EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Miss R Cottrell		University Hospital Southampton NHS Foundation Trust

Heard at: Southampton **On**: 24 August 2018

Before: Judge Brian Doyle, President (sitting alone)

Representation
For Claimant: Mr M Cottrell (brother)
For Respondent: Ms B Criddle, of Counsel

RESERVED JUDGMENT

The reserved judgment of the Tribunal on the preliminary issues is as follows:

(1) The claimant's complaints of unfair dismissal and direct disability discrimination (in respect of the decision to dismiss her in August 2017 and to uphold that decision on appeal in December 2017) are in time and may proceed to the final hearing commencing on 29 October 2018.

(2) Any other complaints of indirect disability discrimination or failure to make reasonable adjustments are not pursued and are dismissed.

(3) The claimant is a disabled person for the purposes of the Equality Act 2010 by virtue of the condition of Hodgkin's lymphoma only.

(4) The respondent's application to strike out the whole or part of the claim as amended, or to make a deposit order in respect of it, is refused.

REASONS

Introduction

1. This is a preliminary hearing to determine three preliminary issues: (1) whether those aspects of the claim as amended to include disability discrimination complaints are in time; (2) the status of the claimant as a disabled person other than in respect of her reliance upon having Hodgkin's lymphoma; and (3) whether any part of the claim should be the subject of a strike out order or a deposit order.

Preliminary hearing (case management)

2. A preliminary hearing for case management purposes was conducted by Employment Judge Wright on 12 April 2018. Her case management summary and orders appear at [49-54]. The judge listed the claim for a final hearing on 29 October 2018 for 5 days. The judge made orders as to the provision of evidence as to the claimant's status as a disabled person and for disclosure generally. She listed the present preliminary hearing (originally listed for 29 June 2018, but later relisted to 24 August 2018) [52].

The present hearing

3. At the conclusions of submissions, I reserved my decision. I afforded the claimant an opportunity to provide evidence as to the prescribing and dispensing of Propranolol and to comment upon the respondent's case law authorities. The claimant provided evidence as to Propranolol, but she did not avail herself of the opportunity to comment on the respondent's case law authorities. The respondent provided additional submissions in respect of that evidence.

4. It was anticipated that the parties would agree a joint bundle for the preliminary hearing. That is what the respondent had expected when it prepared the hearing bundle. Despite that, the claimant provided three additional bundles. The respondent's counsel declared herself not disadvantaged thereby. I was able to conduct the hearing despite having to juggle four bundles. Much of the documentary evidence in the claimant's bundles might in due course be of assistance at the final hearing of the merits of the case (for example, the absence management records).

5. References in [ ] below are references to the preliminary hearing bundle prepared by the respondent. References in { } below are references to the preliminary hearing bundles prepared by the claimant.

6. The claimant was represented by her brother, who is a qualified solicitor, although not on the record of these proceedings as such. I understand that he does not practise in the fields of employment or discrimination law.

The claimant's witness evidence

7. The claimant had prepared a witness statement (including an appendix providing a chronology of her Hodgkin's lymphoma diagnosis and treatment), which was taken as read. Some 30 minutes into perfectly reasonable cross-examination by the respondent's counsel, the claimant became tearful and agitated. She eventually left the hearing room in some distress. I adjourned the hearing to allow her to compose herself or for her representative to otherwise advise me of how she wished to proceed. After 15 minutes, the claimant returned to the hearing room and the remainder of her evidence passed without further event.

8. I found the claimant to be an honest rather than an impressive witness. Quite early in her cross-examination I had to ask her not to look to her father at the back of the hearing room for what appeared to be support. Although this may have been a sign of nervousness on her part (and it preceded the break in her evidence that I have just described), it gave the appearance that she was seeking confirmation of the answers that she was giving. She complied with my request. Her answers on occasion lacked confidence and certainty. Both the respondent's counsel and I at several points had to ask her to answer questions with answers of what she did do, rather than what she would have done, or to say whether she could or could not recall or simply did not know. Nevertheless, I was assisted by her evidence and I felt able to rely upon it, so far as it went.

The claim as originally presented

9. The claim relies upon the claimant's former employment with the respondent as a Band 5 Registered Staff Nurse on the Neurosciences Intensive Care Unit at Southampton General Hospital. The claimant's employment commenced on 22 April 2013. It ended on 30 August 2017 with her summary dismissal.

10. Acas received the claimant's early conciliation notification on 16 November 2017. An appeal against her dismissal was rejected on 7 December 2017. Acas issued an early conciliation certificate on 16 December 2017. The claimant submitted her ET1 claim on 12 January 2018. As originally presented, the claim contained a single complaint of unfair dismissal.

11. The claimant had not indicated an intention to bring a disability discrimination complaint in section 8.1 of the ET1 form [6]. In answer to section 12 of the ET1 form "Do you have a disability?" the claimant answered "No" [9]. However, so far as is relevant for this preliminary hearing, in section 8.2 of the ET1 claim form [7] the claimant made reference to migraines and gastro-intestinal problems; a diagnosis of Hodgkin's Lymphoma treated with chemotherapy and radiotherapy; migraines and gastritis as a result of her cancer treatment; and sickness absences. She asserted that her dismissal was in reality because of her sickness record.

Application to amend the claim

12. Prior to presenting the claim on 12 January 2018 the claimant sought legal advice from an employment law solicitor in a Southampton law firm on one occasion only. The claimant already had the advantage of the guidance of her father, who has experience of HR issues, and of her brother, who is a solicitor, although not an employment law specialist. The ET1 claim form was completed as a family effort at her father's computer on the day that it was presented.

13. The claimant did not at first seek to bring a disability discrimination complaint. She believed that it was already out of time and that this was also the view of the solicitor that she had consulted. The claimant and her family had undertaken extensive research into disability and disability discrimination and how, if at all, her conditions and circumstances might fit into the legal framework. The claimant took a positive decision not to present a disability discrimination complaint when the ET1 form was prepared and presented on 12 January 2018.

