EMPLOYMENT TRIBUNALS

Claimant: Ms R Neira

Respondent: East Lancashire Hospitals NHS Trust

Heard at: Manchester **On:** 21 to 25 October 2024

Before: Employment Judge Cookson
Mr Pennie
Mr Aldritt

REPRESENTATION:

Claimant: Mx Oscar Davies (Counsel)
Respondent: Mr Gareth Price (Counsel)

JUDGMENT having been sent to the parties on 31 October 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This was a claim about direct religious or similar philosophical belief discrimination brought by Ms Neira (the claimant) about alleged detriments in the course of her employment which she says she was subject to because she had not had the Covid-19 vaccine. Early conciliation was undertaken between 31 January and 2 February 2023 and her claim was lodged on 5 February 2023.

2. The claimant is a respiratory physiologist and has worked for the respondent since November 2018. Her employment is continuing.

3. The claimant relies on a belief in what has been referred to for short hand purposes as informed consent in medical treatment as her protected belief. Her belief is accepted by the respondent as a protected philosophical belief for the purposes of the Equality Act 2010 and so it has not been necessary for us to make a

finding about that. The claimant had decided not to be vaccinated against Covid-19 and says that was a manifestation of her belief.

4. In reaching our judgment we have considered

a. The agreed bundle of documents prepared by the respondent ("the bundle") which regrettably had not been prepared so that documents were arranged in chronological order;

b. The evidence given in the witness statements and oral evidence from the claimant and Ms Serish Khan (respiratory nurse):

c. The evidence in witness statements and oral evidence for the respondent from

i. Ms Clare Brown (respiratory and sleep physiologist)

ii. Ms Kelli Waterworth (whose evidence was given by video link) (Respiratory Service Manager & Home Oxygen Service Clinical Lead)

iii. Mr Christopher Nicholson Interim Deputy Divisional Director of Operations, Medicine and Emergency Care at Blackburn Hospital

iv. Mr Ian Donoghue Interim Divisional Director of Operations for Medicine and Emergency Care

d. Evidence in the statement of Ms Kate Atkinson Director of Service Development and Improvement of East Lancashire Hospitals NHS Trust whose evidence was not challenged in cross examination;

e. An agreed chronology, cast list and statement of agreed facts regarding the roll out of the Covid 19 Vaccine

f. Oral and written submissions given by counsel for both parties including an opening statement from the claimant's counsel.

5. We had the benefit of an agreed list of issues. There were some discussions about the drafted list after the parties were asked to clarify their positions on manifestation of belief and on who the correct comparator would be for the complaints of direct discrimination. The respondent accepted that the claimant had a protected belief but did not accept that not having the covid vaccine was a manifestation of that protected belief.

6. The Tribunal raised with counsel at the start of the hearing the issue of the comparative exercise it would be required to undertake to decide if there had been less favourable treatment. In particular the judge asked the parties to explain the respective positions on comparators and whether this was a case which was being argued on the basis of manifestation of belief being so intrinsic to the protected characteristic it must be factored into the identity of the comparator. We were told

that was not the basis of the claims. The claimant asserts that not being vaccinated is a manifestation of her belief, but her case was the correct comparator was as identified in the list of issues which is attached. That is, for most of the claims, a hypothetical comparator who was not vaccinated for reasons other than the claimant's protected belief. We determined the case on the basis on which it was put by the claimant and her counsel.

7. Unfortunately despite counsel informing the tribunal that the list of issues was agreed and they were ready to proceed on that basis, the Tribunal did not find the list of issues an easy document to work with. The tribunal found it rather confusing in that it is significantly repetitive in some respects, and it is significantly jumbled in terms of its chronology. For the purposes of giving judgment, the issues were identified in chronological order and that approach has also been adopted in these reasons on that basis that should making our reasoning easier to follow. The list of issues presented to us (which is marked as a draft but was presented as agreed by counsel) is attached to these written reasons.

8. The Tribunal was also somewhat hampered by a bundle which did not comply with the case management orders to arrange documents in chronological date order and it was unclear to us why the parties, and the respondent in particular, had taken it upon themselves to disregard the tribunal express instructions without seeking leave from the Tribunal. It was an unhelpful decision on their part.

The Law

The Equality Act

9. **s10 Religion or belief**

"(1) Religion means any religion and a reference to religion includes a reference to a lack of religion.

(2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.

(3) In relation to the protected characteristic of religion or belief—

(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief;

(b) a reference to persons who share a protected characteristic is a reference to persons who are of the same religion or belief."

10. **s13 Direct discrimination**

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

11. There are two parts of direct discrimination: (a) the less favourable treatment and (b) the reason for that treatment. Sometimes however it is difficult to separate these two issues so neatly. The Tribunal can decide what the reason for any treatment was

first: if the reason is the protected characteristic, then it is likely that the claim will succeed – *Shamoon v Constable of the Royal Ulster Constabulary* [2003] UKHL 11.

"Because of": reason for less favourable treatment

12. In terms of the required link between the claimant's protected characteristic and the less favourable treatment she alleges, the two must be " inextricably linked". The test is not the "but for" test, in other words but for the protected characteristic, the treatment would not have occurred – *James v Eastleigh Borough Council [1990] IRLR 288.* The correct approach is to determine whether the protected characteristic, here a protected belief, had a "significant influence" on the treatment – *Nagarajan v London Regional Transport* [1999] IRLR 572. The ultimate question to ask is "what was the reason why the alleged perpetrator acted as they did? What, consciously or unconsciously, was the reason?" - *Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48. This is a question of fact for the Tribunal to determine, and is a different question to the question of motivation, which is irrelevant. The Tribunal can draw inferences from the behaviour of the alleged perpetrator as well as taking surrounding circumstances into account.

13. If there is more than one reason for the treatment complained of, the question is whether the protected characteristic relied upon was an effective cause of the treatment – *O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School* [1996] IRLR 372.

14. **s39 Employees and applicants**

"(1) An employer (A) must not discriminate against a person (B)—

(a) in the arrangements A makes for deciding to whom to offer employment;

(b) as to the terms on which A offers B employment;

(c) by not offering B employment.

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment."

15. **s123 Time limits**

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

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

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

(3) For the purposes of this section—

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

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

16. There is guidance in the *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640 to explain how the tribunal should approach this issue. In that case, Leggatt LJ said as follows: -

"It is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980, the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under section 7(5) of the Human Rights Act 1998.

That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)".

17. That means that the exercise of this broad discretion involves the multi-factual approach, taking into account all the circumstances of the case in which no single factor is determinative or the starting point. In addition to the length and reason for the delay, the extent to which the weight of the evidence is likely to be affected by the delay, the merits, and balance of prejudice; other factors which may be relevant include the promptness with which a claimant acted once he or she knew of factors giving rise to the course of action and the steps taken by the claimant to obtain the appropriate legal advice once the possibility of taking action is known.

18. We were referred to the judgment of the Court of Appeal in *Robertson v Bexley Community Centre* [2003] EWCA Civ 576 which reminds us that when Tribunals consider their discretion to consider a claim on the amount of time on just and equitable grounds, "*there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule"*

19. However, the Tribunal has reminded itself that that this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law does not require this but simply requires that an extension of time should be just and equitable — *Pathan v South London Islamic Centre* EAT 0312/13. However the burden rests on the person seeking the exercise of judicial discretion to show that it should be exercised in their favour.

20. **s136 Burden of proof**

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

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

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

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

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

(a) an employment tribunal;.."

21. before the Equality Act 2010, the House of Lords decision of *Igen v Wong* [2005] IRLR 258 set out a two-stage test tribunals must apply when deciding discrimination claims. This two-stage approach was discussed in the Court of Appeal decision of *Madarassy v Normura International plc* [2007] EWCA 33, with guidance being provided by Mummery LJ. Since the Equality Act 2010 (although the burden of proof provisions differs in wording to the test set out in Igen), the Appellant Courts and EAT have repeatedly approved the application of the guidance set out by Mummery LJ in *Madarassy*. In summary the first stage is where the burden of proof first lies with the claimant who must prove on a balance of probabilities facts from which a Tribunal *could* conclude, in the absence of any other (non-discriminatory) explanation, that the respondent had discriminated against him (or her). If the claimant meets the burden and establishes a prima facie case (which will require the Tribunal to hear evidence from the claimant and the respondent, to see what proper inferences may be drawn), then the burden shifts, and the respondent must show it had a non-discriminatory reason for the difference in treatment. This will require consideration of the subjective reasons that caused the employer to act as he/she did as referred to above.

22. Tribunals must be careful, and the burden of proof provisions should not be applied in an overly mechanistic manner: see *Khan v The Home Office* [2008] EWCA Civ 578 (per Maurice Kay LJ at paragraph 12).

23. The approach laid down by section 136 EqA requires careful attention where there is room for doubt as to the facts necessary to establish discrimination, but where the Tribunal is able to make positive findings on the evidence one way or another, the provisions of section 136 does not come into the equation: see *Martin v Devonshire Solicitors* [2011] ICR 352 (per Underhill J at paragraph 39), approved by the Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054 (per Lord Hope at paragraph 32).

24. It is, however, 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 EAT 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”.

25. In terms of the law which we have considered in this case, we received helpful detailed written and oral submissions from both counsel on how we should direct ourselves on the law and in particular on manifestation of belief and those submissions and how we applied them are discussed below.

Findings of fact

26. We have made our findings of fact in this case on the basis of the material before us taking into account contemporaneous documents where they exist and the

conduct of those concerned at the time. We have resolved such conflicts of evidence as arose on the balance of probabilities and taking into account our assessment of the credibility of witnesses and the consistency of their evidence with the surrounding facts.

27. We have not made findings of fact about every matter referred to in evidence before us but only those matters which we concluded were relevant to the legal issues to be determined.

