Case Number: 1801814/2020(V)

EMPLOYMENT TRIBUNALS

Claimant:	**Mrs E Irabor**		
Respondent:	**Leeds and York Partnership NHS Foundation Trust**		
Heard by:	**CVP**	**On:**	**7,8 & 9 December 2020** **15 December 2020** **In Chambers** **(Reserved Decision)**

Before: **Employment Judge Shulman**
Mrs L J Anderson-Coe
Mrs L Hill

Representation

Claimant: Dr O Taiwo
Respondent: Gareth Price, Counsel

RESERVED JUDGMENT

1. The Tribunal gave Judgment as follows:
   1.1. For the claim of direct disability discrimination – dismissed.
   1.2. For the claim of failure to make reasonable adjustments – dismissed.
   1.3. For the claim of direct race discrimination – dismissed.
   1.4. For the claim of direct associative race discrimination – dismissed.
   1.5. For the claim of victimisation – dismissed.
   1.6. For the claim of unauthorised deduction from wages – dismissed.

REASONS

1. **Claims**

   1.1. Direct disability discrimination.

   1.2. Failure to make reasonable adjustments.

   1.3. Direct race discrimination.

   1.4. Direct associative race discrimination.

   1.5. Victimisation

   1.6. Unauthorised deduction of wages.

2. **Issues**

   2.1. The issues in this case are set out in paragraphs 2 to 8 inclusive in the list of issues agreed between the parties and can be found on pages 56 to 60 of the file of documents. These will be revisited in the determination of the issues at paragraph 6 below.

3. **Matters occurring during the hearing**

   3.1. At the outset of the hearing the claimant made an application to amend the claimant's claim form, as previously set out on 30 November 2020, so as to add claims of victimisation (a further act), harassment – race, harassment – disability, whistleblowing, further acts of race and disability discrimination and unfair dismissal. The respondent resisted the application. In advance of the hearing Employment Judge Deeley directed that the matter be dealt with at the start of this hearing. Argument took place on the first morning of the hearing and towards the end of the first morning the claimant was invited to consider the future of the application. After lunch the claimant indicated that the application to amend would be withdrawn but that the claimant might make a claim for unfair dismissal later.

4. **The law**

   The Tribunal has to have regard to the following provisions of the law:

   4.1. In relation to direct disability discrimination section 13 Equality Act 2010 (EA).

   4.2. In relation to failure to make reasonable adjustments sections 20 and 21 EA.

   4.3. In relation to direct race discrimination section 13 EA.

   4.4. In relation to direct associative race discrimination section 13 EA.

   4.5. In relation to victimisation section 27 EA.

   4.6. In relation to unauthorised deduction of wages sections 13 and 27 Employment Rights Act 1996 (ERA).

   4.7. In relation to the question of whether or not any or all of the claims under EA might be out of time section 129 EA.

5. **Facts**

The Tribunal, having carefully reviewed all the evidence (both oral and documentary) before it, finds the following facts (proved on the balance of probabilities):

5.1. The claimant commenced employment with the respondent on 9 December 2002 as a band 5 physical health nurse, running clinics, to monitor physical health of patients in the community based at St Mary's House, Chapeltown, Leeds.

5.2. In July 2016 the claimant started to experience back pain.

5.3. On 25 March 2019 Vanda Brack, who gave evidence before us, became the claimant's line manager. The claimant had been off work with low back pain since 15 October 2018. A reorganisation of the community clinics was implemented on 25 March 2019. The previous three clinics, including that at St Mary's House, became one. Because of her health the claimant missed the opportunity of an interview to decide if a position was available for her and she became scheduled for redeployment. The claimant had known Ms Brack in the past and the claimant told us that Ms Brack had not caused the claimant any previous concern. Indeed, Ms Brack had at one point been the claimant's mentor. Before Ms Brack became a manager, she had trained in equality and diversity in 2017 and the training covered race and disability.

5.4. The Trust's sickness records showed the following absences of the claimant relating to back problems:

5.4.1. From 4 July 2016 to 13 November 2016 (133 days);

5.4.2. From 27 July 2017 to 30 August 2017 (38 days);

5.4.3. From 17 October 2018 up to and including the date of the claim. This latter absence was recorded in the Trust's system as "other musculoskeletal problems", but also related to bereavement in respect of the sad loss by the claimant of her mother.

5.5. There was an occupational health referral since the absence which commenced on 15 October 2018. The date that the claimant's mother passed away was 26 October 2018.

5.6. The claimant has never been to work as paragraph 5.4 above indicates since her last absence.

5.7. On 8 March 2019 there was an outcome letter following a Stage 1 sickness absence meeting, which took place on 19 February 2019. The claimant attended that meeting unaccompanied. Six matters were agreed between the claimant and K Tscanaschak, her then line manager. Ms Tscanaschak informed the claimant that Ms Brack would be succeeding her as the claimant's line manager. The agreed outcomes were:

5.7.1. To continue to support the claimant under Stage 1 of the Trust procedure;

5.7.2. To attend another review in 12 weeks;

5.7.3. To maintain open lines of communication;

5.7.4. Prior to the claimant's return to consider reasonable adjustments;

5.7.5. That the claimant's post on return would be a temporary post until a substantive post was secured;

5.7.6. The claimant would be supported with training and the opportunity to shadow a new team.

The outcome letter was focused on the claimant's bereavement and not on her back injury. When the claimant came into see Ms Brack on 13 March 2020 for an informal meeting the focus was again on the claimant's bereavement rather than her back.