14. At the administrative vetting stage of the ET1 claim form on 15 January 2018 an Employment Tribunal caseworker referred the claim to an Employment Judge with the request "Potential for DDA claim – wait for ET3 before listing or clarify with C? – or code UDL and list for 2 days?" On 16 January 2018 Employment Judge Roger Harper instructed "Clarify with C, reply 7 days, before serving".

15. That judicial instruction was acted upon by email to the claimant on 17 January 2018: "The claim form has been referred to Employment Judge R Harper who directs the Claimant to clarify if she is claiming disability discrimination. If she is claiming disability discrimination, the Claimant is to provide details of this claim".

16. The claimant considered the matter with her father and brother. She decided to seek to amend the claim so as to bring a complaint of disability discrimination.

17. The claimant replied on 22 January 2018: "Please find attached my formal letter requesting the addition of disability discrimination to my claim … as suggested in your email below" [13]. The attached letter dated 22 January 2018 [15-16] confirmed that the claimant wished to include a complaint of disability discrimination. The letter referred specifically to migraines and gastro-intestinal (GI) problems as disabilities.

18. The claimant attached a document [17] that appears to be an occupational health referral by the Senior Sister on the Neurosciences Intensive Care Unit to an Associate HR Advisor on or about 11 March 2016 (see also {Exhibit RC-03}). This refers to the claimant having had 16 occasions of short term absence totalling 42 days. It refers to her previous diagnosis and treatment for Hodgkin's lymphoma and that she had been left with recurrent migraines and GI problems resulting in frequent short-term absences. Reference is also made to psychological problems and to reasonable adjustments.

19. On 23 January 2018 the claimant emailed the Tribunal: "I have had time to do more research and look at the documents provided by the Trust so please accept the attached version of my letter dated today 23rd January as the version to be used to add disability discrimination to my claim" [19]. She enclosed a record of her sickness absences commencing on 6 July 2013 through to 30 August 2017 [29].

20. Her letter of 23 January 2018 [21-26] is considerably more detailed than the letter of 22 January 2018 [15-16]. It refers in greater detail to migraine and gastritis commencing in the summer of 2013; to her diagnosis of Hodgkin's lymphoma in September 2014; her absence from work from October 2014 for chemotherapy and radiotherapy treatment; a phased return to work commencing in March 2015; and to post-treatment continuing bouts of migraines and gastritis. She referred to the weakening of her immune system by the cancer and her treatment, and to the effect that this had upon her general health and her sickness absence record. Reference is made to treatment of her migraines and gastritis leading to her being able to control these conditions by mid-2016 [23].

21. The claimant's letter of 23 January 2018 concluded with asserting three causes of action of disability discrimination: (a) failure to make reasonable adjustments; (b) indirect discrimination; and (c) direct discrimination [26].

22. The Tribunal "accepted" the amendment to the claim on 2 February 2018 on the direction of Employment Judge Roger Harper. Notice of the claim and of the amendment was then sent to the respondent for the first time. The respondent had until 2 March 2018 to present a response. The response was received on 2 March 2018. The matter was listed for the first preliminary hearing (held on 12 April 2018).

Response to the claim

23. The respondent's ET3 response [38] denied the complaint of unfair dismissal. It accepted that the claimant was a disabled person by virtue of her condition of Hodgkin's lymphoma, but denied the three complaints of disability discrimination. The respondent asserted that the complaints of disability discrimination were out of time. It contended that the matters relied upon in the claimant's letter of 23 January 2018 [21-26] significantly pre-dated December 2016.

The amendment

24. Under cross-examination the claimant agreed that the period covered by her complaint of indirect disability discrimination and failure to make reasonable adjustments [23-24] is March 2015 to December 2016. She agreed that her complaint was as summarised in the three bullet points at [26] and that the alleged complaint of direct disability discrimination was her dismissal by the respondent.

25. The claimant was taken in cross-examination to a letter from the claimant to Matron Monk of the respondent [168]. That letter is dated 24 January 2017

and it was received on 28 January 2017. There is a reference to having been informed that she could bring a complaint of disability discrimination [170]. Under cross-examination, the claimant agreed that she had seen the employment law solicitor at the Southampton law firm by the time she had written this letter (early 2017). She had not been dismissed at this point, but she was under suspension. The claimant agreed that she did not have disability discrimination in mind at this time, but that the solicitor had raised it as a possibility and he had provided her with advice about it. She was advised of the possibility of an Employment Tribunal claim. The three months' time limitation had been explained to her and that she might already be out of time. She did not seek further legal advice (other than the advice of her father and brother). She understood what she had to do by way of the Acas early conciliation procedure.

26. During the course of the preliminary hearing the claimant's representative changed the basis of the amended claim. The disability discrimination complaint is now defined by the claimant as being solely one of direct disability discrimination arising out of the dismissal of the claimant on 30 August 2017 and the dismissal of her appeal on 7 December 2017. Events prior to these dates are now relied upon only as context and background evidence. The claimant no longer pursues indirect disability discrimination or failure to make reasonable adjustments. The respondent invited me to dismiss any wider disability discrimination claim, which I shall do.

Is the amended claim in time?

27. There is no question that the unfair dismissal claim is in time. The claimant was dismissed on 30 August 2017 and that is the effective date of termination of employment. But for the Acas early conciliation provisions, time for bringing an unfair dismissal complaint would run until 29 November 2017. However, the Acas early conciliation provisions had the effect of extending the limitation period until 16 January 2018. The ET1 form was presented on 12 January 2018 (one month after the date of the Acas certificate). The unfair dismissal complaint is clearly in time and no issue is taken in respect of it.

28. The (now narrowly drawn) amended claim (direct disability discrimination arising from the dismissal and the appeal) refers to events that culminated in a dismissal on 30 August 2017 and an unsuccessful appeal on 7 December 2017. Had this complaint been included in the original ET1 claim it would have been in time (both as to the dismissal and as to the appeal).

