EMPLOYMENT TRIBUNALS

Claimant: Ms. J Panton

Respondent: LTE Group

Heard at: London South (by video)

On: 24, 25 and 26 June 2025

Before: Employment Judge Cawthray
Ms. N Styles
Mr. P Morcom

Representation
Claimant: John J.F. Neckles – representing as a friend - not in capacity as union representative

Respondent: Mr. D Jones, Counsel

JUDGMENT having been sent to the parties on 30 June 2025 and written reasons having been requested in accordance with Rule 60 of the Employment Tribunals Rules of Procedure, the following reasons are provided:

REASONS

Background, Procedure and Evidence

1. The Claimant contacted ACAS for the purpose of Early Conciliation on 15 June 2021 and was issued with an Early Conciliation Certificate on 1 July 2021. She submitted her claim to the Employment Tribunal on 12 July 2021.

2. The Claimant remains employed by the Respondent.

3. A Case Management Preliminary Hearing took place on 28 February 2022 and was conducted by Employment Judge Bryant. At this hearing Employment Judge Bryant allowed the Claimant's application to add a direct race discrimination complaint.

4. No reasonable adjustments were required for this hearing.

5. At the start of the hearing the Employment Judge checked the documents that had been provided. The Respondent had produced a bundle that ran to 502 pages. However, the electronic bundle (which was all the Tribunal had) was not in a clear or organised form and the numbering was not clear and was confusing. The Respondent had produced witness statements for:

   Diane Koppit, Sharon McDermot, Nicola Phillips and Tarron Pearson.

6. The Claimant had submitted a witness statement.

7. The Employment Judge explained to the parties that they would not read all the bundle and they needed to be directed to documents that the parties required them to read.

8. The Respondent had produced a draft list of issues and the Employment Judge had a detailed discussion with the parties at the start of the hearing in an attempt to get clarification on the unlawful deduction from wages claims and the dates relating to the allegations of less favourable treatment.

9. After a break, the Claimant's representative, Mr. Neckles, informed the Tribunal that the Claimant was withdrawing her unlawful deduction from wages complaint.

10. The Employment Judge explained that complaint would be dismissed. Mr. Neckles then clarified the time frame for the discrimination allegations.

11. A further break was permitted to allow the Respondent to consider their position in view of the withdrawal and clarification of the alleged discrimination. The intention was then to start the Claimant's evidence at 1.45pm as the whole morning had been taken with trying to clarify the position and allowing breaks for Mr. Neckles to obtain instructions from the Claimant. The Employment Judge directed the representatives to ensure that the witnesses all had clean copies of the witness statements and bundle available for use in cross examination and be ready to confirm if they would affirm or take an oath.

12. On return at 1.45pm Mr. Jones explained that in view of the withdrawal of the unlawful deduction from wages claim the Respondent would only call Ms. Pearson and Ms. Philips as witnesses. The Employment Judge checked the Claimant had the documents she needed. She did not have a clean copy of her witness statement and had to locate another copy. The Claimant did not have a copy of the Respondent's witness statements. Mr. Neckles stated he had not sent the Respondent's witness statements to the Claimant, as he had wanted her to focus on her own evidence and said he was going to ask her questions after cross examination. The Employment Judge gave the Claimant to be sent the Respondent's witness statement and read them and after returning the Claimant said there was lots of information in the statements that she had comments on. At this time it was past 2.30pm. The Employment Judge noted that she was concerned that the Claimant had not previously seen the statements

and asked Mr. Jones to set out the Respondent's position. Mr. Jones explained that in fairness to the Claimant he considered it sensible for the Claimant to start her evidence the next day, and given the withdrawal he still felt the matter could be managed in the allocation hearing time.

13. The Tribunal panel agreed that this was a sensible way forward.

14. The Employment Judge clearly explained that all the witnesses needed to have a clean copy of the witness statements and bundle available for when they are giving evidence and are not permitted to have any other documents. At the start of day 2, before the Claimant started giving evidence the Employment Judge checked that the Claimant had copies of the necessary documents and no other documents with her. Relatively early into the day the Claimant referred to a document that she said she no longer had and then also referred to some information that she said she had noted and she said she had some documents on the floor in the room, but they were not within view. Mr. Jones set out his concerns about the situation and the Employment Judge directed the Claimant again that she can only have in view the exchanged clean witness statements and bundle.

