered relevant. All numbers in square bracket are page references to the bundle.

18. We found the Claimant to be a witness who told the truth to the best of her ability. However, the Claimant sometimes took a position that commonly accepted facts, were superseded by her perception of those facts. We accept that the Claimant's two brain tumours, and some memory loss affected her perception, and we make no criticism of the Claimant as we accept that she did her best to tell the truth as she saw it. However, she was an unreliable witness for reasons we detail in this judgment. We found the Respondent's witnesses to be credible, truthful, and reliable witnesses, save that the passage of time made it difficult for Ms Wilson to recall a conversation that took place 3

years ago.

19. The Claimant worked for the Respondent as a Flexible Lecturer in the English Department. She was paid hourly by the Respondent, and her hours of work varied from week to week depending upon the need for her services. The Claimant entered into a Lecturer's zero hours' worker agreement with the Respondent with effect from 7 January 2019 [84] which ended on 31 October 2019 due to ill health. We find that the Claimant was diagnosed with brain tumours in October 2019 and told the Respondent of her brain tumours around the time of her diagnosis in October 2019.

20. The consequence of the Claimant's brain tumours is that she had epilepsy, memory loss and difficulty retaining new information, unilateral hearing loss and a dystonic tremor in her right hand. These including the brains tumours are the Claimant's disabilities.

21. The Claimant completed a health questionnaire for the Respondent on 17 January 2020 [30]. In the questionnaire the Claimant stated she has "*a brain tumour (low grade diffuse glioma) which the specialists have said isn't grade 3 or 4 (malignant) but that it is rather a 'cancer-in-waiting', and it is dormant for the time being. I have to have longitudinal MRI scans (every three months), and I am under a consultant at The John Radcliffe Hospital*. *She also stated that she had been diagnosed with a long-term health condition, of epilepsy, unilateral tremor/weakness on the right side and memory loss regarding new information*". [30]. We find that when the Claimant referred to chemotherapy and radiotherapy, this was a reference to the treatment of the Claimant's brain tumours not her epilepsy or dystonic tremor in the right hand or any other disabilities referred to, as she was not having cancer treatment in relation to these other conditions.

22. The Claimant then returned to work for the Respondent as a flexible lecturer in 2020 under a "terms of engagement for an occasional worker agreement". This agreement was signed by the Claimant on 22 January 2020 [92]. In this agreement it stated "*it is entirely at the College's discretion whether to offer work to you and the College is under no obligation to provide work to you at any time. The offer of casual work on one occasion does not give rise to any expectation that further work will be offered or, if offered, will be at the same location or for the same hours.*"[89] Furthermore it stated, *"the College reserves the right to terminate an assignment at any time for operational reasons."* The agreement also stated, "*Your hours of work will vary depending on the business needs of the College."* And "*You will be paid for the hours actually worked"* [90]. We find that at all material times the Claimant was an occasional worker under the January 2020 agreement. We do not accept the Claimant's oral evidence that she would be the only occasional worker that sat with the permanent staff and that permanent staff would only buy her drinks for example, as the reason why she perceived that she was part of the permanent staff. We accept Ms Wilson's evidence that there was no separate staff room for permanent staff and occasional workers. The Claimant's evidence that the permanent member of staff would not buy drinks for other permanent members of staff also leads us to conclude that the purchasing of drinks for the Claimant had nothing to do with her status as an occasional worker or otherwise. We also note that the Claimant worked on Tuesday 23 November 2021 & Thursday 25 November 2021 [218]. The Claimant's evidence was that she was adamant that she did

not work on any days other than Monday, Wednesdays and did her admin Friday. We note that there were occasions where the Claimant charged for admin hours of work on other days i.e. Sunday 5 December 2021 [220], Sunday 9 January 2022 [222] & Tuesday 15 February 2022 [224].

23. We find that the Claimant knew that she was an occasional worker at all times, and we note the repeated reference to her status on her payslips [155-174] and her timesheets [210-227] and in emails to the Claimant since January 2020, for example an email trail in May 2020 where the subject is "occasional worker update" sent to the Claimant by Ms Wilson [236-237].