29. There is a considerable body of (not always consistent) case law on amending an Employment Tribunal claim. I draw my understanding of the current state of the law from *Harvey on Industrial Relations and Employment Law* Division PI Section I(5)(b). Is this an amendment of a claim that (i) is merely designed to alter the basis of an existing claim, but without purporting to raise a new distinct head of complaint; or (ii) adds or substitutes a new cause of action, but one which is linked to, or arises out of the same facts as, the original claim; or (iii) adds or substitutes a wholly new claim or cause of action which is not connected to the original claim at all?

30. The claimant submits that her case on direct disability discrimination is based solely upon the decision to dismiss and the upholding of that decision on appeal. The claimant relies upon the preceding events only as background and contextual evidence, but not as separate causes of action which are actionable in themselves. The events from March 2015 onwards establish the respondent's conduct and attitude towards the claimant. It is said that the respondent relied upon the allegations about the theft and other issues to dismiss the claimant in reality because of her sickness absence record. See [178], [179] and [180] and the claimant's bundle {Tab 2 pages 98 and 102}. The claimant was dismissed on 30 August 2017 and the appeal was dismissed on 7 December 2017. The ET1 was presented on 12 January 2018. The application to amend it was made on 23 January 2018. See *Galilee v The Commissioner of Police of the Metropolis* [2018] ICR 634 EAT. Time runs from the application to amend, the claimant contends. Alternatively, if the later date is 12 April 2018 (the date of the first preliminary hearing), then claimant was not legally represented and should not be penalised. The respondent is not prejudiced or disadvantaged.

31. The respondent's written submissions are based in the main on the amendment as widely drawn. However, the central thrust of those submissions was that permission to amend the claim was not granted until the first preliminary hearing (12 April 2018) and that the amendment takes effect not from the date of the original claim (12 January 2018) or the date of the application to amend (23 January 2018), but from the later date (*Galilee*). The amendment is thus out of time and there is no basis for a just and equitable extension of time. The claimant had taken legal advice. She also had the benefit of her father's and brother's support and advice. She was aware of the time limitation. She took a positive decision not bring a disability discrimination complaint until the Tribunal itself raised it. Moreover, the respondent would be prejudiced or disadvantaged if the amendment was permitted to proceed.

32. I do not agree that the amendment was accepted on 12 April 2018. It was accepted on 2 February 2018, albeit the question of time limitation remained at large and was expressly identified at the case management hearing on 12 April 2018 as an issue for this present preliminary hearing (see the second question in *Galilee*).

33. In my judgment, the (now narrowly drawn) amendment does not fall within the category (i) I have identified above. The claimant is not merely seeking to change the grounds on which the original complaint of unfair dismissal is being advanced, even when regard is had to the ET1 claim form as a whole. If this was a category (i) amendment, the thrust of my consideration would be under rule 29 and the principles in *Selkent Bus Co v Moore* [1996] ICR 836 EAT and having regard to the relevant Presidential Guidance.

34. Equally, in my judgment, this is not an amendment that falls within category (iii). It is not an entirely new claim unconnected with the original claim as pleaded.

35. This is because, in my judgment, the amendment (as narrowly drawn) is self-evidently a category (ii) amendment. The claimant is alleging a different type

of complaint (direct disability discrimination) from the one pleaded in the original claim (unfair dismissal), but it is justified by the facts pleaded in the original claim. The claimant is seeking to put a new or additional label on the alleged facts upon which she relies. Both complaints rely upon the decision to dismiss and the upholding of that decision on appeal. Both complaints rely upon the evidential matrix of events that led to those decisions, commencing with the diagnosis of the claimant's medical condition in September 2014 and culminating in her dismissal and its confirmation in August and December 2017. The factual basis of both claims is the same.

36. The unfair dismissal complaint is in time. Is the disability discrimination complaint out of time?

37. Had the amendment been made and accepted by 16 January 2018 there would have been no question of time limitation arising and only the *Selkent* considerations would have arisen. However, the amendment was not made until 23 January 2018 and it was not accepted until 2 February 2018. So on the face of it this is an amendment seeking to add an out of time complaint to a claim that is in time. As *Harvey* puts it: "The position is … that if the new claim arises out of facts that have already been pleaded in relation to the original claim, the proposed amendment will not be subjected to scrutiny in respect of the time limits, but will be considered under the general principles applicable to amendments, as summarised in *Selkent*."

38. It is not for me to decide afresh whether the amendment should have been accepted on 2 February 2018. That fell for the decision of Employment Judge Roger Harper. It is assumed that he took all the circumstances into account, and balanced the hardship and justice of allowing the amendment against the hardship and justice of refusing it.

39. Looking at the matter through my eyes at this remove, time limits aside, the application to amend was made within a short period of both the extended time limit expiring and the original claim being presented. It was prompted by the Tribunal's inquiry, but that inquiry was responded to promptly. The respondent had not yet been required to respond to the claim and, when it did, it was able to address the full particulars of the amended claim (as then broadly drawn) without obvious disadvantage or prejudice. Other than dealing with the medical evidence as to disability, there is little or no other evidence that would not have been raised as part of the factual matrix of the unfair dismissal complaint that would not now have to be considered as part of a narrowly drawn direct disability discrimination complaint, even though the additional statutory questions for the Tribunal at final hearing will be different. Although the final hearing is due to commence on 29 October 2018 for 5 days, the parties have been on notice of the possibility of having to prepare for a disability discrimination complaint (more widely drawn than now) since 2 February 2018 or, at least, 12 April 2018.

40. Accordingly, my judgment is that the amendment as narrowly drawn should be permitted to proceed and, because it is a category (ii) amendment, time limitation is not in issue and the amendment is in time.

41. If it is possible that I am wrong in either or both of my conclusions that time limitation is not in issue or that this is a category (ii) amendment then, in the alternative, I considered how I should proceed if this is a category (iii) amendment.