15. Both parties gave oral submissions.

16. For completeness, it is noted that three final hearings had previously been listed and postponed.

Issues

17. The issues for determination, as discussed and agreed by the parties, are set out below.

Time limits

18. Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

    Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
    If not, was there conduct extending over a period?
    If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
    If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
        Why were the complaints not made to the Tribunal in time?
        In any event, is it just and equitable in all the circumstances to extend time?

Direct race discrimination

19. The Claimant's race is Black British of Caribbean origin.

20. Did the Respondent do the following things:

    Allegation 1 - In September and October 2020, deny the Claimant the right to refuse to work in a wing 'infested' with COVID-19;

    Allegation 2 - From 1 December 2020 until 12 July 2021, deny the Claimant hours that instead were given to her colleague 'Isabelle';

    Allegation 3 - From February 2021 until 12 July 2021, did Nicola Phillips (Line manager) refuse to allow the Claimant to cover ESOL classes on Tuesdays and Thursdays and instead brought in her own son (Ethan Phillips) to cover them;

    Allegation 4 - On 26 August 2021, did the Respondent offer 'cover' work to Nicola Phillips's daughter (Charis Phillips), Ethan Phillips, Simon Bennett and Lisa Shipton instead of the Claimant

21. Was that less favourable treatment?

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

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

24. The claimant says they were treated worse than the persons listed below and in the alternative relies on a hypothetical comparator.

Isabelle Falm, Anna Antonio, Ethan Phillips; Chair Phillips; Simon Bennett and Lisa Shipton,

25. If so, was it because of race?

Findings of Fact

26. The findings of fact were made on the balance of probabilities, based on the evidence presented during the hearing.

27. The Respondent provides education and training services in prisons, young offenders institutes, secure hospitals and secure centres.

28. The Claimant joined the Respondent following a TUPE transfer in or around 2015 or 2016. She has been working at HMP Wandsworth since around 2008.

29. The Claimant was employed as a Permanent Sessional Lecturer. During her time at the Respondent she taught both English and English as a second language (ESOL). Around the time of Covid the Claimant predominantly taught ESOL. The Claimant worked on the prison wings for four days a week Monday to Thursday.

30. HMP Wandsworth prison requires educational services and the Respondent provides them. The service needs vary depending on the prison population and the Respondent works to provide services for the various sites under an Annual Development Plan (ADP). The ADP changes.

31. At the time claim is about Nicola Phillips was the Respondent's Hub Manager and Claimant's line manager at the time and Tarron Pearson was Local Education Manager.

32. Between March and August 2020 none of the Respondent's employees were permitted to work in the prisons and staff temporarily worked from home due to the Covid outbreak. The ADP was being reviewed every 2 months during covid. During this period sessional staff were paid an average, the Claimant was paid an average of 4 days.

33. In June and July 2020 discussions about returning to the prison were undertaken with staff. The Claimant did not raise any concerns about Covid with her line manager, Nicola Philips.

34. During the course of the hearing the Tribunal was directed to letters dated 23 February 2021 and 17 March 2021 which contained information for extremely clinically vulnerable persons. There was no evidence that the Claimant disclosed any health conditions to the Respondent or told them that she should be shielding at the point of returning to work in the prison in August and September 2020.

35. In August and September 2020 the Respondent sought to encourage all staff to return to work in the prison on a partial basis using a bubble system. The Claimant returned to working in the prison on a partial basis on a Monday and Wednesday. The panel was not directed to any clear evidence indicating that the Claimant raised any concerns about returning to work in the prison twice a week with the Respondent.

36. Naturally, the Claimant was anxious about Covid and the potential to become unwell and that as she lived alone there would be no one to care for should she become unwell.

37. Some of the Respondent's staff shielded and did not return to work in the prison initially.

38. By the end of September 2020 the Claimant was working 2 days a week in the prison and 2 days from home. The Respondent discovered that Anna Antonio, an employee who had joined the Respondent shortly before the Covid outbreak, had not undertaken what has been referenced as personal protection training. The Respondent did not permit Anna Antonio to work on the prison wings because she had not completed the requisite training. The Claimant, in oral evidence, said that she had not completed

the personal protection training. There is no mention of this in her witness statement. The Respondent's management, specifically Ms. Philips and Ms. Pearson, had assumed that the Claimant had completed this training as she had been working on the prison wings for many years, including when she was employed by her previous employers. On this understanding, Ms. Philips and Ms. Pearson did not check with the Claimant what training she had or had not taken. The Tribunal were not directed to any evidence that she told the Respondent about her lack of training at the time.