28. As noted above, the claimant is employed as a Band 6 Respiratory Physiologist by the respondent. The claimant has worked for the respondent since November 2018 and has worked in the NHS for many years.

29. In April 2021, following suspected food poisoning, the claimant suffered brain swelling which caused a seizure and resulted in her being admitted to critical care for several days. In light of the brain injury, the claimant was forced to take approximately six months off work.

30. The claimant has told us that she has long standing belief in informed consent for medical treatment. That is accepted by the respondent as a protected belief. While she was off ill in 2021 the claimant developed concerns about the covid vaccine which she describes as evidence based, although Mr Nicholson told us the sources she relies do not reflect what would be described as mainstream medical thinking. Her witness statement also suggests what might be described as a certain level of covid scepticism.

31. In terms of the claimant's own decision not to take the vaccine she had observed that some colleagues experienced short term side effects and after her seizure she developed concerns about the risk the vaccine might pose to her as someone with a brain injury. The claimant told us that, sadly, her mother had a stroke after medical treatment and this has informed her belief. She also has ethical objections to how the vaccine is manufactured.

32. The claimant has offered us significant commentary in her witness evidence which includes references to what she regards as evidence supporting her views. As explained to the parties it was not necessary for this tribunal to make findings about the claimant's underlying criticisms of the vaccine and whether they are well-founded or not. That is not our role. We do accept that her opinions about the concerns she has raised are genuinely held.

33. The claimant was due to return to work on the expiry of a sick note in late September/October 2021. The claimant's immediate line manager, Clare Brown is also a long-time friend and work colleague of the claimant. Ms Brown was newly promoted and did not take direct responsibility for managing the claimant's return to work but did speak to her before her return and they exchanged WhatsApp messages. This had led the claimant to understand they would be working together within the unit, but Ms Brown explained she had not appreciated

how limited desk space was, in part due to social distancing arrangements put in place for the pandemic. There are few rooms in the unit and most were needed for clinical work.

34. On the 1st of October 2021 Ms Brown sent the claimant a WhatsApp message asking '....are you vaccinated yet?' (referring to the covid vaccine) when the claimant asked why, Ms Brown '.. we've just had some updates on COVID, I'll keep you posted..".

35. The Tribunal accepts that the backdrop to this conversation was the continuing rollout of the covid vaccine. The vaccine rollout had begun in December 2020. The claimant had decided not to take the vaccine at that time. Although NHS staff of whatever age had been eligible for vaccination, at the time the claimant had gone off sick in April 2021 many NHS were not yet fully vaccinated and the risk of covid infection had still been primarily mitigated through the use of PPE.

36. By the time the claimant was returning to work in October, the national vaccine rollout had significantly progressed and the vaccine was regarded by the respondent and within the NHS as being a significant mitigation to the risks of covid. The Government had announced mandatory vaccination for certain health and social care staff with an intention to extend this to further to doctors and nurses in due course. Managers within the respondent had begun to anticipate and plan for compulsory vaccination, but it appears that the claimant had been unaware of the proposals.

37. The claimant's return to work and associated long term absence process was managed by Ms Brown's line manager, Ms K Waterworth. A long-term absence review meeting via "Teams" on 11 October 2021. The claimant describes the tone of the meeting as formal and more formal than previous absence meetings she had attended and it appears we were invited to draw some sort of adverse inference from that, but we accept what Ms Waterworth told us that she approaches meetings under a formal process in a formal way. We concluded this was simply a question of Ms Waterworth's management style.

38. The issue of vaccination came up at the meeting. There was a dispute between the parties about who raised that first, but we find nothing turns on that. Whether staff were vaccinated was a matter of discussion for NHS managers anticipating the legislation and the claimant knew it was something that might be of interest on the basis of the messages from Ms Brown.

39. We accept that Ms Waterworth encouraged the claimant to be vaccinated but as a matter of fact we do not find that she used the words "superspreader" as alleged. This is discussed in the conclusions section below. We accept that Ms Waterworth informed the claimant that the respondent regarded unvaccinated staff as "high risk" in terms of the risk to them of being exposed to covid and that the claimant herself would pose a higher risk to patients and colleagues if she became infected. As a result a referral to Occupational Health was to be made.

Ms Waterworth also told the claimant about the government proposals which meant that if the claimant remained unvaccinated, she might face being redeployed or having her employment terminated. The claimant told us that she found that threatening.

40. Following that meeting a letter was sent which said this 'We discussed that you are not Covid vaccinated and that a referral has been made to occupational health as you are deemed high risk. We discussed the potential risks to other employees and yourself and patients whilst you remain unvaccinated'. The letter also stated, 'We discussed the phased return and you will need to remain out of high risk clinical areas.'

41. The claimant returned to work on 14 October 2021. Initially she was assigned to work in the library to use the computers there to complete training and induction and dealing with administrative matters like arranging to have her logon to the respondent's computers reactivated. The claimant describes that as being isolated and feeling unsupported. She was upset that no one had come to meet her on her return although Ms Waterworth did come to see her in the library. We accept that due to attempts to maintain distancing in clinical areas and the limited working space, staff not undertaking clinical work were often expected to work in the library and this was not unusual. It is clear that the claimant had understood from Ms Brown that they would be working together in the same space. It may be that the claimant had misunderstood, it may be that Ms Brown had not explained things very well. Mrs Waterworth had made arrangements for the claimant to work from St Peter's Centre in Burnley after the library induction period.

42. On 15 October Ms Waterworth approached the claimant while she was working in the library and there was a further discussion about the claimant's health, her vaccination status and where she would work. Ms Waterworth told her that she would not be able to undertake what was described high risk clinical work due to being unvaccinated. The claimant became very upset.

43. The claimant was asked to attend a short notice assessment with Mr Bentley from Occupational Health (OH). The claimant covertly recorded that on her phone and left the recording on, she says inadvertently, when she went to see Ms Waterworth after seeing OH. Mr Bentley had prepared a short report and the claimant took that with her. The claimant told us that Ms Waterworth did not read the report. Ms Waterworth told us that she is well used to seeing such reports and that she was able to quickly scan it. We accept that as the report is very short.

44. A transcript of that meeting between the claimant and Ms Waterworth has been prepared by the claimant but we did not hear any of the recording to enable us to assess Ms Waterworth's tone of voice.

45. What is clear from the transcript is that before meeting, Ms Waterworth had been told by Occupational Health that claimant had made a complaint to them about

not been supported. Ms Waterworth's concerns about that complaint dominated the meeting. The tribunal found Ms Waterworth's evidence about what happened to be somewhat difficult to follow. Ms Waterworth told the claimant that in terms of managing the claimant's return she would be "taking a step back because it had gone formal". Ms Waterworth was not able to explain in clear terms what she had meant by this, but we concluded that the only sensible interpretation is that Ms Waterworth had taken the view that there was to be some sort of grievance process and the matter was now out of her hands.

46. What was curious is that Ms Waterworth now suggests that this was some sort of misunderstanding on the claimant's part. The claimant says she had not complained to OH. The claimant had not raised a grievance nor had she intended to. There does not appear to have been any suggestion on HR's part that there was to be grievance process. It was Ms Waterworth who suggested she would need to take a step back and it is odd that she cannot explain that. We conclude that someone within OH told Ms Waterworth that the claimant had complained about her, Mrs Waterworth was upset and angry to be accused by the claimant in this way and the claimant who was upset and confused that she was being accused of making a complaint.

47. In terms of the evidence of discrimination however, we draw no inference from what happened. We have no evidence from the claimant to suggest that Ms Waterworth knew about her protected belief. Ms Waterworth knew that the claimant was not vaccinated, but it is not suggested that the claimant had told her about her protected belief. Ms Waterworth was clear that she did not know about that belief or why the claimant had chosen not to be vaccinated. To the extent there was hostility between the two women, we conclude that this was because Ms Waterworth thought the claimant had made an unfounded complaint to her occupational health colleagues about a lack of support. That had nothing to do with the claimant's protected belief.

48. Mrs Waterworth told the claimant to go home because she was concerned by how upset she was. The claimant subsequently went off sick and did not return to clinical work as planned. That meant the arrangements for her return were overtaken by events.

49. The subsequent handling of the claimant's return to work was not handled by Ms Waterworth and the short 15 October report from Mr Bentley was subsequently overtaken by Dr Ferguson's report prepared on 20 October 2021.

50. Over the following weeks the claimant remained off work due to stress. She raised concerns about the way she had been treated by Ms Waterworth. An internal informal dispute resolution process was followed which eventually resulted a facilitated meeting on 18 January 2022 between the claimant and Ms Waterworth but this did not resolve matters between them.

51. In the meantime, on 18th of October 2021 the claimant emailed Chris Nicholson (Cardiology and Respiratory Directorates Manager) and raised various concerns about the vaccine explaining why she had decided not to have it. We concluded that some of the matters raised relate to the claimant's protected belief, although it is not apparent how they all relate to that belief.

52. The claimant was assessed on 20 October 2021 by Dr Ferguson. He assessed her as being unfit for work. The claimant told Dr Ferguson that she was now absent from work due to stress because she had been restricted from working in clinical areas because she was not vaccinated and after what the claimant called negative encounters with Ms Waterworth.

53. Dr Ferguson's report which is addressed to Mr Nicholson, stated that the claimant was assessed as moderate risk for Covid-19. He noted that vaccination was advisable but not mandatory and stated that when the claimant was fit to return to work, she would be fit for her substantive post and to help keep the claimant safe, Dr Ferguson would recommend the use of appropriate PPE, including a FFP3 facemask for aerosol generating procedures. He also recommended a meeting with management to resolve the workplace issues. Dr Ferguson recommended a further four week phased return to work when the claimant was well enough to return.