42. If this is an entirely new claim unconnected with the original claim as pleaded then time limitation will be required to be considered. The new claim is deemed to take effect either as at the date of the presentation of the original claim (so-called "relation-back") or at the date when permission to amend was given (*Galilee*). I would feel obliged to follow *Galilee*, although it departs from the long-standing orthodoxy, because of its comprehensive review and analysis of the authorities, albeit that this is an area of procedural law that would now benefit from Court of Appeal scrutiny.

43. On the facts before me, permission to amend was granted on 2 February 2018 (not 12 April 2018). However, the relevant primary time limit for a direct disability discrimination complaint arising out of the decision to dismiss the claimant on 30 August 2017 and the upholding of that decision on 7 December 2017 would expire on 6 March 2018 (without taking any account of any extension of time for Acas early conciliation). The decision to dismiss and the confirmation of that decision on appeal are of one piece. Conduct extending over a period is to be treated as done at the end of that period (Equality Act 2010 section 123(3)(a)). Time begins to run from 7 December 2017 and expires on 6 March 2018 (at the earliest). As at 6 March 2018 permission to amend had been given on 2 February 2018 and thus the new complaint is in time.

44. Of course, the analysis would be entirely different if the attempted amendment had been the widely drawn version of that amendment presented on 23 January 2018. Complaints about indirect discrimination and failures to make reasonable adjustments would have been very clearly out of time. There would appear to have been little scope for the exercise of judicial discretion on the just and equitable basis. The claimant had taken legal advice at the relevant time and she had chosen not to include issues of indirect discrimination and failures to make reasonable adjustments (and issues preceding the dismissal and appeal) in the original claim.

45. For these reasons, principally or in the alternative, the complaint of direct disability discrimination arising from the decision to dismiss and the confirmation of that decision on appeal may proceed to final hearing, subject to the remaining issues. All other disability discrimination complaints are dismissed.

Is the claimant a disabled person?

46. I can now turn to the second issue, which is to what extent and in respect of what impairments the claimant is a disabled person for the purposes of that direct disability discrimination complaint?

Claimant's medical evidence

47. The claimant's medical evidence was forwarded by email to the Tribunal and the respondent on 24 May 2018 [55]. It is contained in a letter of the same date [57-61] with enclosures [62-148]. The letter itself stands as part of the claimant's own statement as to her status as a disabled person, together with an impact statement [147-148]; relevant excerpts from her medical records [63-136]; a summary of those records prepared by or on behalf of the claimant [137-144]; and a letter dated 20 May 2018 from Professor Peter Johnson, Professor of Medical Oncology at Southampton General Hospital, the claimant's treating consultant.

Professor Peter Johnson

48. I will start with the evidence dated 20 May 2018 provided by Professor Peter Johnson, the claimant's treating consultant, because evidence from such a source is usually the best possible evidence of a claimant's medical condition and her status, if such, as a disabled person within the meaning of the Equality Act 2010 (subject to ultimate judicial decision).

49. Professor Johnson first saw the claimant as an out-patient on 15 September 2014 following an urgent referral by her GP, which in turn had resulted from an A&E attendance with abdominal pain (query a UTI). A chest X-ray had shown enlarged lymph nodes in the mediastinum. Subsequent investigations confirmed Hodgkin's lymphoma at stage IIA. Two thoracic surgical procedures were carried out on 10 and 18 October 2014. There followed a course of treatment with chemotherapy and radiotherapy. The treatment has appeared to be successful, with no sign of recurrence following a CT scan carried out after 2 years in September 2017.

50. Professor Johnson notes that the treatment was complicated by quite severe side effects of nausea and vomiting and a pulmonary embolism (treated with a course of anticoagulation).

51. Professor Johnson records that the claimant's return to work was made more difficult by the after effects of treatment. The claimant experienced significant fatigue and oesophagitis. The oesophagitis arose shortly after completing radiotherapy and required medical treatment, although it had settled by the first follow-up visit. Follow up visits to the lymphoma clinic on 9 March 2015, 18 May 2015 and 23 September 2015 resulted in the examining doctors reporting the claimant as being well.

52. I insert reference to {Exhibit RC-06} here confirming the claimant to be symptom-free and fit to return to work as at 12 October 2015. There is reference there to multiple short-term sickness absences, understood to be as a result of migraines, being treated by her GP by suitable medication. The medical view was that this should improve in the upcoming year and that two minor self-limiting incidents of diarrhoea/vomiting and allergic reaction to contrast should not contribute to future sickness absence. The conclusion was that there was no new

underlying medical problem identified that would contribute to a higher than average sickness absence.

53. Professor Johnson concludes his report by recording his understanding that the claimant had experienced recurrent urinary tract infections (UTIs), probably resulting from a combination of the immune suppression resulting from the earlier treatment and the abnormal anatomy of the claimant's kidney. He opines that he would normally expect the after-effects of the lymphoma treatment to have resolved by 6 months after the end of radiotherapy for the type of treatment the claimant had received.

54. A separate letter from Professor Johnson dated 11 October 2017 [70] records a satisfactory scan with no sign of activity from Hodgkin's disease. Professor Johnson confirmed the continuation of the existing patient-triggered follow-up. See also similar evidence dated 23 September 2015 [95] and 23 February 2016 [90].

The medical records

55. The medical records and the claimant's summary of them chart the incidences of the claimant's symptoms and treatment relating to (1) Hodgkin's lymphoma [137-138]; (2) migraines [139-140]; (3) immunity-related infections [141-142]; and (4) gastritis [143-144].

56. The claimant's status as a disabled person by reference to her condition of (1) Hodgkin's lymphoma is not in issue. This is a disability by virtue of paragraph 6(1) of Schedule 1 to the Equality Act 2010. The medical records relating specifically to this condition commence on 31 August 2014 and end on 24 November 2014, although of course, as Professor Johnson's evidence reveals, the claimant was being treated for this condition (including its after care) from 15 September 2014 until as recently as September 2017.