24. In September 2021, an English Teacher called Collette went off sick. Collette provided GP fit certificates at 2 week intervals initially and then took a leave of absence and then after the first term of the academic year she went on sabbatical. The Claimant was covering Collette's hours on Monday's and Wednesday's from around the beginning of the school year in September. However, Collette had more hours of work that other occasional workers were covering. It was also the case that another English Teacher, Victoria went off ill in relation to a COVID related illness in the October half term in 2021. The Claimant started covering her hours also on a Monday and Wednesday from November 2021. Victoria had 18 contact hours spanning Monday to Friday, so other occasional workers covered Victoria's additional hours as well as the Claimant. However, Victoria returned from illness after the Christmas break and on a phased return to work. By February 2022, the Claimant had Victoria's hours on a Monday and Wednesday removed from her. We note that the Claimant made no complaint about the removal of these hours of work, neither did she attribute the removal of these hours of work as having anything to do with her disability.

25. On 8 February 2022, the Claimant emailed the Respondent to inform them that she would be going off work to have a brain biopsy at the end of March 2022 and so did not want to commit to any dates to do invigilating work. She did not know how long her recovery would be as she would be undergoing chemotherapy, that medical professionals had said that after one cycle of treatment she would be able to return to work. [Claimant's witness statement paragraph 16]. The Claimant admits in her evidence and we accept that the College did not express concern at this and wished her luck for the procedure.

26. The Claimant told Ms Wilson about her impending surgery on 18 March 2022 before the 17 March 2022. In a text message on 17 March 2022 the Claimant asked Ms Wilson if she wanted an "update" on the surgery [228]. We find that Ms Wilson knew of the plan for the Claimant to have chemotherapy in February 2022 as the reason why the Claimant could not commit to invigilation work was the same reason the Claimant would not have been able to commit to teaching work in the English department. We find that Ms Wilson continued to offer the Claimant work in February 2022 after she had knowledge of the Claimant's plan for chemotherapy. We note that the Claimant worked in February and March 2022 [224-226].

27. On 22 April 2022, the Claimant text messaged Ms Wilson asking "*to know the plan of action for when [she] can do things again after the 29th"* [195]. On 26 April 2022, the Claimant called and then emailed Ms Wilson [193]. The Claimant's email stated:

"*Hi Rachael,*

I keep trying to get in contact with you because I am ready to come back to work after the 29th. I am back to my health prior to the operation so I am feeling much improved. The team have said that I can work while receiving chemotherapy as well but I will hear more about their treatment plan tomorrow."

28. Ms Wilson responded a few hours later [192-193]

" *Hello Gemma,*

Wow, congratulations on your recovery. I am pleased to hear it has gone well. Could we discuss once you have details regarding the next part of your treatment plan, please? I have a lot to do tomorrow anyway, so could we talk on Thursday? Best regards, Rachael"

29. The Claimant accepted that she and Ms Wilson had had a friendly relationship, and that Ms Wilson had been supportive to her historically. We find that the email that Ms Wilson sent in response to the Claimant's email dated 26 April 2022 stating "*Wow, congratulations on your recovery. I am pleased to hear it has gone well"* [193] was an example of that supportive nature. The Claimant's evidence that the comment was "dismissive" [Claimant's witness statement paragraph 20] was an example of her misinterpretation of an expression of support from Ms Wilson.

30. In her evidence that Claimant said that Ms Wilson's response of saying that she could talk about it on Thursday was Ms Wilson being dismissive. We find that there was nothing dismissive about the response and there was nothing to suggest that Ms Wilson was not taking the Claimant's return to work seriously.

31. On Friday 29 April 2022, the Claimant emailed Ms Wilson to ask if they could speak about her return to work that day. Ms Wilson responded the same day and suggested 4pm that day or Tuesday 3 May 2022. [192] However, the Claimant did not call Ms Wilson on 29 April 2022 [196].

32. Ms Wilson called the Claimant on 3 May 2022 at 13:43. The Claimant missed that call and called Ms Wilson back the same day at 13:47 [196]. The Claimant had a conversation with Ms Wilson at 13:47. The call lasted for 23 minutes and 57 seconds. The Claimant said in her written evidence at paragraph 23 of her witness statement that in that conversation Ms Wilson informed her that she was not on an employment contract, and that it would "*not be viable for the business*" for her to continue working at the College whilst receiving Chemotherapy and Radiotherapy every day. The Claimant said that she was not given the opportunity to explain her treatment plan as it seemed that they had already decided that it would not be viable for her to continue working there. The Claimant added that she was also upset that they had made an assumption about the treatment she would be receiving, and she felt that the decision was made based upon an assumption, and not fact.