54. Mr Nicholson believed that OH had not understood the claimant's job and the risks of her working environment and raised various concerns. It is also clear he was irritated that the report was addressed to him rather than a more junior line manager. The respondent had assessed aerosol producing work, like the lung function tests, as creating a high risk of covid transmission. The claimant was assessed by OH as being at moderate risk of covid infection but she was potentially undertaking high risk work. The tribunal accepted that Mr Nicholson did not think the risks could be mitigated to an appropriate degree by PPE alone. Mr Nicholson emailed Dr Ferguson about his report and there was subsequent correspondence between Mr Nicolson and the Head of OH, Mr Denney. Mr Nicholson's irritation with the report he had received is clear from the correspondence, but the Tribunal concluded this was directed at OH, not the claimant. HR intervened and although it is not clear from the evidence before us, it appears that Dr Ferguson may have complained about the correspondence sent to him.

55. Mr Nicholson gave us evidence in his statement that he was concerned about the covid risk to unvaccinated staff in part because of concerns which had been raised about risk mitigation for a consultant colleague who had died as a result of contracting covid before vaccination was available despite using PPE. By this point in time vaccination was regarded as part of risk reduction for covid in combination with PPE. If covid risk could not be managed the respondent's approach was to make changes to duties.

56. Mr Nicholson explained that PFT (pulmonary function tests), the main work the claimant had been undertaking, were assessed by his unit as high risk because although they are not strictly regarded as aerosol producing, the tests can often produce a cough response which can result in aerosol production. In Mr Nicholson's view the respondent's covid risk assessment meant that the claimant should be assessed as being at high risk for covid exposure because of her work, and even if OH had assessed her as being at low risk (they assessed her as moderate risk), that risk assessment meant that the claimant should not be redeployed to clinical work until it was clear the risk could be adequately managed. This would be the case whatever the reason for not being vaccinated.

57. It is clear that Mr Nicholson and OH disagreed to some extent about risk mitigation, but we accept that Mr Nicholson genuinely thought that the OH advice was inconsistent with the respondent's risk assessments and inadequate and that he was concerned that although the claimant might say she would accept the risk of working in a high-risk setting, this would not be appropriate because it was the respondent's legal obligation to manage the health and safety risk. It is of course right that employers cannot abdicate the management of health and safety though employee consent. It was no answer for the claimant to say she was happy to take the risk.

58. In the background the Government had continued to push forward with its plans for mandatory vaccination for social care staff and had confirmed that vaccination would be mandatory for patient facing staff in the NHS from April 2022. In light of the time for someone to be fully vaccinated, in essence that the claimant would have to have had her first vaccine some weeks before then. Across the NHS plans were being put in place to manage the staff deployment implications of the proposals.

59. Mr Nicholson asked for a formal sickness procedure to be initiated for the claimant as she continued to be off work and anticipating the approaching Government deadline for vaccination, told HR that if the claimant was able to return to work she would not be able to undertake patient facing work in light of the proposed legislation and she need to be placed in the redeployment register. It was recorded that the claimant would not disclose her vaccination status in preparation for the implementation of the legislation.

60. The claimant returned to work on 28 January 2022. She was required to undertake a further period of retraining and induction. The claimant was told that a formal review meeting would be held on 3 February 2022 as part of the respondent's procedure for dealing with unvaccinated staff in light of the forthcoming legislation. This was called a Formal Vaccination as a Condition of Deployment meeting.

61. Unexpectedly on 31 January 2022 the Government announced that the requirement for covid vaccination for patient facing staff and NHS trusts was being withdrawn and NHS trusts were instructed to step down the formal

procedures in place. The claimant's Formal Vaccination as a Condition of Deployment meeting was cancelled, but the time was used instead by Mr Nicholson to meet with the claimant with Mr Peter from HR to discuss how her covid risk was to be managed. That was because notwithstanding the change in Government policy, the issue of managing risk from work assessed as high risk, as explained above, still needed to be managed. Mr Nicholson and Mr Peter went through the risk assessment form with the claimant. She was told that the management of high risk work for unvaccinated staff was being determined by the senior leadership team.

62. On 7 February 2022 the claimant emailed to explain flaws she had identified in the risk assessment and in particular told the respondent that she considered she fell into a low risk category. On 18 February 2022 the claimant asked to return to her substantive duties. Mr Nicholson replied to say that he was still waiting awaiting instructions from the senior executive team about what clinical duties staff with higher risk assessments could undertake.

63. The claimant continued working in the library area. She was still on a phased return and therefore not working full time, but eventually she exhausted the internal training and administrative work that had been set for her. There appears to have been little management contact with the claimant during this time and the managers struggled to explain what she had been doing and how decisions were eventually taken about her redeployment to duties.

64. The claimant made a request for "early resolution" on 7 March 2022. In essence this was a grievance. The claimant raised allegations of discrimination relating to her covid status and health problems. She complained about Ms Waterwork's conduct and being coerced into having the covid vaccine and complained about the OH process and being threatened with the termination of her employment.

65. Mr Donoghue was asked to investigate the matter. He invited the claimant to a meeting on 27 April but that was delayed because the clamant was waiting for documents from a data subject access request.

66. The claimant was returned to her substantive post in April 2022. None of the respondent's witnesses were able to explain to us why the claimant's return to substantive duties had not been managed sooner or indeed what prompted the decision to return her to her duties.

67. When the claimant did return to her substantive duties, she was not assigned to undertaking PFTs but instead was required to work in the sleep clinic. This was band 6 work and the claimant acknowledged that the respondent was entitled to assign her work within her pay grade, but she enjoyed the PFT work and found it rewarding. She wanted to return to that work which she had been doing before her original sickness absence. However we were told that the respondent witnesses that while the claimant work had been mainly undertaking PFT tests prior to her sickness absence in April 2021, the waiting list for those tests had

since reduced and workload in other areas had increased, particularly in terms of sleep tests. Assigning that work to the claimant was consistent with the risk assessment and met community need. We accepted that evidence.

68. The claimant sent Mr Donoghue a detailed statement in support of her request for early resolution on 25 June 2022. The initial meeting went ahead on 5 July and the claimant was accompanied by her trade union representative. The claimant raised her risk assessment and the fact that she disagreed with the so called "ALAMA" (Association of Local Authority Medical Advisors) risk score she had been given.

69. Mr Donoghue investigated those concerns. In relation to the risk assessment issues, he requested clarification from OH about the scoring and discussed the risk assessment with Mr Nicholson.

70. A further resolution meeting was held on 17 August 2022. In relation to the risk assessment element Mr Donoghue told the claimant that he was satisfied with the approached adopted by Mr Nicholson. The claimant asked for further clarification of what evidence the risk assessment had been based upon. She was told this had been based on information received from NHS England but that clarification would be sought.

71. The claimant was sent a formal outcome on 5 September 2022. Mr Donoghue found that the claimant had not been sent copies of OH referrals and should have been provided with those, but otherwise her concerns were not upheld and Mr Donoghue confirmed that in accordance with the risk assessment he was satisfied that it was in accordance with the risk assessment to move the claimant to lower risk duties within the scope of her current role and job description. In relation to queries about the risk assessment, Mr Donoghue explained that he had been told that the risk assessment was based on guidance from ALAMA and he provided the relevant website details for further information.

72. Mr Donoghue also commissioned an independent investigation to look at where there was inappropriate or bullying behaviour within the Sleep Service. That was undertaken by Gillian Rose and falls outside the scope of this tribunal claim.

73. The claimant subsequently appealed against Mr Donoghue's decision. The appeal was considered by Ms Atkinson Director of Service Development), Faith Woods-Beradi (a senior member of the HR team) and Julie Rigby (Union Partnership Officer). The appeal was heard on 23 March 2023. In the appeal the claimant made clear that she thought the respondent's risk assessment was insufficient and that she disagreed with PFTs being categorised as an aerosol generating procedures (AGPs). She had undertaken her own risk assessment using the ALAMA tool and considered that her individual risk was low. In relation to the point on appeal about risk assessments Mr Donohue pointed out that all staff has been subject to a risk assessment and that he was satisfied that Mr Nicolson had followed the correct risk assessment procedure.

74. The appeal panel were told that as at April 2023 PFTs did not feature on the up-to-date list of AGPs. "Induction of sputum" did feature on the list but it was accepted that this was not synonymous with coughing after a PFT and coughing itself was not an AGP. Mr Brewer the head of OH and Wellbeing explained that vaccination is given equal weight as other mitigations. The risk assessment was devised by OH in conjunction with the standard ALAMA tool and had been subsequently updated.

75. The appeal outcome was given at a hearing on 28 April 2023. In the course of the hearing the appeal panel discussed whether to carry out an up-to-date risk assessment but the claimant did not want to share her medical information so that was not taken further. In terms of risk assessment, the panel concluded decisions had been taken on the basis of staff safety. A number of recommendations were made at the end of the appeal hearing including a recommendation of a further risk assessment reflecting the updated guidance relating to PFTs.

76. The claimant undertook early conciliation between 31 January and 2 February 2023 and her claim was lodged on 5 February 2023. She did not offer any evidence about her reasons for submitting her claim at that time or why she had not brought any claim earlier.

Discussion and Conclusion

Manifestation of belief

77. The respondent accepted that the claimed had a protected belief under s10 of the Equality Act 2010.

78. In *Eweida & Others v United Kingdom* the European Court of Human Rights made clear that in order to constitute a manifestation of a belief within the meaning of Article 9 the act of manifestation has to be intimately connected with the relevant religion or belief, but there is no requirement for the applicant to establish that he or she has acted in the fulfilment of a duty mandated by that belief system.

79. In this case we accept that the claimant's decision not to be vaccinated was closely connected to her belief. It was not mandated by that belief but there was a close connection and, on that basis, we accepted that it was a manifestation of the belief.