57. So far as (2) migraines are concerned the claimant is uncertain as to when this condition commenced. The first medical records refer to the claimant visiting her GP on 6 August 2015. The last entry in the medical records is dated 22 March 2016. It will be necessary to return to the detail of these records shortly.

58. I do not understand the claimant to be relying upon (3) immunity-related infections as giving rise to a disability of themselves. The records commence on 31 August 2014 and conclude 2 January 2018.

59. So far as (4) gastritis is concerned, the claimant relies upon her attendance at A&E on 31 August 2014 as the earliest record of this condition. The latest record is 7 April 2018. It will be necessary to return to the detail of these records shortly.

60. In addition, the claimant's witness evidence was that her attendance records record that she had absences from work for headache/migraine on 9 August 2013 and 25 October 2013; and for gastrointestinal problems on 20 November 2013, 17-20 December 2013 and 17-18 March 2014.

Migraines

61. The claimant's evidence is that she is unsure when her migraines commenced. She contends that they were occasional and infrequent prior to the diagnosis of Hodgkin's lymphoma with no aura or specific trigger. However, after her chemotherapy and radiotherapy had concluded, and after her return to work in March 2015, she asserts that her migraines became much more frequent and intense, with a defined aura. She describes excruciating pain, nausea and vomiting, with at times difficulty in speaking, leading to time off work. She states that the commencement of prophylactic Propranolol has reduced the frequency and intensity of the migraines.

62. At the time of her first consultation about this condition with her GP on 6 August 2015 the claimant was self-medicating with non-prescription medication [98]. There had been an earlier consultation in October 2014 about what pain relief she could take during chemotherapy for bad headaches [106]. By 9 October 2015 her GP was prescribing Rizatriptan, which by 22 March 2016 was being reported by as ineffective [87]. Propranolol was then prescribed, although other records suggest that this prescription was not continued [63-65], [80], [83].

63. Under cross-examination the claimant agreed that the first time she consulted her GP about migraine headaches was 6 August 2015 [98]. Her evidence was that this was the first time she had experienced an aura. The last time she consulted her GP about migraines was 22 March 2016.

64. I gave the claimant an opportunity to disclose evidence in support of her reliance upon Propranolol to control her migraine. She has disclosed relevant primary care health records. These suggest that the claimant was seen on 22 March 2016 and prescribed a 28-day course of Propranolol (40 mg twice per day) until 4 May 2016, when the course appears to have ended. A new course of medication commenced on 10 July 2017, with the medication being dispensed on 31 July 2017 and the course ending on 12 September 2017. A further course commenced on 22 February 2018, with medication being both prescribed and dispensed on that date. That course expired on 6 April 2018. A new course commenced on 14 June 2018, being dispensed the same day, with a further course being prescribed and dispensed on 24 July 2018.

Gastritis

65. The claimant's evidence is that she had two sickness absences in 2013 for gastro-intestinal problems. She then experienced a very painful bout of gastritis on 31 August 2014 resulting in a presentation at A&E. A further episode was experienced on 2 September 2014 [121], which led in time to the diagnosis of Hodgkin's lymphoma. The claimant says that she was prescribed Omeprazole to protect against excessive stomach acid build up and painful gastritis symptoms. Her evidence is that it is not possible to ascertain if her gastro-intestinal problems were gastritis as a long-term after-effect of lymphoma or a diarrhoea and vomiting infection as a long-term side effect of lymphoma.

66. The medical records record the first gastro-intestinal problems as dating from 17 March 2014, with events recorded at 31 August 2014, 23 January 2016 (intravenous analgesia) [96], 16 March 2016 (ultrasound) and 7 April 2014.

67. The evidence from the 7 April 2018 consultation records that the claimant's primary care records note her previous history of Hodgkin's lymphoma "in remission" and a prescription list of Co-codamol, Fluoxetine, Zopiclone, Quetiapine and Omeprazole [63-65]. The diagnosis appears to be "viral gastroenteritis".

68. Under cross-examination the claimant accepted that she has not been diagnosed or treated for gastritis since September 2014.

The claimant's position

69. The claimant's position is set out in her letter of 24 May 2018 [57-61]. Her primary position is that her disabled person's status is established by the diagnosis of Hodgkin's lymphoma. Further or in the alternative, she relies upon the resulting gastritis and migraines caused by the progressive condition of Hodgkin's lymphoma and its treatment. Further or in the alternative, she relies upon the gastritis and migraines as physical impairments amounting to disability.

70. She asserts that the symptoms of Hodgkin's lymphoma can include gastritis and an increased risk of infection due to the effect that the cancer has on the lymph nodes. She relies upon generic evidence of this from evidence available on the internet [58]. For example, she points to literature from the Lymphoma Action website {231-244} and from Macmillan Cancer Support {109-230} and {245-255}. By way of illustration, Macmillan Cancer Support explains how a person's digestive system can be affected by chemotherapy, including nausea and diarrhoea {250}. She also asserts that the side effects of the treatments undertaken by her (including chemotherapy and radiotherapy) can cause gastritis and an increased risk of infection [59].

The claimant's impact statement

71. As is often helpful in establishing whether a claimant is a disabled person for the purposes of the Equality Act 2010, the claimant has provided an "impact statement" [147-148]. Emphasis has been placed on three particular paragraphs of that impact statement. I consider it important and appropriate to set out those paragraphs in full, as follows:

> On return to work in 2015 after my treatment I began to have recurrent migraines which I have never experienced before (the previous "migraines" had no aura and whilst I had to go to bed to cope with them, after one episode of vomiting I was usually slightly better and could function). However, after my cancer treatment my migraines started with an aura which included visual disturbances (my vision resembles that of looking into the sun) then an almost kaleidoscope effect in one eye. This means I cannot see to complete activities of daily living let alone look after a critically ill patient. The migraines would be so bad that I would vomit repeatedly. As a result of this, I was unable to focus at all on charts and computer screens with patients' vital signs on. Due to the vomiting I would also have to leave my patients suddenly in order to go and be sick. If I experienced a migraine prior to my shift starting, I would have to call into work to say that I would not be