33. The Claimant's witness statement at paragraph 23 states that in response to what Ms Wilson had said, the Claimant suggested that she, for the time-being, engage in administrative work, and the preparation of lesson plans, until hours

came available during September 2022. The Claimant's evidence was that Ms Wilson rebutted her suggestion and stated that if the Claimant were to undertake that work, she would not have time to spend with her daughter. And that she did not want the Claimant to waste her time as she was not going to be paid for the alternative work that she had suggested.

34. The Claimant said initially in oral evidence that she made a note of the phone call, but the notes were not available as she probably got rid of them. However under further questioning the Claimant said that she could not be 100% sure she took notes although this is her normal practice. However, when the Claimant was asked where those notes were, the Claimant indicated that she was not particularly organised with her notes, and they were contained in various notepads and that she did not know where those notes were. We find that to a certain extent; the Claimant rode back from her initial evidence that she had consulted those notes in writing her claim form. The Claimant said that actually she had not consulted her notes in preparing her case and she had not tried to find those notes in preparing her case. We find that the Claimant did not write a note of the conversation with Ms Wilson on 3 May 2022 at all.

35. We find that the Claimant's reference to chemotherapy and radiotherapy in the conversation on 3 May 2022 was a reference to cancer treatment of the Claimant's brain tumours not her epilepsy and dystonic tremor in the right hand as she was not having cancer treatment in relation to these conditions. Furthermore we find that the Claimant's evidence about her treatment plan was inconsistent. The Claimant gave evidence that she did not know what her treatment plan would be as she did not know about the cancer until her biopsy on 16 March 2022. However, in the email dated 26 April 2022 to Ms Wilson the Claimant's states *"The team have said that I can work while receiving chemotherapy as well but I will hear more about their treatment plan tomorrow."* [193]

36. Furthermore, in her email to Ms Zylene Chamberlain on 5 May 2022 where she raised a formal grievance to Ms Chamberlain she specifically referred to feeling she had "*been treated less favourably since I have mentioned my treatment and since I have had my surgery. (Radiotherapy and chemotherapy)."* She then says say in response to the alleged comment of Ms Wilson that *"it wouldn't be viable for me to work at the college if I was to be having chemotherapy and radiotherapy everyday"; "That is not the case because I haven't even spoken to my oncologist yet."* We prefer Ms Wilson's evidence that she did not know what the Claimant's treatment plan would be moving forward and that she had experience with two other members of staff having had cancer and so she had experience dealing with a staff member who had to have cancer treatment. She said that she tried to be supportive and compassionate, but she had a duty to run the timetable, and she recognised it is a lot to take on and that she would do right by the individual and it was about trying to be fair.

37. Ms Wilson did not recall whether she said to the Claimant in a phone call on 3 May 2022 *"it would not be viable for the business if [the Claimant] was to have radio therapy and chemotherapy to work at the college anymore"*. Ms Wilson's evidence was that she had not been asked about the conversation at the time and had left the Respondent's employment in July 2023 before she was asked about the conversation. Ms Wilson did not outright deny the allegation. However, it is notable that the Claimant's version of what Ms Wilson stated in

that telephone conversation on the 3 May 2022 as set out in her claim form differs from what she says Ms Wilson said in her e-mail to Ms Chamberlain on 5 May 2022. In the email to Ms Chamberlain on 5 May 2022, the Claimant says that Ms Wilson told her *"In addition, she said it wouldn't be viable for me to work at the college if I was to be having chemotherapy and radiotherapy everyday."* [146] In her claim form [8] the Claimant said that Ms Wilson stated, *"it would not be viable for the business if I was to have radiotherapy and chemotherapy to work at the college anymore".* In the Claimant's witness statement paragraph 23, the Claimant stated that Ms Wilson said, *"it would not be viable for the business for me to continue working at the college whilst receiving chemotherapy everyday".* In paragraph 27 of her witness statement, the Claimant says she told Ms Chamberlain in her email on 5 May 2022 she *"wanted to return to my previous position but had been told it was no longer viable for the business for me to return due to me undergoing chemotherapy and radiotherapy".* The Claimant's version what was said is not consistent and we find that the various versions of what was said indicates to us that Ms Wilson did not say *"it would not be viable for the business if the claimant was to have radiotherapy and chemotherapy to work at the college anymore."* Furthermore, the call was nearly 24 minutes, the length of such a call would make it difficult to remember what was specifically said in the call. We cannot be sure of what was said but we accept Ms Wilson's evidence that she would not have used those form of words as she was more likely to be pro student and teacher in terms of providing work. Coupled with the fact that we accept that Ms Wilson did not know about the Claimant's treatment plan and was waiting to hear about the treatment plan moving forward from the Claimant, and that she would be compassionate to someone with cancer undergoing treatment and try to be fair.