The issue of knowledge

80. As Mx Davies observed in their submissions, Article 9(2) enables the right to manifest belief to be restricted, but the respondent has not suggested to us in this case that it seeks to justify interfering with the claimant's right to manifest their belief in this case.

81. In terms of the issue of knowledge and its relevance in direct discrimination claims, Mx Davies rightly reminded us that that there is no requirement within the statutory language for a respondent to have knowledge of a protected characteristic in a claim for direct discrimination but we accepted Mr Price's submission on this point. We were persuaded that the following passage from *Maistry v BBC* which he referred us to is significant in a case like this:

> *"The starting point is that since this is a claim based on discrimination what matters is what motivated the various individual colleagues and managers who were responsible for the acts complained of. What the Applicant himself thought or meant by anything he said is not directly relevant. The Tribunal was, therefore, unquestionably right that if the individuals in question were unaware that the Applicant held the philosophical belief in question they could not be motivated by that fact or, therefore, be guilty of discrimination; nor could the BBC be so guilty as their employer. Whether they were so aware is a question of fact."*

82. It is worth adding that, as already noted in the section of the law, motivation is not relevant to the question of direct discrimination, what matters is the reason for it. However it seems clear that Lord Justice Underhill is using the term motivation above interchangeably with "reason" – if someone is not aware of a belief the it cannot have consciously or subconsciously influenced their decision.

83. Significantly in terms of a number of the issues to be determined, we accepted that no-one at the respondent was aware of the claimant's protected belief and that that was the reason for her not being vaccinated until 18 October 2021 at the very earliest.

84. Mx Davies suggested that the respondent must be aware the claimant holds the protected belief in informed consent because that belief will be shared by virtually everyone who works in the NHS. We preferred Mr Price's submission that it cannot be said that the respondent must have known that that the claimant's protected belief was the reason she was not vaccinated. We agree that it is likely that virtually everyone in the NHS will share a belief in informed consent, but it is also the case that the majority of NHS staff did decide to be vaccinated. We do not see how knowledge can be imputed on the basis suggested.

85. What is more, significant numbers of people, although a minority, declined to take the covid vaccine. Some of them will have done so for same reasons as the claimant, that is because of the same protected belief that they should only be required to take a vaccine for which they felt they could give informed consent; some of them will have done so for other protected reasons, for example there are religious beliefs which do not allow vaccine; some people cannot have vaccines because of a disability or other medical reason, and some will have done so for unprotected reasons, including a belief in conspiracy theories. We see no reason to conclude that the respondent must have been aware of the claimant's protected belief because she had refused the vaccine without her explaining her reasons to her managers.

86. Significantly in terms of our deliberations, we accepted the evidence of Ms Waterworth and Ms Brown that neither of them knew that the claimant had the protected belief at the time it is alleged that she was subject to discriminatory treatment by them.

87. In terms of Mr Nicholson's knowledge, the claimant wrote to Mr Nicholson twice to explain her reasons for not taking the vaccine, in October 2021 and January 2022.

88. In October 2021 the claimant put forward a number of objections to the vaccine. We paid close attention to that correspondence. The claimant does not say in terms what her protected belief is in that correspondence, but she does put forward a number of objections to the vaccine which in our view demonstrate what her protected belief is and that this was why she has decided not to be vaccinated, although she also raises other matters as part of her reason for not being vaccinated some of which seem to fall outside the scope of the alleged protected belief.

89. We conclude that in October 2021 Mr Nicholson was aware of the claimant's belief and her objection to the vaccine. We conclude that although he may not have recognised what he was being told in those terms, he had the requisite knowledge to be aware of the claimant's protected characteristic and that this was her reason for not having the vaccine. If there was any doubt about that, we are satisfied that the January 2022 correspondence must have, or reasonably ought to have, confirmed his understanding of the claimant's position.

90. By the time Mr Donoghue and others came to deal with the claimant's grievance, there could have been no doubt that the respondent was aware of the claimant's protected belief and the manifestation of refusing the vaccine.

91. As explained, the conclusions in relation to the list of issues are set out in chronological order.

Allegation (d)(i) Being told that she could be a 'super spreader' of Covid 19 by Kelli Waterworth on 11 October 2021 on a Teams meeting.
Issue (f) if so, did the Respondent treat the Claimant less favourably than it treated or would have treated the comparator case?
(g) If so, was the reason for that treatment because of the Claimant's Belief?

Hypothetical comparator: a respiratory physiologist unvaccinated against Covid-19 for reasons other than Cs Belief (for example, someone with a medical contraindication to the vaccine).

92. We concluded that Kelli Waterworth was not aware of the claimant's protected belief at the online meeting on 11 October 2021.

93. We accept that the issue of the claimant's covid vaccination status was discussed at the meeting. It was a formal meeting. We decline to draw any adverse inference from the fact that it was a much more formal meeting than the claimant had had previously in relation to her absence. We accept that Ms

Waterworth simply had a formal approach. Significantly, HR was present at that meeting and the HR officer did not raise any concerns and nor did the claimant at the time.

94. We concluded that on the balance of probabilities the alleged "super-spreader" comment was not made. Our main reason for concluding that was the absence of any suggestion from the claimant that that comment had been made for some considerable time after 11 October. As far as we can see, the specific allegation of the comment "super-spreader" having been made was not in fact raised until the following summer. The claimant demonstrated on other occasions that if she disagreed with something that was said or something that was done by the respondent, she was very quick to raise those objections. The claimant's case is that she regards "super spreader" is pejorative and we are satisfied that if the "super-spreader" comment had been made the claimant would have complained about that at the time to HR.

95. We accept that concerns were discussed at the time that if the claimant was not vaccinated, she might be more likely to transmit the covid vaccine, which reflected the current medical understanding, but the claimant was not referred to as a "super-spreader". We can also see no basis for the claimant to feel offended by a discussion about whether the fact that she was not vaccinated increased both her risk of catching covid and the risk she may pose to respiratory patients and colleagues given the impact covid had had on the NHS, particularly before vaccine rollout. We accept that the same conversation would have taken place with any unvaccinated member of staff, whatever the reason for not being vaccinated.

96. This complaint is not well founded and is dismissed.

Allegation (d)(iii) Senior line manager, Kelli Waterworth, attempted to coerce the Claimant into getting vaccinated on 11 and 15 October 2021

Allegation d (viii) Being repeatedly threatened with redeployment or termination if the Claimant did not get the Covid-19 vaccination …

a. [by] Kelli Waterworth 15 October in the library meeting room.

Issue (f) if so did the Respondent treat the Claimant less favourably than it treated or would have treated the comparator case?

(g) If so, was the reason for that treatment because of the Claimant's Belief?

For all of the allegations Hypothetical comparator: a respiratory physiologist unvaccinated against Covid-19 for reasons other than Cs Belief (for example, someone with a medical contraindication to the vaccine).

For allegation d(v)(a) the comparator is a real comparator: any unvaccinated staff also working in patient-facing role

97. These separate allegations are so closely linked that it makes sense to deal with them together. In fact allegation d(iii) about coercion on 15 October and allegation d(viii) about threats on 15 October appear to be the same allegation

phrased slightly differently. If there is any difference between them that was not explained by the claimant or her counsel.

98. In terms of the position that UK in general, and the NHS in particular, was in at October 2021, we agreed with Mr Price that we cannot ignore the factual context. When the claimant had begun her sickness absence in April 2021 it was only just possible for any members of NHS staff to be fully vaccinated given the required waiting between each vaccinations. In contrast, by the time that the claimant was returning to work in October 2021, the national vaccine rollout had progressed significantly and there were Government proposals to compel compulsory vaccination for NHS and social care staff. Steps to mandate vaccination for some settings were already well underway, and the same approach was to be implemented more widely across the NHS. Managers within the respondent had begun to anticipate what the impact of the anticipated compulsory vaccination programme would be across a very large workforce. We accept that this raised significant workforce planning issues for the respondent.

99. This proposal was also being actively and widely discussed within the media and was well known within the community. The claimant told us that she was wholly unaware of those Government proposals. She does not own a TV and she did not watch the news. We have no reason to doubt that, but the fact that the claimant was not aware of the proposals did not mean this was a real and anticipated proposal which was being widely discussed across the national media, amongst the UK public generally and amongst medical and care staff.

100. We accept that Ms Waterworth raised the Government's legislative proposals in relation to compulsory vaccination with the claimant in the course of the meetings on 11 and 15 October 2021. The claimant says that this was a shock but we accept her reaction was a surprise to Ms Waterworth given how widely known these proposals were.

101. The claimant told us that she had found being told this to be threatening, but we accepted the respondent's argument that this did not mean that Ms Waterworth was making a threat to the claimant that she would be redeployed or terminated, and it did not mean that she was seeking to coerce the claimant to have a vaccine as alleged.

102. The ordinary English meaning of "coercion" is the use of force or threats to make someone do something that they did not want to do. What Kelly Waterworth did, as indeed other managers did in due course, was to warn the claimant that there was Government legislation over which the respondent had no control and which would give the claimant an extremely stark choice in the very near future. The Government mandate would force staff to make a choice. The Government had said there was to be a statutory prohibition on the employment of unvaccinated employees in patient facing roles, with very limited exemptions. There had been no suggestion that the claimant's philosophical belief or other vaccine scepticism would be covered by an exemption to that.