> able to come in, and if I was on a shift when a migraine struck, I would be sent home. This was due to the standard hospital policy regarding staff illness at work which required staff to stay away from work for at least 48 hours for fear of cross-infection.
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> In order to recover from an episode, I would have to lie in bed, in a dark room with no auditory or visual stimuli. I would have to try and sleep it off (which would usually take around 8 hours once the pain had become less intense). Conventional painkillers such as paracetamol, ibuprofen and co-codamol were completely ineffective. The vomiting caused by the migraine could last for up to three days. I repeatedly went to my GP in Southampton post cancer diagnosis and treatment explaining that my migraines were debilitating and I was unable to work. Eventually after following recommendations such as getting my eyesight tested, I was placed on Rizatriptan (a drug used for the prompt treatment of migraines; further painkillers may not be needed if the drug is taken quickly). This treatment did not work on some occasions. I then returned to my GP and was placed on Propranolol (a preventative treatment which I take every day) this combination has been very effective in preventing the migraines. In the summer of 2016 when the medication had a chance to be effective my attendance improved significantly. On more than one occasion I had the migraine aura and I was denied access to my locker for taking the medication which would have prevented it progressing. This also had an effect on my career progression as, on a return to work interview after a migraine-related absence I was informed I was being removed from the Neuro Intensive Care course due to my absence record.
>
> The gastritis symptoms are an agonising, cramping/stabbing pain constantly in my epigastric region. This would cause frequent vomiting and I was unable to stand properly. I was hospitalised a few times with this, once as an inpatient. I was treated with morphine and Omeprazole. I am now prescribed to take Omeprazole twice a day, every day. As with the vomiting associated with migraine, the episodes of gastritis would mean that I was unable to be in work for a period of 48 hours from when I was last vomited. The gastritis and migraines are completely unpredictable and this has led to me phoning at short notice to cancel my shift and also being sent home early and number of times, therefore I was believed to be unreliable and untrustworthy with regards to my attendance.

72. I am bound to observe that many aspects of the detail of this impact statement are simply not supported by the medical records.

The respondent's position

73. The respondent's position is that it accepts that the claimant is and remains a disabled person in respect of Hodgkin's lymphoma [149]. It does not accept that the medical evidence supports her contention that she is a disabled person by virtue of any conditions of gastritis and/or migraines. The respondent considers that there is no connection between her Hodgkin's lymphoma or its treatment and the claimant's gastritis or migraines at the relevant time. The respondent contests whether the medical evidence indicates that the migraines and/or gastritis had the necessary substantial and/or long-term effect to constitute a disability as distinct from the Hodgkin's lymphoma.

74. In addition, the respondent relies upon the documentary evidence to demonstrate its reason for the dismissal of the claimant. This may fall to be properly tested at any final hearing, but I set it out here for completeness.

75. On 30 July 2015 the claimant attended a Formal Attendance Review Meeting {Exhibit RC-02}. This covered the period of the claimant's absences

while undergoing treatment for Hodgkin's lymphoma (and this is acknowledged in the Review).

76. On 20 June 2016 the claimant was given a First Written Warning – Attendance [153-154] following a meeting of the same date. That warning records 43 days absence over 19 occasions in a 12 months period (18.04% against a target of 3.5% and less than 4 occasions). No reference is made therein to disability-related reasons for absence.

77. On 18 November 2016 the claimant was given a Final Written Warning – Attendance following a meeting on 20 October 2016 [155-156]. That warning records 47 days absence over 16 occasions in a 12 months period (24.78% against a target of 3.2% and less than 4 occasions). No reference is made therein to disability-related reasons for absence.

78. On both occasions, the claimant expressed herself happy with the support being provided to her. She declined an occupational health referral.

79. In correspondence with the respondent dated 24 January 2017 [170] the claimant referred to having been informed that she could bring a disability discrimination claim for treating her less favourably due to her disability and denying her a chance to complete the Neuro Intensive Care course.

80. On 30 October 2017 the respondent informed the claimant of the outcome of a disciplinary hearing [172-182]. That concerned 4 allegations of misconduct. (1) On 24 and 25 December 2016 DF118 and codeine tablets went missing, although no patients had been prescribed them, and the claimant was one of only four staff members on the relevant shifts. (2) On 28 December 2016 the claimant started her shift and stated that there were no DF118 tablets in store, in circumstances where there was no reason for her to notice this as no patient had a prescription for DF118 at the time. (3) Over the past 6 months there had been over-ordering of DF118 and codeine tablets which appeared to reduce when the claimant had been absent from work; (4) On the balance of probabilities, it was thought that the claimant had been involved in taking DF118 and codeine for personal use.

81. The claimant takes issue with how allegation (4) is dealt with [178-180]. These pages must speak for themselves. In summary, the respondent records why on the balance of probabilities it concluded that the claimant may have been involved in taking DF118 and codeine for personal use. It refers back to the evidence and findings in relation to the first three allegations. It then recounts over three pages concerns about the claimant's general conduct and behaviour such as to call into serious question her professionalism and trustworthiness. It concludes that the respondent could have little trust in the claimant's ability to carry out the duties of a Band 5 Nurse to the required standards of professional behaviour, leading to a complete breakdown in trust and confidence, making her position untenable. The respondent found gross misconduct and dismissed her without notice.

Nursery & Midwifery Council Investigating Committee

82. The claimant has drawn my attention to the Interim Orders review hearing conducted by an Investigating Committee of the Nursing & Midwifery Council {98-104}. It appears that following her dismissal by the respondent the claimant was the subject of an Interim Conditions of Practice Order imposed on 28 September 2017. The Interim Orders were reviewed on 5 April 2018 and the case remains under investigation. The areas of regulatory concern are said to be (i) theft of medication and (ii) health (addiction to opiates). The claimant draws attention to a record of a telephone note with Rachel Davis, Head of Nursing at the respondent, on 15 November 2017 to the effect that "there were other employment issues which led her to decide that [the claimant] had breached Trust values".