38. In the email on 5 May 2022 the Claimant also said, "*I want to work in my old position and do not want to find a new job"*.[145] Yet the Claimant told us in evidence that she regard the employment relationship as severed from 3 May. We find that the Respondent did not do anything that would indicate to the Claimant that the relationship was severed but that was the Claimant's misinterpretation of Ms Wilson telling her that she could not guarantee work for the Claimant when she returned from sickness and in September 2022. The Claimant said that Anne Marie Horricks who she accepted was an employee had a phased return to work after having a hysterectomy, but she (the Claimant) did not get a phased return to work. We find that the Claimant did not get a phased return to work because she did not ask for one. The Claimant accepted in evidence that she did not ask for a phased return to work in any event.

39. We accept Ms Wilson's evidence that she was conscious of a reorganisation that had been discussed since February 2022 regarding the English & Maths department and the movement of the teaching of English into vocational lessons taught at the college. There was a formal proposal paper about the reorganisation in March 2022 [186-187], which was confirmed by the Respondent's board in June 2022. [189] Ms Wilson explained that the reorganisation was controversial and she did not support it and that she felt very uncomfortable about not being able to tell the Claimant or anyone else about the impending reorganisation as it was highly confidential. We accept Ms Wilson's explanation of the confidentiality of the reorganisation as to why the Claimant was not told about the reorganisation and that it was a contributing factor to why Ms Wilson could not offer the Claimant further work. We also accept Ms Wilson's evidence that no occasional worker continued to work in

her English department after the reorganisation was implemented from May-July 2022.

40. The Claimant's evidence the Claimant's response to the alleged statement *"it would "not be viable for the business" for me to continue working at the College whilst receiving Chemotherapy and Radiotherapy every day"* was that she "*suggested that she, for the time-being, engage in administrative work, and the preparation of lesson plans, until hours came available during September 2022*" [paragraph 23, Claimant's witness statement]. However, we do not accept that this was said in response to the alleged statement as it does not make sense if the Claimant genuinely believed that she was not offered work because of her cancer treatment she would not have offered to do alternative work. On balance of probabilities it is more likely that if Ms Wilson used the phrase 'viability', it was in relation to the Claimant's proposals for work and the Claimant misunderstood or misinterpreted what she was being told by Ms Wilson.

41. The Claimant was offered work by email on 8 May 2022 by the senior exam co-ordinator as a Maths GCSE invigilator [238]. This email was copied to Ms Wilson. The Claimant said in oral evidence that the offer was disingenuous, and she did not want to go back and work for the Respondent. The Claimant said that email was sent to her work email and that she was not able to log on her work email address. However, the Claimant admitted in evidence that after 3 May 2022 she did not access her work email. We find that the Claimant clearly did access her work email at least until 12 May 2022 because she responded to Ms Chamberlain's emails on 12 May 2022. [142] Neither did the Claimant challenge when questioned that she received the email from Ms Chamberlain on 20 May 2022. We find that this offer of work was not disingenuous, this offer of work was made before the Claimant contacted ACAS on 12 May 2022 and so before the Respondent knew of the Claimant's claim. The Claimant did not provide evidence that there was no offer of hours of work but that the offer was disingenuous. We find it was a genuine offer of work.

42. We also find that the Claimant was offered work on 3 other occasions after 29 April 2022. Next on 13 July 2022, the Respondent sent an email to the Claimant offering her a student experience champions role [239] and then on 23 August 2022 Ms Wilson offered the Claimant a permanent role as an English teacher. [233] Finally an offer of work by James Dawson who was previous Head of Maths with the Respondent was made to the Claimant working as a mentor teaching English on 1 September 2022 [234]. The Claimant said that the offer of work on 13 July and 1 September 2022 were disingenuous offers of work. The Claimant's evidence was that she would not have been given mentor role but would have to apply for it and that she was not interested in a student experience role, because she wanted to teach. The Claimant said that she did not want to work for the Respondent anymore due to a culture of discrimination and that is why she did not respond to Ms Wilson's offer of a permanent position in the English department by text dated 23 August 2022.