39. The Tribunal was not directed to any evidence that the Claimant asked not to work on any wing at the time.

40. After an initial phased return the Respondent sought to move back to all staff working in the prison. All staff were asked to return to work in the prison for all their working hours during October.

41. Initially, in a conversation with Diane Koppit, the Claimant agreed to return to work on site for her four days a week, then in an email dated 1 October 2020 to Diane Koppit she said:

> *"Thank you for your email. Thank you for explaining the situation properly to me about the MOJ and Novus.*
>
> *However, I am aware that if I agree to a different kind of delivery, it could fail. This could leave me vulnerable.*
>
> *Whilst I am concerned about what is good for you, I am more concerned about what is good for me (typically). I will therefore confirm that I have said I am available to work four days a week, Mon - Thursday at home and on site, if the site is safe, as of Monday 19th October.*
>
> *Thank you."*

42. Ms. Koppit sent the Claimant several email replies. In short, she explained the Claimant was needed to work on site. She offered the Claimant three options. She explained continued working from home was no longer an option, directed her to sources for risk assessments and asked the Claimant to confirm her position by 2 October 2020 and explained that option 3 would be implemented if she did not reply.

43. The three options were:

> *"1. You continue to fulfil the hours you have previously worked and attend site as and when required (which will be determined by the organisation)*
>
> *2. If your personal circumstances have changed and you are not able to commit to the hours you have previously worked, please let me know what hours you are able to work and we will consider to reduce your hours in line with this*
>
> *3. If you do not wish to voluntarily reduce your hours nor will attend site as and when required, with effective from Monday 19th October you will only be paid for the hours you work (which may or may not be on site, as*

determined by the organisation) and this is your 2 weeks' notice in writing in line with your contract of employment. We will also consider to undertake an investigation with regards to the allegation of 'refusing a reasonable management request'."

44. The Claimant did not return to working in the prison for more than 2 days a week.

45. From the end of October 2020 the Claimant worked 2 days per week, on site, on Mondays and Wednesdays. The Claimant's pay was reduced and she was paid for 2 days work per week, following the exchange of emails.

46. The Claimant later expressed her dissatisfaction with only working 2 days a week and that she did not agree to the change.

47. In December 2020 the Claimant had a conversation with Anna Antonio. In the Claimant's witness statement she quotes Anna Antionio as saying:

"I have been taken off the wings by Tarron. I'm not allowed to go on. Tarron said. If anything happened to me, it could backfire on her because they're letting her go on the wings, but it hasn't been approved."

48. On 2 December 2020 the Claimant met with Ms. Pearson. She was accompanied by her trade union representative. At the meeting the Claimant said she wanted to work four days a week and for this to be a combination of working at home and in the prison. Ms. Pearson explained the ADP required staff to work at the prison and the additional two days that she had previously worked were not available as they had not been included in the ADP.

49. The Tribunal was not directed to any evidence in which the Claimant requested that she be given additional hours working in the prison between 1 December 2020 and 12 July 2021, save for as discussed at the meeting on 2 December 2020. The Tribunal was not directed to any evidence in which the Claimant was refused hours that were given to Isabelle between 1 December 2020 and 12 July 2021. The Claimant has not specified, nor did she direct the Tribunal to documents, setting out the hours she considers Isabelle worked, or who she asked and when, and when any such request wasrefused and when.

50. Isabelle was a Cover Tutor for English at HMP High Down and HMP Wandsworth. She was not a permanent member of staff. She was allocated hours based on an as needed basis, and did not have set hours. Isabelle was employed between 3 March 2020 and 19 June 2021.

51. The Claimant met with the onsite trade union representative, UCU, and became aware of the Tribunal process, including time limits, around January 2021. She decided to try and resolve her concerns internally in the first instance.