103. Data obtained by the claimant under the Freedom of Information Act shows that a sizeable minority of patient facing staff within the respondent were unvaccinated or unwilling to disclose their vaccination status. This was a minority

of staff, but in terms of numbers, it was still significant. The respondent had no reason at that time to believe that the Government was going to change its mind about those proposals. Therefore the respondent faced the very real possibility of having significant numbers of employees it could no longer employ in their patient facing roles. The workforce planning consequences of that are obvious and given the nature of the work of the NHS it must have been obvious to managers (and no doubt to staff) that redeployment opportunities away from front line roles would be limited, especially for highly trained, skilled and well-paid employees. We have little doubt that when the managers pointed out the proposals and what the consequences might be, they did so in the hope that many staff would choose to take the vaccine. This could be described as a firm "nudge". Ms Khan's evidence that over that autumn period some staff who had previously chosen not to be vaccinated had decided to have the vaccine because of the Government proposals, suggests that this was successful. However the fact that there was a managerial hope that people would take the vaccine in response to these proposals, did not mean that threats were made or there was intimidation or coercion. It was not coercion for the employer to warn what the employment consequences of a choice not to be vaccinated were likely to be.

104. We concluded that any unvaccinated member of staff not covered by a statutory exemption would be treated in the same way. The reason for what was said to the claimant was what the respondent understood its statutory obligations would be under the terms of the proposed legislation, not the claimant's protected belief.

105. This complaint is not well founded and is dismissed.

Allegation d(v) Advice from Occupational Health relating to the Claimant was ignored by managers:…

a. Chris Bentley's report – 15 October 2021 ('Occupational Health recommends the client is supported with colleagues around her', ignored by Kelli Waterworth).

Issue (f) if so did the Respondent treat the Claimant less favourably than it treated or would have treated the comparator case?

(g) If so, was the reason for that treatment because of the Claimant's Belief?

For all of the allegations Hypothetical comparator: a respiratory physiologist unvaccinated against Covid-19 for reasons other than Cs Belief (for example, someone with a medical contraindication to the vaccine).

For allegation d(v)(a) the comparator is a real comparator: any unvaccinated staff also working in patient-facing role

106. In terms of the Occupational Health advice and what happened on 15 October 2021, we accept that the transcript of the discussion between Ms Waterworth and the claimant, prepared by the claimant, shows that the claimant became very upset. It seemed possible to us that perhaps Ms Waterworth perceived the claimant as being more upset than the claimant herself felt. However we accept that Ms Waterworth reasonably perceived that the claimant was extremely upset.

107. We do not accept that we can read into the transcript that Ms Waterworth constantly interrupted the claimant and that we should draw adverse inferences from that as we were invited to do. The earlier transcript from Occupational Health shows that (and as the claimant herself said at the time) she was experiencing some difficulty in finding words and would occasionally trail off in her sentences. The places where we are asked to draw the inference of interruption can just as easily be read as indications of the claimant struggling in that way. We also cannot accept that the fact that Ms Waterworth said "no" on several occasions shows that she was bullying or intimidating or behaving in any way inappropriately towards the claimant. The transcript does not tell us anything about tone of voice. "No" is one of those words that can be said in many different ways which totally alters its meaning. We found Ms Waterworth's account more plausible and overall more consistent with the transcript. We accepted Ms Waterworth's evidence about what happened and that she said "no" this was a way of expressing her dismay at the claimant becoming upset.

108. We also accepted that although the claimant had been upset in part about the discussions about her covid vaccination status, there were other factors including concerns about her dog's health, which were significantly affecting her. This was an issue Occupational Health had raised. We accept that Ms Waterworth had been aware of that when the claimant joined her in the meeting with her and that this had given Ms Waterworth a particular understanding of the Occupational Health report.

109. By that point the claimant had completed (or almost completed) the time Ms Waterworth had intended that she was to spend in the library completing the induction activities. We preferred Ms Waterworth's account of what was said and that during an earlier discussion Ms Waterworth had referred to the claimant working at St Peters, albeit that initially the claimant would not be undertaking clinical work. We concluded that the claimant's account in her witness statement suggests she misheard or misunderstood what Ms Waterworth said about where she would work. It is clear that the claimant had thought she would be working alongside Ms Brown and was upset to be told this would not be the case.

110. In terms of the specific allegation that Ms Waterworth ignored occupational health recommendations made by Mr Bentley, we concluded on the evidence that by the time the meeting in the office began Ms Waterworth had already made arrangements for the claimant to work elsewhere and not in the library the following week (the allegation about being unsupported being concerned with working in the library without colleagues around the claimant). The recommendations of Mr Bentley were not ignored because there already arrangements in place in line with his recommendations. However unfortunately the meeting broke down before that had been fully explained, and after the meeting the claimant went off sick again. This meant the claimant was unaware of what the new arrangements would have been.

111. Following the meeting Ms Waterworth understood that the claimant had made a complaint about her which led Ms Waterworth to conclude that she should not be dealing directly with the claimant while a grievance was resolved. As a result Ms Waterworth was no longer actively involved in the management of the claimant's return to work and it was passed to other managers.

112. We concluded that none of this was because of the claimant's protected characteristics. Rather it was a rather awkward interaction between an employee and a new manager and a reluctance on the part of the manager to deal with that employee because she thought a complaint had been raised. Ms Waterworth was not aware of the claimant's protected belief so that protected belief at that time so that did not influence her, consciously or subconsciously, in what happened.

113. This complaint is not well founded and is dismissed.

Allegation d (v) Advice from Occupational Health relating to the Claimant was ignored by managers…

b. Dr Ferguson's report – 20 October 2021 ('In my opinion, when Ms Neira returns to work, she would be fit to work in her substantive post. To help keep Ms Neira safe in the workplace, I would recommend the use of appropriate PPE', ignored by Christopher Nicholson, Kelli Waterworth and Clare Brown).

Allegation d (xi) A senior manager, Chris Nicholson, attempted to influence the OH report Dr Ferguson of 27 Oct 2022 – 8 Nov 2022.

a. Hypothetical comparator: a respiratory physiologist unvaccinated against Covid-19 for reasons other than Cs Belief (for example, someone with a medical contraindication to the vaccine).

Issue (f) if so did the Respondent treat the Claimant less favourably than it treated or would have treated the comparator case?

(g) If so, was the reason for that treatment because of the Claimant's Belief?

Hypothetical comparator: a respiratory physiologist unvaccinated against Covid-19 for reasons other than Cs Belief (for example, someone with a medical contraindication to the vaccine).

Real comparator: any unvaccinated staff also working in patient-facing role

114. Shortly after the events of 15 October the claimant had been seen again by Occupational Health, on this occasion time by Dr Ferguson. Dr Ferguson had sent an assessment to Mr Nicholson.

115. Mr Nicholson is the head of the unit in which the claimant worked. He has responsibility for 500 employees. It was clear to the panel that he was somewhat irritated by being expected to deal with this Occupational Health report, but we had no evidence from which we conclude that this was in any way connected with the claimant's covid vaccination status or her protected belief, simply he is a busy senior manager who did not think there was any reason why he would be expected to deal with matters which he considered to be the responsibility of more junior managers. That is very clear from the correspondence.

116. The Tribunal concluded that Mr Nicholson was concerned that the Occupational Health advice had failed to take into account the operational situation that he, as head of unit, faced at that time. He was dealing with a unit under pressure from workloads, facing the additional challenge of the forthcoming

changes in legislation and the operational difficulties that that would present him with and he had responsibility to ensure not only the health and safety of the claimant but of other staff and, of course, of potentially vulnerable respiratory patients. Mr Nicholson's irritation with Dr Ferguson is apparent in the correspondence that he subsequently sent to Dr Ferguson, which never seems to have been replied to. Instead it appears that Dr Ferguson must have raised his own concerns about the email he received because then HR become involved and took over matters.

117. The allegation we had to decide was whether Mr Nicholson had ignored the report. The Tribunal agreed with Mr Price that the fact that Mr Nicholson sent a long reply to Dr Ferguson demonstrated that he did not ignore the report and in fact he had done the opposite. He clearly engaged with the content of it.

118. As a senior manager working in a clinical setting, Mr Nicholson was not satisfied that it was the report was adequate and that Dr Ferguson had taken into account all of the relevant information in relation to the environment the claimant was working in, including the vulnerability of the patents in respiratory care. We do not doubt that Mr Nicholson's concerns were genuine, although perhaps rather intemperately expressed. Given the context of the workplace, it was reasonable for him to query the advice given. We are satisfied Mr Nicholson would have responded in the same way to any OH report for any employee, vaccinated or unvaccinated, if he did not think the OH report properly considered the context of the unit.

119. The allegation that Mr Nicholson attempted to "influence" the Occupational Health report is so closely linked to the allegation above it is difficult to distinguish our reasoning. First we do not accept that as principle that if a manager is concerned that Occupational health advice have not taken into account all of the relevant information and queries the advice given that can properly be called "attempting to influence the report" nor can that reasonably be perceived to be detriment by an employee. We agree with Mr Price that this is simply what one would be expect of a senior manager taking their responsibilities seriously. We did not consider that the claimant could reasonably perceive a manager engaging with OH because they were concerned about the health and safety implications of the OH report as a detriment. If Dr Ferguson had replied to address Mr Nicholson's concerns and Mr Nicholson had then refused to accept the advice perhaps that would be different.

120. We also conclude that there is no evidence to suggest Mr Nicholson would have responded to Dr Ferguson's report any differently if the OH report had been received about a respiratory physiologist unvaccinated against Covid-19 for reasons other than the claimant's belief (for example, someone with a medical contraindication to the vaccine) or any other unvaccinated staff member also working in patient-facing role. As noted we think that if Mr Nicholson had had concerns about advice from OH about a vaccinated member of staff he would have acted in exactly the same way. We accepted that this was not an interaction between Mr Nicholson and Dr Ferguson that happened because of the claimant's protected belief, but because of Mr Nicholson's more general irritation with Dr Ferguson and his report.