43. Furthermore the Claimant said that she did not see the email offer of 13 July 2022, because the email went to her work email address. But we find that the Claimant did not see the email because she did not look or access her work email after 20 May 2022 because she no longer wanted to work for the Respondent.

Relevant Law

The Burden of Proof in Discrimination cases

44. Proving and finding discrimination is always difficult because it involves making a finding about a person's state of mind and why she has acted in a certain way towards another, in circumstances where she may not even be conscious of the underlying reason and will in any event be determined to explain her motives or reasons for what she has done in a way which does not involve discrimination.

45. The burden of proof is set out at Section 136 Equality Act 2010 ("EqA"). The relevant part of section 136 EqA says: -

    a. *"This section applies to any proceedings relating to a contravention of this Act.*

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

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

46. It is for the Claimant to prove the primary facts from which a reasonable Tribunal could properly conclude from all the evidence before it, in the absence of any other explanation, that there has been a contravention of the Equality Act. If a Claimant does not prove such facts she will fail – a mere feeling that there has been unlawful discrimination or harassment is not enough.

47. Once the Claimant has shown these primary facts then the burden shifts to the Respondent and discrimination is presumed unless the Respondent can show otherwise. Could conclude means "a reasonable Tribunal could properly conclude from all the evidence."

48. As set out above, at the first stage the Claimant must prove "a prima facie case." Each case is fact specific, and it is necessary to have regard to the totality of the evidence when drawing inferences. Once the burden of proof has shifted, it is the second stage and is for the Respondent to show that the relevant protected characteristic played no part whatsoever in its motivation for doing the act complained of.

49. It is, however, it is not necessary in every case for the Tribunal to specifically identify a two-stage process. There is nothing wrong in principle in the Tribunal focusing on the issue of the reason why. As the Employment Appeal Tribunal pointed out in Laing v Manchester City Council [2006] IRLR 748 "If the tribunal acts on the principle that the burden of proof may have shifted and has considered the explanation put forward by the employer, then there is no prejudice to the employee whatsoever".

50. This approach to the burden of proof has been confirmed by the Court of Appeal in Ayodele v City Link and another [2017] EWCA Civ 1913.

Direct discrimination

51. Section 13 EqA sets out the statutory position in respect of claims for direct discrimination because of disability.

> *"(1) person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*
>
> *(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.*
>
> *(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B."*

52. The comments of the Court of Appeal in Madarassy v Nomura International plc [2007] EWCA 33, albeit a sex discrimination case under the pre Equality Act 2010, Sex Discrimination Act 1975, are still very much applicable to direct discrimination under the Equality Act 2010. Mummery LJ giving judgment says at paragraph 56, *"The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."*

53. Section 23 EqA deals with comparators under section 13 EqA and states:

" *(1) On a comparison of cases for the purposes of section 13, 14, [19 or 19A] there must be no material difference between the circumstances relating to each case.*
(2) The circumstances relating to a case include a person's abilities if—
(a) on a comparison for the purposes of section 13, the protected characteristic is disability;….."

54. It can be appropriate for a Tribunal to consider in a direct discrimination case, first, whether the Claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of disability. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the Claimant was treated as he or she was. (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] IRLR 285)

55. During the course of the proceedings the Claimant referred us to the EAT decision of Roddis v Sheffield Hallam University UKEAT/0299/17/DM. We considered this decision. However, it deals with less favourable treatment under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 and whether a zero contract hours worker could compare themselves to a comparable full time worker for the purposes of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000. We were dealing

with less favourable treatment and comparators under sections 13 & 23 of the Equality Act 2010. It was therefore not relevant to any of the Claimant's complaints.

Unfavourable treatment because of something arising in consequence of disability.

56. Section 15 EqA states:

"(1) A person (A) discriminates against a disabled person (B) if –
A treats B unfavourably because of something arising in consequence of B's disability and
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 have reasonably been expected to know, that B had the disability."

57. The correct approach when determining section 15 EqA claims is set out in the EAT decision of Pnaiser v NHS England and others UKEAT/0137/15/LA at paragraph 31.