52. The Claimant submitted a grievance on 1 February 2021. She raised concerns about the management of Covid. The Tribunal have not read the grievance letter in full.

53. A grievance process was undertaken, and the key stages were: a grievance meeting took place on 11 March 2021 and a grievance outcome was issued on 1 April 2021. The Claimant appealed the grievance outcome on 8 April 2021 and a grievance appeal outcome was issued on 1 June 2021.

54. The Claimant says that Ms. Philips refused to allow her to cover English classes on Tuesdays and Thursdays and brought her son, Ethan Philips, in to cover them between February and 12 July 2021. The Claimant, whilst affirming her evidence, said there were parts of her statement that referred to ESOL but that should read English and in cross examination clarified it was English classes, not ESOL, that she says were given to Ethan Philips.

55. The Tribunal found that Ms. Philips was not involved in recruiting her son. He worked in a different team under a different line manager. Initially Ethan Philips was a Sessional Tutor and taught maths, he did not teach English or ESOL. From April 2021 Ethan Phillips started a new role as Learning Support Practitioner.

56. The Claimant alleges that on 26 August 2021 Ms. Philips offered cover to work to Charis Philps, Ethan Phillips, Simon Bennett and Lisa Shipton, but she did not offer cover work to the Claimant.

57. In oral evidence the Claimant said it was English work that was covered as Martine Fontenelle was away.

58. Charis Philips, Ms. Philip's daughter, covered a period of approximately 4 or 5 days in August 2021 due to sickness absence. Charis Philips was already employed by the Respondent and worked at another prison, HMP Feltham. She covered sickness absences mainly for English and some ESOL.

59. The Tribunal accepts Ms. Philips evidence and finds that on 26 August 2021 Ms. Philips did not give Ethan Philips, Simon Bennett or Lisa Shipton cover work. Mr. Bennett taught only ESOL, Ms. Shipton was an art teacher and never taught English and Ethan Philips taught maths and on 26 August 2021 was in a different role. Only Mr. Bennett was under Ms. Philip's management at that time.

60. The Claimant did not ask Ms. Philips for additional hours in August 2021, but Ms. Philips did consider whether she could utilise the Claimant for the additional hours. However, she determined it was not appropriate due to her concerns about the Claimant's performance and delivery of the ADP. Ms. Philips had raised concerns with the Claimant informally for approximately year and informed Ms. Pearson of her concerns.

The Law

<u>Direct race discrimination</u>

61. Section 13 Equality Act 2010 states:

13 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.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.

(6) If the protected characteristic is sex—

(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;

(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

(7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).

(8) This section is subject to sections 17(6) and 18(7).

62. Section 136 of the Equality Act 2010 states:

136 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;

(b) the Asylum and Immigration Tribunal;

(c) the Special Immigration Appeals Commission;

(d) the First-tier Tribunal;

(e) the Education Tribunal for Wales;

(f) the First-tier Tribunal for Scotland Health and Education Chamber.

63. Under section 13(1) of the Equality Act 2010 read with section 9, direct discrimination takes place where a person treats the claimant less favourably because of race than that person treats or would treat others.

64. Under section 23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

65. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of race. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the claimant was treated as they were. (*Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] IRLR 285).*

66. Decisions are frequently reached for more than one reason. Provided the protected characteristic had a significant influence on the outcome, discrimination is made out. (*Nagarajan v London Regional Transport [1999] IRLR 572, HL*).

67. The case law recognises that very little discrimination today is overt or even deliberate. Witnesses can even be unconsciously prejudiced.

68. There are two stages to the burden of proof test as set out in section 136 of the Equality Act 2010.

Stage 1: There must be primary facts from which the tribunal could decide – in the absence of any other explanation, that discrimination took place. The burden of proof is on the claimant (*Ayodele v (1) Citylink Ltd (2) Napier [2018] IRLR 114, CA; Royal Mail Group Ltd v Efobi [2021] UKSC 22*). This is

sometimes referred to as proving a prima facie case. If this happens, the burden of proof shifts to the respondent.

Stage 2: The respondent must then prove that it did not discriminate against the claimant.

69. In other words, where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of race, then the burden of proof moves to the respondent. It is then for the respondent to prove that it did not commit, or as the case may be, is not to be treated as having committed, that act.