Legal materials

83. For completeness I record the legal materials that the claimant has placed before me: the Equality Act 2010; *Berry v HMRC* ET 2402435/2016; *College of Ripon & St John v Hobbs* [2002] IRLR 185; *Kirton v Tetrosyl* [2003] ICR 1237; *Lofty v Hamis* [2018] IRLR 512; *MoD v Hay* [2008] ICR 1247; *Sutton v Sheffield Children's NHS Foundation Trust* ET 1800471/2017; Statutory Guidance on meaning of disability; and extracts from IDS Employment Law Handbooks.

84. The respondent has placed before me: *Woodrup v London Borough of Southwark* [2003] IRLR 111; *Morgan Stanley International v Posavec* EAT (2014); *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194; *Galilee v Commissioner of Police of the Metropolis* [2018] ICR 634; and *Ezsias v North Glamorgan NHS Trust* [2007] ICR 1126.

Respondent's written submissions

85. The respondent's counsel presented written submissions, which she supplemented orally (with further written submissions in relation to the claimant's additional evidence as to Propranolol).

86. The respondent accepts the claimant's status as a disabled person by virtue of her condition (now in remission) of Hodgkin's lymphoma: Equality Act 2010, Schedule 1, paragraph 6(1). What is contested is whether the claimant's reliance on gastritis and/or migraine, whether as separate impairments or together, and whether as a symptom of or effect of Hodgkin's lymphoma or its treatment (including its effect on the immune system), amount to disability or disabilities.

87. The allegation of direct disability discrimination relates to August 2017 when the claimant was dismissed (and, I interpose, December 2017 when the appeal was dealt with).

88. The respondent's case is that whether the migraine and gastritis are symptoms of or caused by Hodgkin's lymphoma does not permit the claimant to rely upon Equality Act 2010, Schedule 1, paragraph 8 (progressive conditions).

Her cancer (Hodgkin's lymphoma) is already deemed to be a disability by virtue of Equality Act 2010, Schedule 1, paragraph 6 (and see also the Statutory Guidance on the meaning of disability, paragraph B21). The respond asserts that the claimant has produced no medical evidence that her migraines and/or her gastritis are aspects or symptoms of her cancer or that they are caused by her cancer treatment (as opposed to could be). No evidence is produced to support the claimant's contention that either of these conditions is a symptom of her cancer. The medical evidence rather points to the claimant having a pre-existing history of headaches and gastritis, pre-dating her diagnosis of Hodgkin's lymphoma.

89. The medical records show that the claimant consulted her GP about migraines in August 2015, 5 months after the conclusion of her cancer treatment. The claimant considered that this might be stress-related. The claimant's reliance on gastritis and migraine is not supported by her consultant's evidence dated 20 May 2018. He expected the after-effects of her cancer treatment to settle by July 2015. He does not identify either gastritis or migraine as after-effects of the cancer treatment. That is also consistent with the occupational health advice from October 2015.

90. The respondent also submits that the medical evidence does not support the contention that the migraines and/or gastritis are individually or cumulatively disabilities. She has not consulted her GP about migraines since 22 March 2016. Her sickness record shows no absences for headache or migraine since March 2016. The evidence about the prescribing and dispensing of Propranolol is inconsistent. There is no medical evidence to support any contention of deduced effects if any such medication were to be stopped or not taken. It cannot be assumed that there would be such deduced effects of the degree required.

91. The claimant's medical records indicate that she has not been the subject of medical consultation regarding gastritis since September 2014. A hospital admission in January 2016 was in respect of suspected gallstones. Another incident in April 2018 concerned viral gastroenteritis rather than gastritis. Again, this is consistent with the occupational health and primary care records. There is no evidence of a referral for investigation of GI problems in March 2016, as opposed to a referral for suspected tonsillectomy in May 2016. The claimant is prescribed Omeprazole, but there is no evidence of the deduced effects of ceasing that treatment.

92. As for the Propranolol, the respondent submits that the claimant's case – that she has taken this medication to prevent migraines since March 2016, leading to her symptoms being controlled such that she did not suffer migraines, leading to improved work attendance from summer 2016 – is not borne out by the further evidence. There is no prescription of Propranolol between 4 May 2016 and 10 July 2017. Two 28-day courses were prescribed on 10 July 2017 and 31 July 2017. There was then no further prescription until 22 February 2018. As at 24 July 2018 her average usage of medication was 70%. This suggests that the claimant does not take her medication regularly (the claimant admitted in cross-examination that she was not very good at taking her medication).

Claimant's oral submissions

93. The claimant expressly relies on the written case set out in the letter on her behalf written by her brother to the respondent's solicitors on 24 May 2018 [57-61]. The claimant's case is that the real reason for her dismissal was her sickness absence record. If reasonable adjustments had been made for it then her sickness absence record would not have been an issue.

94. The claimant's status as a disabled person is established by her condition of Hodgkin's lymphoma. This is agreed. She also relies upon migraines and gastritis, as the side effects of cancer, but also standing alone as individual impairments. In response to the respondent's view that there is no medical evidence of this, the claimant points to the evidence at {RC-02 and RC-3} and the evidence at Tab 5.

95. The claimant contended that the respondent recognised that her absences were linked to her cancer. The respondent then had a duty to make reasonable adjustments for the claimant. See *Kirton v Tetrosyl*. The claimant invited the Tribunal to draw inferences. As to the migraine and gastritis, the claimant referred to her impact statement, to the statutory guidance on the meaning of disability and to *MoD v Hay*. The claimant asked the Tribunal to look at the cumulative effects of her conditions.

96. The effects of the migraine have also been long-term – more than 12 months. The migraines started much earlier than the medical evidence records and changed in type after the cancer was diagnosed and during its treatment. Propranolol was prescribed from and after March 2015 and so account has to be taken of the deduced effects of the treatment.