58. The approach is summarised as follows:

    a. The Tribunal must identify whether there was unfavourable treatment and by whom – no question of comparison arises;

    b. The Tribunal must determine the cause of the treatment, which involves examination of conscious or unconscious thought processes. There may be more than one reason but the "something" must have a significant or more than trivial influence so as to amount to an effective reason for the unfavourable treatment;

    c. Motive is irrelevant when considering the reason for treatment;

    d. The Tribunal must determine whether the reason is "something arising in consequence of disability"; the causal link between the something that causes unfavourable treatment and disability may include more than one link – a question of fact to be assessed robustly;

    e. The more links in the chain between disability and the reason for treatment, the harder it is likely to be able to establish the requisite connection as a matter of fact;

    f. This stage of the causation test involves objective questions and does not depend on thought processes of the alleged discriminator;

    g. Knowledge is required of the disability only, section 15 (2) EqA 2010 does not extend to requirement of knowledge that the "something" leading to unfavourable treatment is a consequence of disability;

Harassment

59. Section 26, EqA 2010 sets out the legislative framework for harassment:

> *"(1) A person (A) harasses another (B) if—*
>
> *A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of—*
>
> *violating B's dignity, or*
> *creating an intimidating, hostile, degrading, humiliating or offensive environment for B […..]*
>
> *(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*
> *(a) the perception of B;*
> *(b) the other circumstances of the case;*
> *(c) whether it is reasonable for the conduct to have that effect.*
>
> *(5) The relevant protected characteristics are— ..disability;"*

60. In Richmond Pharmacology v Dhaliwal [2009] ICR 724 the EAT stressed that the Tribunal should identify the three elements that must be satisfied to find an employer liable for harassment: (a) Did the employer engage in unwanted conduct, (b) Did the conduct in question have the purpose or effect of violating the employee's dignity or creating an adverse environment for him/her, (c) Was that conduct on the grounds of the employee's protected characteristic?

61. In a case of harassment, a decision of fact must be sensitive to all the circumstances. Context is all-important.

62. Richmond Pharmacology v Dhaliwal confirmed that not every comment that is slanted towards a person's protected characteristic constitutes violation of a person's dignity etc. Tribunals must not encourage a culture of hypersensitivity by imposing liability on every unfortunate phrase.

63. Mrs Justice Slade's comments on how a Tribunal should approach the words "related to the protected characteristic" are helpful in the EAT decision of Bakkali v Greater Manchester (South) t/a Stage Coach Manchester [2018] IRLR 906, [2018] ICR 1481 (EAT). She says, whilst it is difficult to think of circumstances in which unwanted conduct on grounds of or because of a relevant protected characteristic would not be related to that protected characteristic of a Claimant – "related to" such a characteristic includes a wider category of conduct and as such requires a broader enquiry when making a decision. (See paragraph 31 (Slade J presiding)

64. Tribunals must not devalue the significance of the meaning of the words used in the statute (i.e., intimidating, hostile, degrading etc.). They are an important control to prevent trivial acts causing minor upset being caught in the concept of harassment. Being upset is far from attracting the epithets required to constitute harassment. It is not enough for an individual to feel uncomfortable to be said to have had their dignity violated or the necessary environment created. (Grant v Land Registry [2011] IRLR 748).

65. Considering whether there has been harassment includes both a subjective and objective element. Underhill J in Pemberton v Inwood [2018] EWCA Civ 564 summarised the position as follows: *"In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b))"*

66. Section 212(1) EqA says "*detriment does not, subject to subsection (5) include conduct which amounts to harassment."*

67. Section 212 EqA means that an action that is complained of must be either direct discrimination or harassment, but it cannot be both. It must be one or the other. This is because the definition of detriment excludes conduct which amounts to harassment.

Conclusions & Analysis

68. We considered the oral and written submissions of both parties in coming to our decision. The parties' oral submissions were in essence a summary of their written submissions.

Direct discrimination

Issue 1.1.1 The Respondent did not provide work to the Claimant after 29 April 2022

69. We found the Respondent did offer the Claimant work on 4 occasions after 29 April 2022. Neither in the Claimant's claim form or her witness statement or Claimant's supplemental witness statement did the Claimant say that she was not offered work by the Respondent after 29 April 2022. In her oral evidence the Claimant did not say that the Respondent did not offer her work but that she did not want to work for the Respondent due to what she considered a culture of discrimination at the Respondent.