121. This complaint is not well founded and is dismissed.

Allegation d (ix) HR being told by a senior line manager, Christopher Nicholson, on 17 November 2021 to place the Claimant on permanent redeployment register if she wished to not be vaccinated.

Issue (f) if so did the Respondent treat the Claimant less favourably than it treated or would have treated the comparator case?

(g) If so, was the reason for that treatment because of the Claimant's Belief?

122. In terms of chronology, the next matter which we had to consider, was the allegation that HR was told by Mr Nicholson on 17 November to place the claimant on the permanent redeployment register if the claimant did not wish to be vaccinated.

123. It is not in dispute that this was this was the instruction given to HR by Mr Nicholson. The reason it was done was the anticipated legislative changes which were coming into force. The respondent had no ability to change the Government's legislation. It was the legislation which was the reason for the anticipated need for redeployment, not the claimant's belief. Although we had no evidence about other unvaccinated staff, we accept that the same instruction would have been given for all unvaccinated staff, whatever the reason for not being vaccinated. This did not seem to be matter in dispute.

124. Given the circumstances at the time, we accept that Mr Nicholson would have had good reason to consider that it was unlikely that there was going to be any other alternative but for the claimant to be redeployed, if possible, if she had not changed her mind about the vaccine. On her case the claimant had been adamant that she would not change her mind. If the respondent was not going to be permitted by law to continue employing the claimant in current role, it was to her advantage to be placed on a redeployment register for any new vacancies for which a vaccine was not mandated. That was not less favourable treatment and the instruction given was because of proposed legislative change.

125. This complaint is not well founded and is dismissed.

Allegation d(viii) Being repeatedly threatened with redeployment or termination if the Claimant did not get the Covid-19 vaccination:

b. 24 January 2022, Christopher Nicholson.

c. 24 January 2022, Christopher Nicholson.

d. 28 January 2022 Christopher Nicholson.

Hypothetical comparator: a respiratory physiologist unvaccinated against Covid-19 for reasons other than Cs Belief (for example, someone with a medical contraindication to the vaccine).

Issue (f) if so did the Respondent treat the Claimant less favourably than it treated or would have treated the comparator case?

(g) If so, was the reason for that treatment because of the Claimant's Belief?

126. This is in essence a repetition of the previous allegations and our findings about these occasions when the claimant was warned that she would have to be redeployed or her employment terminated if she was not vaccinated are the same as our conclusions for the previous allegations of being threatened with redeployment or termination.

127. We accept that what the respondent did was to repeat to the claimant what the implication of the forthcoming legislation would be as the deadline approached and the legislation loomed. The claimant may well have been upset or irritated to have been given the same warnings, but we accept that it was right for the respondent to be clear on what it thought the consequences of the legislation would be for her, especially as it was clear the claimant disagreed with what she was being told. Telling the claimant she was likely to face redeployment or dismissal was not a threat but a warning about the consequences of the legislation. The claimant could not reasonably perceive that as a detriment. In essence what it seems the claimant expected the respondent do was to disregard the impending legislation. It was unclear to the Tribunal on basis she expected the respondent to do that.

128. Importantly we accept that even at this very late stage, the respondent had no way to know that the Government would change its position.

129. In any event we accept that the same warnings about redeployment or dismissal would be given to the hypothetical comparator and were given to other unvaccinated staff.

130. These complaints are not well founded and are dismissed.

Allegation d(vi) An unsuitable and insufficient risk assessment was used to block the Claimant from performing PFTs by Christopher Nicholson & Joshua Peter - 3 Feb 2022 (Kelli Waterworth's office); Christopher Nicholson 16 August 2022.

a. Hypothetical comparator: a respiratory physiologist unvaccinated against Covid-19 for reasons other than Cs Belief (for example, someone with a medical contraindication to the vaccine).

b. Real comparator: The Claimant, Dec 2020 up to April 2021, was allowed to do PFTs through Covid (Delta variant).

And

Allegation d(viii) The Respondent failed to provide authentic evidence used to create the risk assessment requested by C on:

- ***a. 11 March 2022 'Asked [Ian Donoghue] how determined to be high risk and method made of assessment versus OH report saying medium risk'.***

b. Then verbally at resolution meeting on 17 Aug 2022 [Ian Donoghue, Kate Atkinson], and written on 19 Aug 2022 to Christopher Nicholson.

i. Hypothetical comparator: would be someone in the same circumstance as the claimant, but without her philosophical belief, and who is not vaccinated (for example, someone with a medical contraindication to the vaccine).

Issue (f) if so did the Respondent treat the Claimant less favourably than it treated or would have treated the comparator case?

(g) If so, was the reason for that treatment because of the Claimant's Belief?

Allegation d(vi)

131. We agreed with Mr Price that the context of what happened at that time is significant. Unexpectedly, on 31 January 2022 the Government had announced at very short notice that the legislation in relation to mandatory vaccines was being dropped. This would have been difficult for any employer to manage but the Tribunal concludes that for a large organisation within the NHS (and perhaps particularly for a large operational unit which is dealing with patients particularly vulnerable to covid such as those being treated in a respiratory unit), that announcement inevitably had significant implications for the organisation of the workforce. The entire basis of many weeks or even months of workforce planning had to be changed almost overnight.

132. We accept that from Mr Nicholson and Mr Peter's perspective, there was an understanding that the covid vaccine offered both a reduction in risk of serious illness to the vaccinated individual and in terms of the transmission risk to others. We appreciate the claimant does not agree with that, but equally we accept that this was the widely acknowledged medical position. Mr Nicholson told us this meant the mandatory vaccination policy was understood to be consistent with managing the health and safety risks posed by covid in the respiratory unit. This was a unit which cared for patients with respiratory vulnerabilities and whose conditions could increase the risk for staff. More particularly one of the procedures which the claimant had undertaken – undertaking PFTs or "pulmonary function tests" which lung function which was thought to present a particular transmission risk due to the nature of the test being undertaken, and the concern was the risk that performing the tests could pose to staff. The change of government policy on vaccination did not change the need for the respondent to manage the health and safety risks in the workplace generally and in relation to this part of the workplace in particular.

133. We accept that the respondent has a large workforce deployed in many different settings and with very different risk profiles in terms of risks to staff and patients from covid infection. We did not hear a great deal of evidence in relation to the risks faced in different patient facing roles, but we think it is obvious and inevitable that there will be differences. Mr Nicholson explained to us (and we accepted his evidence) that the Government's change of position meant that the

respondent now suddenly had to re-evaluate its workforce mobilisation, and it considered that there was a risk to the health and safety of its staff for those without vaccinations, particularly in some clinical settings in light of the work undertaken. That applied to the claimant. That was the case regardless of the reason for staff not being vaccinated, whether for health or medical reasons, religious beliefs, philosophical belief reasons or more general vaccine scepticism or other reasons.

134. We accept that it was decided by the respondent that some sort of risk assessment process would be required. Mr Peters and Mr Nicholson had planned to meet the claimant in anticipation of the new legislation Now that had fallen away they used the opportunity to meet to explain the risk assessment.

135. In terms of the claimant's allegation that an unsuitable and insufficient risk assessment was undertaken, we faced some difficulty in terms of the evidence presented to us. This Tribunal is simply not in a position on the basis of the evidence that was presented to us to make any findings that the risk assessment was unsuitable or insufficient. That almost certainly would have required some sort of expert evidence being led by the claimant in relation to the risk assessment and we did not have that. The fact that the claimant disagreed with the risk assessment does not make it unsuitable or insufficient. The risk assessment presented to us appears to be on its face a perfectly sensible risk assessment document which covers the matters which, as an industrial jury, we might expect to see covered in that sort of document. The claimant disputes that pulmonary function tests represent a significant risk to health and safety because of covid, but we accept that Mr Peter and Mr Nicholson genuinely considered it to be high risk based on their assessment of medical opinion at the time. Given the limited evidence made available to us and we have no reason to find that to be an unreasonable assessment, even if there are differing views as suggested by the claimant. In terms of the appropriateness of the risk assessment in those circumstances however we were simply not been given evidence which enables us to make findings about its appropriateness in the circumstances.

136. We concluded that the claimant had not shown any basis for us to conclude that the reason for this risk assessment being applied to her was related to her protected belief. We concluded that the same risk assessment would have been applied to an unvaccinated member of staff who was not vaccinated for reasons unrelated to protected belief.

137. In terms of the suggestion that we should draw an adverse inference from the fact that the claimant had performed PFTs before her sickness absence in April 2021, we preferred Mr Price's submission that the claimant could not rely on her position in the past for comparison purposes because s13 says discrimination occurs if "A treats B less favourably than A treats or would treatment <u>others</u>".

138. In any event the circumstances in April 2021, which was only very shortly after it would have been possible for any member of staff to be fully vaccinated, was clearly materially different from that in February 2022. We were told that by January 2021 all health care workers working within the respondent were legible to receive the first dose of the covid vaccine, but the completion of vaccination required two doses with the second being given several weeks after the first and

there could be reasons for vaccinations being delayed. There was no agreed position between the parties about the situation in April 2021 and we had little evidence about this, but from what we heard we conclude the delineation of staff based on vaccination status had not yet been organised. We could not draw any conclusions about the treatment of the claimant with reference to the manifestation of her protected belief in comparison with others at this time.

139. These complaints are not well founded and are dismissed.

Allegation d(viii)

140. This complaint relates to the claimant's request for early resolution, essentially her grievance which was considered by Mr Donoghue.

141. In terms of the allegation the first point is that the claimant could not reasonably perceive that she was subject to any detriment when she did not receive an immediate reply to the points raised in her grievance submitted on 11 March 2022. When she submitted her grievance she must have understood and anticipated that it would take time to consider that. An initial meeting was delayed at the claimant's request while she waited for documents requested under her data subject rights. In the usual way a resolution meeting was arranged when Mr Donoghue dealt with all the points that had been raised. The claimant must have expected her concerns to be investigated and Mr Donoghue had a number of matters to look at.