Discussion: disability status

97. There is no question that the claimant has established her status as a disabled person by virtue of her condition of Hodgkin's lymphoma. This is conceded. The Equality Act 2010, Schedule 1, paragraph 6(1) (and section 6(4)) apply.

98. What the claimant has not established, on the balance of probabilities, is that her conditions of gastritis and/or migraine, whether separately or in tandem, and whether standing alone or as symptoms or after-effects of Hodgkin's lymphoma or its treatment, amount to a disability or disabilities so as to establish on a separate or additional basis the claimant's status as a disabled person at the relevant times.

99. The burden of proof in relation to her status as a disabled person is upon the claimant. She must establish that she has a physical or mental impairment that has a substantial and long-term effect upon her ability to carry out normal day-to-day activities: Equality Act 2010, section 6(1). It does not matter whether the conditions relied upon are illnesses in their own right or the effects of some other condition or its treatment, but there must be sufficient medical and other evidence to establish that the claimant has a physical or mental impairment that

has a substantial and long-term effect upon her ability to carry out normal day-to-day activities at the relevant time.

100. I am prepared to accept the claimant's impact statement as some evidence of what she says are the effects of gastritis and migraine upon her ability to carry out normal day-to-day activities. Unfortunately, there needs to be some medical evidence to provide the underpinning of that personal evidence. It is possible to piece together sufficient indications from the primary care records, the sickness absence records and the occupational health account that at various times the claimant has suffered from gastritis and/or migraine and has been prescribed medication for those conditions.

101. However, the medical evidence is patchy and incoherent or inconsistent. I would have expected to have seen a more complete and compelling narrative from the medical evidence, in tandem with the claimant's own testimony, to support the contention that her conditions of gastritis and/or migraine, whether separately or in tandem, and whether standing alone or as symptoms or after-effects of Hodgkin's lymphoma or its treatment, amount to a disability or disabilities so as to establish on a separate or additional basis the claimant's status as a disabled person and at what relevant times.

102. That is particularly so to the extent that the claimant appears to be relying to any extent on having recurrent conditions (Equality Act 201, Schedule 1, paragraph 2(2); the deduced effects of medical treatment (Equality Act 2010, Schedule 1, paragraph 5); or progressive conditions (Equality Act 2010, Schedule 1, paragraph 8). See *Woodrup v London Borough of Southwark* [2003] IRLR 111 CA. As the respondent's submissions highlight, the necessary evidence to the required degree is not present. It is especially telling that the evidence of Professor Johnson, the claimant's consultant, simply does not support the positive case that the claimant otherwise seeks to make in respect of gastritis and migraine as disabilities.

103. The evidence in respect of migraine and Propranolol illustrates this difficulty. I accept the respondent's submission that the claimant's migraine condition was not regarded as sufficiently serious to warrant prescribed medication between May 2016 and July 2017 (14 months). Medication was reissued in July 2017 for about a month and then reissued once more from February 2018. If the claimant did not suffer migraines from summer 2016 then they could not have had a substantial adverse effect on her ability to carry out normal day-to-day activities from that time. It further cannot be safely concluded from the evidence that but for the prescription of medication the claimant would have experienced deduced effects of disability. She has not discharged the burden of proof upon her.

104. In conclusion, in my judgment, the claimant has not established that her conditions of gastritis and/or migraine, whether separately or in tandem, and whether standing alone or as symptoms or after-effects of Hodgkin's lymphoma or its treatment, amount to a disability or disabilities so as to establish on a separate or additional basis the claimant's status as a disabled person <u>at the relevant times</u>.

Strike out or deposit order

105. Finally, the respondent invites me to strike out the unfair dismissal and direct disability discrimination complaints or order the claimant to pay a deposit as a condition of pursuing them.

106. The respondent accepts that it is only in the exceptional case that a claim should be struck out when the central facts are in dispute. Here it is said that there is an exceptional case because the facts that the claimant will need to establish are totally and inexplicably inconsistent with the undisputed contemporaneous documentation: *Ezsias v North Glamorgan NHS Trust* [2007] ICR 1126 CA. Here the claimant says that the real reason for her dismissal was her sickness absence. The dismissal letter evidences that she was dismissed because the respondent believed that she had stolen medication for personal use. In any event, even if the claim cannot be said to have no reasonable prospect of success, it nevertheless has little reasonable prospect of succeeding.

107. In my judgment, as a result of my decisions on the preliminary issues above, the scope of the claim is now considerably reduced. While it will be necessary to hear background and contextual evidence concerning the claimant's disability-related and sickness-related absence record, the focus is now entirely upon the claimant's status as a disabled person by virtue of her cancer only and the respondent's reasons for dismissing her in August 2017 and upholding that decision on appeal in December 2017. While the respondent makes a positive case that her dismissal was because of the theft of medication for personal use, that reason will need to be tested against the alternative scenarios, contended for by the claimant, that the real reason for her dismissal was her disability status or her sickness-related absence record.

108. Accordingly, I am unable to conclude at this preliminary stage that the claimant's claim, as amended and narrowed, has little or no reasonable prospect of success. I decline to make a deposit order or a strike out order in respect of the claim, in whole or in part.

Summary

109. The claimant's complaints of unfair dismissal and direct disability discrimination (in respect of the decision to dismiss her in August 2017 and to uphold that decision on appeal in December 2017) are in time and may proceed to the final hearing commencing on 29 October 2018.

110. Any other complaints of indirect disability discrimination or failure to make reasonable adjustments are not pursued and are dismissed.

111. The claimant is a disabled person for the purposes of the Equality Act 2010 by virtue of the condition of Hodgkin's lymphoma only.

112. The respondent's application to strike out the whole or part of the claim as amended, or to make a deposit order in respect of it, is refused.

Written reasons

113. The parties had been reminded of the provision for judgments and reasons to be placed on the online register. No application has been made under rule 50.

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Judge Brian Doyle
7 September 2018

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RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON

7 September 2018

FOR THE TRIBUNAL OFFICE