5.8. On or about 20 August 2019 Ms Brack spoke to the claimant and informed her that a Stage 1 sickness absence meeting would take place on 16 September 2019 and Ms Brack referred the claimant to occupational health to clarify the position regarding the claimant's illness in advance of the meeting. In the letter inviting the claimant to the meeting there was clear reference as to who may accompany the claimant at the meeting. This stated, in accordance with the respondent's policy, that the claimant "may be accompanied by your Trade Union representative or a work colleague". The occupational health referral was deferred until after the meeting.

5.9. The date of the meeting was changed to 18 September 2020. These are the facts which the Tribunal finds relating to the events of the meeting on 18 September 2020. The claimant and a Dr Taiwo, who did not give evidence before us, but did represent the claimant at this Tribunal, arrived for the meeting. Ms Brack was in her office. She had heard from Ms Janet Twinn, an HR advisor for the respondent, who gave evidence before us, that Ms Twinn was running late for the meeting. Ms Brack went to see the claimant outside her room and whilst she was there she saw Dr Taiwo who was with the claimant. Ms Brack said words to the effect that "you didn't tell me you were bringing anyone with you. Who is this?" Dr Taiwo said words to the effect "it doesn't matter who I am, you are not entitled to ask and you wouldn't have asked if the claimant was white". Dr Taiwo is black and describes his race as African. Dr Taiwo stopped the claimant speaking to Ms Brack saying that she could address her points at the meeting. Dr Taiwo said that he was going to raise a complaint of discrimination against Ms Brack, with which the claimant agreed. Ms Brack agreed that Dr Taiwo was entitled to do so. Ms Brack was of the view that it was right to ask Dr Taiwo who he was. We find that this question caused the offence. In any event Ms Brack was trying to find out who Dr Taiwo was and said as much to the claimant. Dr Taiwo told the claimant not to answer that question. Ms Brack was unsettled by this, because she was effectively being accused of being a racist. She withdrew to her office knowing that Ms Twinn was on her way so that she could receive advice on the position. On Ms Twinn's arrival Ms Brack relayed her understanding of the conversations. Ms Twinn's advice to Ms Brack was to apologise for a misunderstanding, but it was still necessary for them to find out who Dr Taiwo was. This was

because the respondent only allowed trade union representatives and work colleagues into sickness absence review meetings. Ms Brack and Ms Twinn went outside from Ms Brack's office to meet the claimant and Dr Taiwo. Ms Brack apologised for the claimant's upset at the way she had spoken. She said that it was not what she meant and that she needed to know who Dr Taiwo was in order for him to be permitted to enter the meeting. Dr Taiwo had his identity badge in his hand before everyone went into the meeting. He showed it to Ms Twinn. She took details in the meeting. For the purposes of that meeting Ms Twinn and Ms Brack decided that Dr Taiwo was a trade union representative and the meeting went ahead.

5.10. Once the meeting was underway it went ahead without incident. The claimant was told there would be a referral to occupational health. Dr Taiwo raised the question of the claimant's entitlement to injury allowance. We find that the claimant and Dr Taiwo had not discussed the question of injury allowance before the meeting. The right to an injury allowance puts the onus on an employee to start the process. In fact, the claimant did not make an application for injury allowance until 27 February 2020, which she personally delivered to the respondent but not until 11 March 2020. The fact is that the claimant did not make the application earlier. One of the reasons she gave was that she was not out of money because of her Universal Credit. On the other hand, she said that she had been out of sick pay since October 2019. The claimant agreed with the Tribunal that there was no delay in the injury allowance process of the part of the respondent. At the meeting the respondent had agreed to send an application form for injury allowance to the claimant. It was decided in the meeting to move to Stage 2 in the sickness absence procedure.

5.11. After the meeting Ms Brack spoke that day to her manager Claire Paul to report what had happened earlier.

5.12. On 7 October 2019 Ms Brack wrote an outcome letter following the meeting on 18 September 2019 to the claimant, assisted by Ms Twinn. That letter enclosed an application form for injury allowance, which somehow did not get to the claimant, nor did the claimant ask for another copy then. The outcome letter referred to a reference to occupational health and that the claimant's continued absence would be managed under Stage 2. It invited the claimant to a Stage 2 meeting on 4 November 2019. It was pointed out that if the claimant was unable to work within a reasonable timescale she may have to move to Stage 3 of the sickness absence procedure, where dismissal would be a possibility on capability ill health grounds. Alternatives were mentioned for a return to work. It was stated that the organisation for which Dr Taiwo was a representative, the Alternative Workers Congress (AWC) was not recognised by the respondent but that the claimant could still bring a trade union representative (she was a member of UNISON) or a work colleague. In relation to having a colleague to be with her the claimant told us that she worked alone and therefore did not know anyone. A suggestion was made in the hearing of the respondent incorrectly making mention of the claimant having

previously being represented by a pastor during internal hearings. The outcome letter gave the claimant a right of appeal.