142. It has not been necessary for us to consider the detail of the grievance process but we accepted that there was a careful and considered determination of the claimant's grievance and her request for the risk assessment evidence was a part of that process.

143. Following the claimant's request on 11 March, Mr Donoghue did what might be expected in the circumstances and asked for clarification of the risk assessment. When he came to reply to the claimant in relation to the whole of the grievance, Mr Donoghue explained the information he had been provided with about the assessment of risk by OH and Mr Nicolson.

144. The claimant is critical of the information that was provided. She thinks that an incomplete position was provided, but we accepted that Mr Donoghue thought he had provided the relevant information to the claimant – he had passed on what he was provided with by Occupational Health and the links to the ALAMA process. There is a certain amount of information built into a risk assessment tool in terms of underlying calculations, but we accept that Mr Donoghue was not in a position to interrogate that. We find no evidence to conclude that Mr Donoghue would have done anything differently if he was dealing with another unvaccinated comparator employee or indeed that in comparable circumstances involving any employee questioning a risk assessment, he would have done anything differently. Mr Donohue, in essence, relied on the information he was provided with to answer the issues raised.

145. In terms of the allegation against Ms Atkinson, the claimant chose not to challenge her evidence and her denials of discrimination but in any event the

appeal panel engaged with the issues the claimant raised and indeed as a result recommended a review of risk assessment moving forward and offered the claimant the opportunity to be rescored but the claimant did not want to share her medical information to enable that to happen.

146. In terms of presenting authentic evidence about the risk assessment, it is clear that the basis for modelling was explained to the claimant as best the respondent could – the respondent's managers were not in a position to outline all of the underlying modelling used by ALAMA but that did not mean the explanation given to the claimant was not authentic.

147. It seemed to us that what the claimant wanted to do was to challenge the risk assessment model itself but we did not have any evidence to suggest the model was inherently biased. The respondent had adopted a nationally risk assessment tool used by the NHS and others, to seek to properly assess and manage health and safety risks. It did not do that because of the claimant's protected belief.

148. These complaints are not well founded and are dismissed.

Allegation d (ii) Being made to work in isolation in the library for two months from 28 January 2022 to 28 March 2022 by Christopher Nicholson and/Clare Brown.

> ***a. Hypothetical comparator: respiratory physiologist, unvaccinated against Covid-19 for reasons other than Cs Belief, returning from long-term sickness absence on a phased basis;***
>
> ***b. Actual comparator: any unvaccinated staff also working in patient-facing role, see FOI [621].***

And

Allegation d (v) Not being allowed to work in a patient facing role from 28 January 2022 until 28 March 2022 by Christopher Nicholson.

> ***a. Hypothetical comparator: respiratory physiologist, unvaccinated for reasons other than Cs Belief, returning from long-term sickness absence on a phased basis;***
> ***b. Real comparator: any unvaccinated staff also working in patient-facing role, see FOI [621]***

And

Allegation (xii) Chris Nicholson not permitting the Claimant to return to her substantive duties performing PFTs from 14 October 2021 until present day (but for purposes of this claim, until 5 February 2023).

149. The tribunal found a significant overlap between these issues such that it make sense to set out our conclusions on these closely linked complaints in the same section.

150. When the claimant first returned to work after her sickness absence between October 2021 and 28 January 2022 she was required to undertake a process of updating and retraining just as she had done previously. It appeared to be accepted by respondent's witnesses that she was required to work or mainly work in the library for this although there seemed to be some confusion about that and respondent witnesses suggested that they thought she had been working in the respiratory unit. We accept that at the time space on the unit was extremely limited and available computers and offices were being used for active clinical work. The claimant could not reasonably perceive being required to undertake the standard return to work process nor using the library for that in these circumstances as less favourable treatment. She could not reasonably expect the limited space for patient work to be given up for her to use a computer. We accept that the library is an area used by staff when they are not undertaking patient work so the clamant was not isolated in the library in the sense of being made to work on her own and it was a reasonable location to assign her to initially on her return to work to undertake the return-to-work process.

151. However once the claimant had completed that return to work "re-induction" process, we accept that she reasonably perceived being made to keep "working" in the library when she had no actual patient work to do in line with her usual duties, as a detriment.

152. We accepted that in the immediate aftermath of the Government's reversal on the vaccine requirements, there were workforce mobilisation issues which took a time to resolve. The fact that this coincided with the claimant's return to work form sickness was perhaps a complicating factor in her case. The respondent had to work out what duties unvaccinated staff could safely do. We accepted that an employee who was not vaccinated but who did not share the claimant's protected belief, the hypothetical comparator relied upon by the claimant, would have been treated the same way.

153. We also concluded that the claimant's position was also complicated by the fact that the claimant had written to the respondent on 7 February 2022 to raise various objections to the risk assessment and she then raised a grievance on 7 March. This perhaps made it inevitable that managing her return to work would be more complicated. Significantly we also accepted that although it appears that this period of time lasted a surprising period of time, the claimant was working on a gradual return to work which meant in fact she worked a very limited number of shifts during this period of time. In light of this there were non-discriminatory reason for the claimant not returning to a patient facing duties and being allocated the library during February.

154. However by March the claimant was still allocated to the library for work purposes. The respondent's managers were vague in their evidence about this. There seemed to be a lack of personal accountability between the respondent's managers in terms of whose responsibility it was to ensure the claimant was

returned to “active duties”. To some extent this seems to have been due to a failure to clearly allocate a line manager who was responsible for the claimant given the ongoing dispute with Ms Waterworth, but that would not explain why the claimant was not being considered and managed. No-one seemed able to explain why the library working had continued for so long.

155. The claimant was eventually allowed to return to the unit on 28 March. As well as not explaining why the claimant had been assigned to the library for so long, Mr Nicholson was unable to recall what had changed to allow her return. There is a noticeable lack of information in the witness statements about that. Other witnesses were unable to recall what had happened and explain the decision-making process.

156. It was not disputed that the claimant had completed the retraining required of her in the library sessions. She could reasonably expect to return to her substantive duties and the respondent could reasonably be expected to have determined how to manage that, even with any health and safety concerns in relation to the risk assessment. By this point in time the claimant's relationship with Mr Nicholson had become somewhat strained and the source of that was that Mr Nicholson disagreed with the claimant about covid vaccination and the claimant’s concerns. We concluded that the length of the time which the claimant had spent in limbo in the library without any explanation being offered then or now, given that this was ultimately within Mr Nicholson’s control, was such that the burden of proof to show that there was a non-discriminatory reason for this less favourable treatment fell on the respondent.

157. In the absence of any evidence of non-discriminatory reason for the claimant’s continued assignment to the library we draw an inference that the claimant’s protected belief and her decision not to be vaccinated influenced Mr Nicholson’s interest in getting the claimant back to her substantive role and so the management of that. We concluded that Mr Nicholson would have not treated an employee who was not vaccinated for reasons other than the claimant’s protected belief, in the same way.

158. This means there are grounds to uphold partially uphold complaints d(ii) and d(v) although as a panel we struggled to understand any difference between those complaints. The claimant had been assigned to working in the library because she was not being allowed to patient facing work during the period to 28 March 2022. The allegations are essentially just different ways of expressing the same complaint. The claimant was not subject to less favourable unlawful treatment throughout the period of 22 January 2022 to 28 March because of the manifestation of her protected belief, but she was subject to less favourable treatment because of that belief during the shifts she worked during her phased return during March.

159. The final allegation is in relation to Mr Nicholson not permitting the claimant to return to her substantive duties performing pulmonary function tests from 14 October 2021 to the present day, which for these purposes means 5 February 2023 the date when the claim was submitted.

160. This allegation overlaps with allegations d(ii) and d(v), which has noted are themselves overlapping allegations. In terms of deciding this final allegation we focused on the period of 28 March 2022 when she returned to some patient facing duties) to 5 February 2023 (when she submitted her claim). On 28 March 2022 the claimant returned to working in the unit but she was not assigned to the same work. We therefore considered whether the allocation of new duties was less favourable treatment because of her protected belief.

161. The claimant is employed as a Band 6 respiratory physiologist. She is employed on contractual terms which enable the respondent to decide how she is deployed within the needs it has to meet respiratory needs of those it serves in the community. The respondent has the ability to decide how the claimant is deployed within those parameters.

162. We accepted Mr Nicholson's evidence that during the course of the pandemic and as the service moved out of the pandemic the needs of the community have changed. There is an increasing need in particular for support for those with sleep apnoea, and there is an increasing need for other sorts of support for different patients. He also explained that there were some difficulties in relation to the claimant returning to performing PFTs because she does not hold a relevant registration. There is some dispute about whether that is correct or not which this tribunal is not able to resolve on the basis of the evidence offered but we accept that Mr Nicholson has taken the decision that the claimant is not appropriately qualified to continue to perform PFTs.

163. The tribunal accepts that the respondent has a right to decide how best to deploy staffing resources to meet the respiratory needs of the community, within the scope of the claimant's contract of employment. We find that the claimant has not been required to perform duties which fall outside the scope of her duties and the claimant does not have a right to dictate to the respondent what particular duties she should be allowed to preform because she finds them the most interesting, enjoyable or rewarding.

164. In the circumstances we found that the claimant could not reasonably perceive the duties she was signed after her return to the unit on 28 March 2022 as being a detriment and less favourable treatment and although we had drawn an inference of discrimination from her being required to work in the library during March, we did not conclude that was a basis for concluding discriminatory treatment of her had continued because the claimant would prefer to be undertaking her duties.