70. The burden of proof provisions requires careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or another. (*Hewage v Grampian Health Board [2012] IRLR 870, SC.)*

71. Guidelines on the burden of proof were set out by the Court of Appeal in *Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258.* Once the burden of proof has shifted, it is then for the respondents to prove that they did not commit the act of discrimination. To discharge that burden it is necessary for the respondents to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive. Since the facts necessary to prove an explanation would normally be in the possession of the respondents, a tribunal would normally expect cogent evidence to discharge that burden of proof.

72. The Court of Appeal in *Madarassy*, a case brought under the then Sex Discrimination Act 1975, states: *'The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.*

73. A false explanation for the less favourable treatment added to a difference in treatment and a difference in sex can constitute the 'something more' required to shift the burden of proof*. (The Solicitors Regulation Authority v Mitchell UKEAT/0497/12.)*

74. In *Glasgow City Council v Zafar 1998 ICR 120, HL*, Lord Browne-Wilkinson said that in the context of a discrimination claim *'the conduct of a hypothetical reasonable employer is irrelevant. The alleged discriminator may or may not be a reasonable employer. If he is not a reasonable employer he might well have treated another employee in just the same unsatisfactory way as he treated the complainant, in which case he would*

not have treated the complainant "less favourably".' He approved the words of Lord Morison, who delivered the judgment of the Court of Session, that *'it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee, that he would have acted reasonably if he had been dealing with another in the same circumstances'.* It follows that mere unreasonableness may not be enough to found an inference of discrimination. Unfair treatment itself is not discriminatory.

75. In *Amnesty International v Ahmed UKEAT/0447/08/ZT* the EAT stated, paragraph 36, *"…the ultimate question – is – necessarily – what was the ground of the treatment complained of (or – if you prefer – the reason why it occurred)…".*

76. Evidence of discriminatory conduct and attitudes in an organization may be probative in deciding whether alleged discrimination occurred: *Chief Constable of Greater Manchester Police v Bailey [2017] EWCA Civ 425.*

Time limits

77. Section 123 of the Equality Act 2010 sets out the time limit for bringing discrimination and victimisation claims in the Tribunal. It provides that complaints of discrimination should be presented within three months of the act complained of:

    (1)Subject to Sections 140A and 140B proceedings on a complaint within Section 120 may not be brought after the end of –
    (a) *the period of three months starting with the date of the act to which the complaint relates, or*
    (b) such other period as the Employment Tribunal thinks just and equitable."

78. Section 123(1)(b) provides that where a discrimination claim is prima facie out of time it may still be brought *"within such other period as the Tribunal thinks is just and equitable*". This provides a broader discretion than the reasonably practicable test for other claims, such as unfair dismissal.

79. The time for presenting a claim is extended for the duration of ACAS Early Conciliation.

80. However, where the ACAS EC process was started after the primary time limit had already expired the ACAS " freezing" of the time limits does not operate to assist a Claimant (Pearce v Bank of America EAT 0067/19).

81. Time limits should be adhered to strictly (relevant case being Robertson v Bexley Community Centre 2003 EWCA CIV 576.)

82. The burden of proof is on the Claimant.

83. The case law on the application of the "just and equitable" extension includes *British Coal Corporation –v- Keeble [1997] IRLR 336*, in which the Employment Appeal Tribunal ("EAT") confirmed that in considering such matters a Tribunal can have reference to the factors which appear in Section 33 of the Limitation Act 1980. As the matter was put in Keeble:-

"that section provides a broad discretion for the court to extend the limitation period of three years in cases of personal injury and death. It requires the court to consider the prejudice which each party would suffer as a result of the decision to be made and also to have regard to all the circumstances and in particular, inter alia, to –

(a) the length of and reasons for the delay;
(b) the extent to which the cogency of the evidence is likely to be affected by the delay;
(c) the extent to which the party sued had cooperated with any request for information;
(d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;
(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action."

84. However, this list of factors is a guide, not a legal requirement. The relevance of the factors depends on the particular case.

85. In *Aberttawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194* the Court of Appeal noted that the tribunal has a wide discretion and the Tribunal was not restricted to a specified list of factors.

86. The most important part of the exercise is to consider the length and reasons for the delay and balance the respective prejudice to the parties.