70. In those circumstances, there was no finding of fact that the Claimant was not provided with work. She was provided with work and so there was no less favourable treatment and there was no discrimination. But if we are wrong and the Claimant was not offered work, we conclude that is because the Respondent's reorganisation of the English and Maths department meant that there was no longer a need for occasional workers. We consider that Anne Marie Horricks was not an appropriate comparator as she was an employee of the Respondent and not an occasional worker, so there was a material difference. There were in any event no findings of facts upon which we could infer that the Respondent discriminated against Claimant on the grounds of her disability. The Respondent had known about Claimant's disabilities in respect of brain tumours of a long time and knew the Claimant was to go off work in March 2022 and have chemotherapy (cancer treatment) due to those tumours in February 2022 and they continued to offer the Claimant work.

71. We therefore conclude that the Claimant's complaint of direct discrimination is not well founded and is dismissed.

Issue 1.1.2 Did Ms Wilson say in a phone call on 3 May 2022 "it would not be viable for the business if [the Claimant] was to have radiotherapy and chemotherapy to work at the college anymore".

72. We found Ms Wilson did not say "it would not be viable for the business if [the Claimant] was to have radiotherapy and chemotherapy to work at the college anymore" and in those circumstances we conclude that there was no less favourable treatment and therefore no direct discrimination. The Claimant had to be mistaken that Ms Wilson said these words, not least because we accepted that it was not something that Ms Wilson would have been likely to say, she already knew about the Claimant's plan of chemotherapy in February 2022 (as she said had been proposed in her email) and had continued to offer the Claimant work. The Claimant's evidence of what was said was inconsistent in any event. The Respondent was never under an obligation to offer the Claimant work in any event. It would make no sense for Ms Wilson to have uttered those words as she did not need to offer the Claimant any work at any time. Furthermore, we consider that it is unlikely that Claimant believed that Ms Wilson did say those words, if she believed that Ms Wilson was discriminating against her. We say this because she also stated on 5 May 2022 in her email to Ms Chamberlain that she did not want to leave her job but wanted to stay in the same position. In those circumstances we find that the complaint of direct discrimination is not well founded and is dismissed.

Discrimination arising from disability

Issue 2.2.1 -Not providing the Claimant with hours of work after 29 April 2022

73. We have already found that the Claimant was provided with hours of work after 29 April 2022 and the Claimant did not provide evidence that she was not provided with hours of work. We found that the cancer treatment related only to the Claimant's brain tumours, but we conclude that the Claimant's cancer treatment was in consequence of her disability. Notwithstanding, we therefore conclude that there was no unfavourable treatment and as such there can be no discrimination arising from disability. The Claimant's complaint of discrimination arising from disability is not well founded and is dismissed.

Harassment related to disability

Issue 3.1.1 On 3 May 2022 in a phone call at around 13:47 did Ms Wilson say, "it would not be viable for the business if [the Claimant] was to have radio therapy and chemotherapy to work at the college anymore".

74. We found Ms Wilson did not say "it would not be viable for the business if [the Claimant] was to have radiotherapy and chemotherapy to work at the college anymore" and in those circumstances we conclude that there was no unwanted conduct and therefore no harassment related to the Claimant's disability. The Claimant had to be mistaken that Ms Wilson said these words, not least because we accepted that it was not something that Ms Wilson would have been likely to say, she had historically been supportive of the Claimant, she

already knew about the Claimant's plan of chemotherapy in February 2022 and had continued to offer the Claimant work after this date. She had experience of dealing with staff who were cancer sufferers. The Respondent was never under an obligation to offer the Claimant work in any event. It would make no sense for Ms Wilson to have uttered those words. After the conversation on 3 May 2022, even on 5 May 2022 the Claimant said that she wanted to continue to work in the same position, this would have meant working with Ms Wilson, the Claimant would not have wanted this if there had been harassment. In those circumstances we find that the complaint of harassment related to disability is not well founded and is dismissed.

Approved by:

Employment Judge Young

Dated 7 March 2025

JUDGMENT SENT TO THE PARTIES ON
15 March 2025
.....

.....
FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing; written reasons will not be provided unless a request was made by either party at the hearing, or a written request is presented by either party within 14 days of the sending of this written record of the decision. If written reasons are provided they will be placed online.

All judgments (apart from judgments under Rule 51) and any written reasons for the judgments are published, in full, online at *https://www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimants and respondents.

If a Tribunal hearing has been recorded, you may request a transcript of the recording. Unless there are exceptional circumstances, you will have to pay for it. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved, or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings and accompanying Guidance, which can be found here:

www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/