165. In any event we accept Mr Nicholson's decision about the work the claimant was to undertake from March was based on patient need and that was a non-discriminatory reason. We were satisfied that the hypothetical comparator relied upon by the claimant, would have been treated the same way.

166. Our conclusions about these overlapping allegations was that the claimant had been subject to a period of discriminatory conduct but that had concluded some 11 months before her claim was lodged at the tribunal. That meant the tribunal could only uphold the complaint if we concluded that it would be just and

equitable to extend time because it is just and equitable to do so in accordance with section 123 of the Equality Act 2010.

167. In terms of how we approach the question of whether we should extend time on the basis that it is just and equitable, we have taken into account the guidance in **Abertawe Bro Morgannwg University Local Health Board v Morgan** in which Lord Justice Leggatt identified the relevant issues for us to take into account. He drew our attention to the elements which might be taken into account under the Limitation Act 1980. Those are not requirements which are set out in the Equality Act and we recognise that we have a broad discretion and we can take into account any factor provided we are satisfied it is relevant, in deciding whether or not to exercise our ability to extend time.

168. The factors which are almost always relevant to consider when exercising our discretion are the length of the delay, the reasons for it and whether the delay has prejudiced the respondent, for example by preventing or inhibiting it from investigating the claim while matters are still fresh.

169. Mr Price drew our attention to the judgment of the Court of Appeal in **Robertson v Bexley Community Centre.** However we have reminded ourselves this case informs us how to approach in the context of the wide statutory discretion which has been granted by Parliament which allows this tribunal to extend time where it is just and equitable to do so. The judgment in the **Robertson** case does not mean that exceptional circumstances are required in order for time to be extended. The law does not require that – it simply requires that an extension of time should be just and equitable in the circumstances of the case.

170. What the judgment does remind us is that this requires a positive exercise of a judicial discretion exercised by this Tribunal. It is for the claimant to establish that that discretion should be exercised in her favour. It is not for the respondent to persuade us that it should not, and we accept Mr Price's argument that we have to determine this on the basis of the evidence before us including the evidence the claimant chose to provide us with about her reasons.

171. The fact that time was to be considered at this hearing was clearly identified within the List of Issues, and it was clearly referred to by Employment Judge Johnson in his Case Management Orders. Despite that we have had no evidence from the claimant to explain why she did not bring her claim within the primary time limit. Although the claimant remained unhappy about the precise nature of her duties, she had returned to substantive duties in March 2022. The claimant was legally represented throughout the proceedings and had been represented by her trade union throughout much of the process. We can see that the claimant had made reference to bringing legal action in March 2022 in correspondence but for whatever reason the claimant chose not to do so. That strongly suggests to us that the claimant must have had at least some knowledge of her legal rights, or at the very least knowledge that she might have grounds to bring a legal claim which could reasonably be expected to have prompted her to investigate the statutory time limits to ensure the primary time limit for bringing a complaint was complied with.

172. The claimant subsequently brought a grievance through the resolution process but she brought her claim before that process resolved itself. The claimant did not tell us what prompted her to bring her legal claim when she did.

173. We accept the strength in the submission from Mr Price that the respondent has faced real difficulty in answering allegations about things which happened a significant time before it received notice of a legal complaint. This was a case where it was clear that at times witnesses have struggled to recall events and what happened and why. We conclude that the respondent faced forensic prejudice is showing that a hypothetical comparator relied upon by the claimant, would have been treated in the same way as her in relation to her return to substantive duties after the Government withdraw the legislative proposals. We accept that this decision does create prejudice to the claimant but in the absence of any explanation from the claimant about why she did not bring a claim when she had raised that possibility and when it seems she was aware of the relevant facts in dispute, we find that the balance of equity falls in favour of the respondent and that it would not be just and equitable to extend time in relation to the events of March 2022.

174. On that basis we conclude that none of the allegations in this case are well-founded.

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Approved by Employment Judge Cookson

Date:9 April 2025

REASONS SENT TO THE PARTIES ON

Date: 28 April 2025

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FOR THE TRIBUNAL OFFICE

IN THE MANCHESTER EMPLOYMENT TRIBUNAL **CASE NO. 2402379/2023**

BETWEEN

RACHEL NEIRA **CLAIMANT**

and

EAST LANCASHIRE HOSPITALS NHS TRUST **RESPONDENT**

DRAFT LIST OF ISSUES

(a) Was the claim presented within 3 months of the discriminatory act(s) complained of?

(b) If not, should the Tribunal extend time to determine the claim pursuant to s.123(1) EqA 2010?

(c) Does the Claimant's belief in 'informed consent with regards to medical treatment' amount to a protected belief (the 'Belief')? This is conceded by R.

(d) If so, was the Claimant subjected to the following detriments:

(ii) Being told that she could be a 'super spreader' of Covid 19 by Kelli Waterworth on 11 October 2021 on a Teams meeting.

a. Hypothetical comparator: a respiratory physiologist unvaccinated against Covid-19 for reasons other than Cs Belief (for example, someone with a medical contraindication to the vaccine).

(iii) Being made to work in isolation in the library for two months from 28 January 2022 to 28 March 2022 by Christopher Nicholson and/Clare Brown.

a. Hypothetical comparator: respiratory physiologist, unvaccinated against Covid-19 for reasons other than Cs Belief, returning from long-term sickness absence on a phased basis;
b. Actual comparator: any unvaccinated staff also working in patient-facing role, see FOI [621].

(iv) Senior line manager, Kelli Waterworth, attempted to coerce the Claimant into getting vaccinated on 11 and 15 October 2021.

a. Hypothetical comparator: a respiratory physiologist unvaccinated against Covid-19 for reasons other than Cs Belief (for example, someone with a medical contraindication to the vaccine).

(v) Not being allowed to work in a patient facing role from 28 January 2022 until 28 March 2022 by Christopher Nicholson.

a. Hypothetical comparator: respiratory physiologist, unvaccinated for reasons other than Cs Belief, returning from long-term sickness absence on a phased basis;
b. Real comparator: any unvaccinated staff also working in patient-facing role, see FOI [621].

(vi) Advice from Occupational Health relating to the Claimant was ignored by managers.

a. Chris Bentley's report – 15 October 2021 ('Occupational Health recommends the client is supported with colleagues around her', ignored by Kelli Waterworth).

i. Hypothetical comparator: respiratory physiologist, unvaccinated against Covid-19 for reasons other than Cs Belief, with same OH advice
ii. Real comparator: any unvaccinated staff also working in patient-facing role, see FOI [621].

b. Dr Ferguson's report – 20 October 2021 ('In my opinion, when Ms Neira returns to work, she would be fit to work in her substantive post. To help keep Ms Neira safe in the workplace, I would recommend the use of appropriate PPE', ignored by Christopher Nicholson, Kelli Waterworth and Clare Brown).

i. Hypothetical comparator: respiratory physiologist, unvaccinated against Covid-19 for reasons other than Cs Belief, with same OH advice
ii. Real comparator: any unvaccinated staff also working in patient-facing role, see FOI [621].

(vii) An unsuitable and insufficient risk assessment was used to block the Claimant from performing PFTs by Christopher Nicholson & Joshua Peter - 3 Feb 2022 (Kelli Waterworth's office); Christopher Nicholson 16 August 2022.

a. Hypothetical comparator: a respiratory physiologist unvaccinated against Covid-19 for reasons other than Cs Belief (for example, someone with a medical contraindication to the vaccine).
b. Real comparator: The Claimant, Dec 2020 up to April 2021, was allowed to do PFTs through Covid (Delta variant).

(viii) The Respondent failed to provide authentic evidence used to create the risk assessment requested by C on:

a. 11 March 2022 'Asked [Ian Donoghue] how determined to be high risk and method made of assessment versus OH report saying medium risk'.

b. Then verbally at resolution meeting on 17 Aug 2022 [Ian Donoghue, Kate Atkinson], and written on 19 Aug 2022 to Christopher Nicholson.
    i. Hypothetical comparator: would be someone in the same circumstance as the claimant, but without her philosophical belief, and who is not vaccinated (for example, someone with a medical contraindication to the vaccine).

(ix) Being repeatedly threatened with redeployment or termination if the Claimant did not get the Covid-19 vaccination:
a. Kelli Waterworth 15 October in the library meeting room.
b. 24 January 2022, Christopher Nicholson.
c. 24 January 2022, Christopher Nicholson.
d. 28 January 2022 Christopher Nicholson.
    i. Hypothetical comparator: a respiratory physiologist unvaccinated against Covid-19 for reasons other than Cs Belief (for example, someone with a medical contraindication to the vaccine).

(x) HR being told by a senior line manager, Christopher Nicholson, on 17 November 2021 to place the Claimant on permanent redeployment register if she wished to not be vaccinated.
a. Hypothetical comparator: a respiratory physiologist unvaccinated against Covid-19 for reasons other than Cs Belief (for example, someone with a medical contraindication to the vaccine).

(xi) A senior manager, Chris Nicholson, attempted to influence the OH report Dr Ferguson of 27 Oct 2022 – 8 Nov 2022.
a. Hypothetical comparator: a respiratory physiologist unvaccinated against Covid-19 for reasons other than Cs Belief (for example, someone with a medical contraindication to the vaccine).

(xii) Chris Nicholson not permitting the Claimant to return to her substantive duties performing PFTs from 14 October 2021 until present day (but for purposes of this claim, until 5 February 2023).

a. Hypothetical comparator: a respiratory physiologist unvaccinated against Covid-19 for reasons other than Cs Belief (for example, someone with a medical contraindication to the vaccine).

(e) By electing not to receive the Covid-19 vaccine, was the Claimant manifesting her Belief?

(f) If so, did the Respondent treat the Claimant less favourably than it treated or would have treated the comparator case?

(g) If so, was the reason for that treatment because of the Claimant's Belief?