87. In *Robertson –v- Bexley Community Centre (T/A Leisure Link) 2003 [IRLR 434]* the Court of Appeal considered the extent of the discretion. The Employment Tribunal has a "wide ambit". At paragraph 25 of the judgment Auld LJ said:-

"it is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When Tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify a failure to exercise the discretion. Quite the reverse. A Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."

88. Subsequently in *Chief Constable of Lincolnshire -v- Caston [2010] IRLR 327* the Court of Appeal in confirming the Robertson approach confirmed that there is no general principle which determines how liberally or sparingly the exercise of discretion under this provision should be applied.

89. In *Department of Constitutional Affairs -v- Jones [2008] IRLR 128* the Court emphasised that the guidelines expressed in Keeble are a valuable reminder of factors which may be taken into account, but their relevance depends on the facts of the particular case. Other factors may be relevant too. At paragraph 50 Hill LJ said:-

"The factors which have to be taken into account depend on the facts, and the self directions which need to be given must be tailored to the facts of the case as found".

Conclusions

90. The Tribunal considered each allegation separately. The conclusions were unanimous and reached by applying the relevant law to the findings of fact. The Tribunal considered the submissions in full.

91. The Tribunal considered whether there were any overarching inferences that could be drawn from the evidence in relation to all the allegations of race discrimination, and did not consider there were any.

92. For ease of reference the Tribunal have underlined each precise allegation, as clarified at the start of the hearing, and the allegation is underlined and the Tribunals conclusions are set out under each.

<u>Allegation 1 - In September and October 2020, did the Respondent deny the Claimant the right to refuse to work in a wing 'infested' with COVID-19.</u>

93. The Tribunal reminded itself that the Claimant relied upon the named comparator, Anna Antonio, who is white Portuguese, and alternatively a hypothetical comparator.

94. The allegation itself is not clear, but the Tribunal has considered it as framed.

95. As set out in the findings of fact above, the Claimant was working in the prison, on the wings, for 2 days a week from August 2020.

96. The Claimant has failed to identify which wing or wings she says was/were infested with Covid.

97. There is no evidence that the Claimant requested not to work in any Covid infested wing in September or October 2020.

98. There is no evidence that the Respondent refused any request not to work in a Covid infested wing.

99. There was no evidence to support a finding of fact that the Respondent denied the Claimant the right to refuse to work in a wing infested with Covid.

100. Accordingly, as this was not found to have happened as a matter of fact, the alleged detriment in this allegation is not made out.

101. The allegation fails.

102. As an observation, the Tribunal found, as above, that the reason for Ms. Antonio was not permitted to work on the wings was because Respondent discovered she did not have the requisite training.

Allegation 2 From 1 December 2020 until 12 July 2021, did the Respondent deny the Claimant hours that instead were given to her colleague 'Isabelle';

103. The Tribunal reminded itself that the Claimant relied upon the named comparator, Isabelle and alternatively a hypothetical comparator.

104. The Claimant has not provided any evidence that she was denied hours that were given the Isabelle.

105. As explained in the findings of fact, Isabelle was a cover tutor. The two days that the Claimant had worked prior to October 2020 to make up a working pattern on 4 days per week were no longer available and this was explained to the Claimant by Ms. Pearson on 2 December 2020. The Respondent had sought for the Claimant to return to working four days a week in the prisons after the initial period of home working due to Covid.

106. The Claimant has not specified the hours that Isabelle was given and that she was denied.

107. The Claimant has not set out, or directed the Tribunal to any evidence, when she asked to work additional hours in the prison (as opposed to the two days per week from home). She has not set out who she says she asked for hours and who she says denied her hours and when.

108. Accordingly, as this was not found to have happened as a matter of fact, the alleged detriment in this allegation is not made out.

109. The allegation fails.

Allegation 3 - From February 2021 until 12 July 2021, did Nicola Phillips (Line manager) refuse to allow the Claimant to cover ESOL classes on Tuesdays and Thursdays and instead brought in her own son (Ethan Phillips) to cover them

110. The Tribunal reminded itself that the Claimant relied upon the named comparator, Ethan Philips and alternatively a hypothetical comparator.

111. The Claimant, during the course of her oral evidence, said that this allegation should refer to English lessons, and not ESOL lessons. The application to amend dated 16 September 2021 that included this allegation referred to ESOL.

112. The Claimant did not make any application to amend this allegation at any stage during the course of the hearing.

113. The Respondent, during cross examination, sought to deal with the matter pragmatically as it did not impact the Respondent's evidence.

114. There was no application before us, but the Tribunal considered if there had been it would have been minded to grant the application in view of the Respondent's position.

115. In order to take a pragmatic approach, the Tribunal reached it's conclusions on the allegation as framed, with reference to ESOL, as it was required to do so, but note that the same conclusion would have been reached if the allegation was framed to read English in place of ESOL.

116. The Tribunal do not consider that Ms. Philips refused to allow the Claimant to cover any ESOL (or English) classes between February 2021 and 12 July 2021. The Claimant has not set out any evidence of her requesting to be given cover hours, and she has not identified the cover hours in question.

117. The Tribunal did not find that Ethan Philips taught any subject other than Maths. The Tribunal did not find that Ms. Philips brought her son in to cover any ESOL (or English) classes but that he was initially recruited by the Respondent to teach Maths.

118. Accordingly, as this was not found to have happened as a matter of fact, the alleged detriment in this allegation is not made out.

119. The allegation fails.

Allegation 4 - On 26 August 2021, R offered 'cover' work to Nicola Phillips's daughter (Charis Phillips), Ethan Phillips, Simon Bennett and Lisa Shipton instead of C

120. In relation to Ethan Phillips, Simon Bennett and Lisa Shipton the Tribunal did not find that the Respondent offered covered work to these people on 26 August 2021.

121. Accordingly, as this was not found to have happened as a matter of fact, the alleged detriment in this allegation in relation to Ethan Philips, Simon Bennett and Lisa Shipton is not made out.

122. This part of the allegation fails.

123. As set out in the findings of fact, Charis Phillips (Ms. Phillips' daughter) did undertake cover work in August 2021, and it is reasonable to conclude that this included work on 26 August 2021.

124. The Tribunal consider that not getting cover work could be considered a detriment if additional pay was associated with it.

125. The Tribunal considered whether the Claimant had discharged the burden on her to show evidence from which the Tribunal could reasonably

conclude that Charis Phillips was given cover work instead of the Claimant ‘because of” her race.

126. The Tribunal concluded that there was no evidence sufficient to discharge the burden on the Claimant. There was no evidence from which it could reasonably conclude that the Claimant’s race was the reason why, or indeed any part of the reason why, the Respondent (the Claimant having not identified any person responsible for allocating the cover work) gave Charis Phillips the cover work. There is no prima facie case of race discrimination.

127. The Tribunal considered the reason why and kept in mind the context of the background as set out in the findings of fact: there was a need for cover due to sickness absence, Charis Phillips was employed by the Respondent and able to cover, the Claimant had previously expressed she did not wish to work in the prison for more than 2 days per week and in August 2021 Ms. Phillips specifically considered that the Claimant would not cope with additional work and was mindful of the need to deliver the ADP. The Tribunal concluded that these were the reasons why the Respondent offered Charis Phillips the cover work and not the Claimant.

128. There is no evidence, direct or which could be inferred, to infer that the Respondent, or Ms. Phillips or Ms. Pearson, had a discriminatory attitude.

129. The Claimant has failed to show that the Respondent treated her less favourably than the named or a hypothetical comparator.

130. The Tribunal did not consider there to be something more in this case that shifted the burden of proof to the Respondent.

131. If the Tribunal are wrong on this, and the burden of proof shifted to the Respondent, it considered there was a non-discriminatory explanation, namely that set out above, that there was a need for cover due to sickness absence, Charis Phillips was employed by the Respondent and able to cover, the Claimant had previously expressed she did not wish to work in the prison for more than 2 days per week and in August 2021 Ms. Phillips specifically considered that the Claimant would not cope with additional work and was mindful of the need to deliver the ADP. The Tribunal concluded that this were the reasons why the Respondent offered Charis Phillips the cover work and not the Claimant.

132. The allegation fails.

133. As the Claimant was not successful in any of her complaints the Tribunal did not go on to consider time limits as it was not necessary to do so.

Approved by:

Employment Judge Cawthray

15 July 2025