5.13. On 25 October 2019 Dr Taiwo sent an email to Ms Brack, giving notice that the claimant would be appealing the outcome letter and would be lodging a grievance. The email did not specifically refer to discrimination of any kind. Dr Taiwo asked for notes of the meeting of 18 September 2019. Dr Taiwo did not himself take notes and Ms Twinn's notes, which she took at the meeting, were no longer available, having been destroyed following use by Ms Twinn as an aide memoire to the composition of the outcome letter, in accordance with her usual practice. The claimant told us during the hearing that she could have appealed and/or lodged a grievance without Ms Twinn's notes. We find as a fact that it would have been quite possible for her to do so. This is despite the fact that in relation to grievances the claimant was familiar with the respondent's grievance procedure. The claimant said that she could not appeal because she was bedridden. We find as a fact that no appeal or grievance, informal or otherwise, was lodged in respect of the meeting on 18 September 2019 or otherwise.

5.14. On 30 October 2019 the respondent wrote to the claimant reiterating her right of appeal and, reiterating the lack of status of AWC. The application stated who the appeals manager was and the details for an appeal.

5.15. Dr Taiwo emailed the respondent on 4 November 2019. He stated that the claimant was pulling out of the meeting for that day and any further meetings, if the claimant was denied her rights of representation. We find as a fact that the claimant was not deprived of her right of representation according to the policy of the respondent. Dr Taiwo continued to press his position and made reference to victimisation. He revisited the events of 18 September 2019 and threatened a formal complaint, which was never made, asking for the notes again.

5.16. The claimant did not attend the meeting on 4 November 2019 and remained off sick.

5.17. Between 4 November 2019 and 24 February 2020 nothing happened, except for a follow up by occupational health with a report on 7 February 2020. On that date Ms Brack wrote to the claimant, yet again offering a right of appeal from the hearing, which took place on 18 September 2019, where the claimant should submit it and giving the claimant a time limit of 14 days to do so, spelling out the consequences of no appeal. The claimant received another injury allowance form. The claimant was invited to lodge a grievance, stating what the grounds might be and to whom to send it with the consequences in relation thereto. Dr Taiwo was being copied in by the respondent and he was to be copied in on all future correspondence. The respondent was still not agreeing that AWC was a trade union and confirmed what the claimant's rights to be accompanied were.

5.18. For the record we set out the nature of the claimant's impairment, namely lower back pain. The claimant told us that she could not do certain day to day activities, such as cleaning, shopping, gardening,

walking, household work and watching television. The claimant was being treated with diagnostic lumbar medial branch block injection and amitriptyline, codeine and co-codamol. She said that if the treatment was removed she would have to remain in bed and would become depressed.

5.19. As far as time limits are concerned, where applicable, the claimant stated that she did not meet the time limits because of her health. On the other hand, she told us that she knew about tribunals, but not about time limits.

5.20. As far AWC is concerned we find that at no time during the period when Dr Taiwo was seeking to represent the claimant in internal process or at this hearing did Dr Taiwo produce the constitution of AWC. We find that the respondent has a clear policy for representation at sickness absence hearings. We find as a fact that the respondent made a judgment as to whether or not AWC complied with its policy. It also looked at the list of trade unions and AWC was not in that list. There is also a note that the claimant paid her UNISON union dues, including and up to October 2019.

6. **Determination of the issues**

(After listening to the factual and legal submissions made by and on behalf of the respective parties):

6.1. The agreed issues point out that in respect of any alleged acts of discrimination which occurred more than three months before ACAS early conciliation was commenced, in this case on or before 15 October 2019, the Tribunal would not have jurisdiction to hear these issues, and in those circumstances time can only be extended if the Tribunal finds that it is just and equitable to do so. Time can be extended to the date of the complaints which would otherwise be out of time. The Tribunal finds that if there are any occurrences which are out of time these relate to the events of 18 September 2019. That does not constitute a long delay until 15 October 2019. Despite the claimant's knowledge of employment tribunals, because of the shortness of the delay and the claimant's illness, the Tribunal does extend time so as to include claims arising on 18 September 2019.

6.2. The Tribunal finds in relation to the claimant's impairment that in regard to that impairment, the claimant's difficulty with the day to day activities described above and what might happen to the claimant without medication and/or treatment, and having regard to a concession made during the hearing by the respondent, the claimant is a disabled person within the meaning of section 6 EA that the claimant is indeed a disabled person.

6.3. Concerning direct disability discrimination, the claimant set out eight alleged acts of less favourable treatment upon which we make determinations as follows:

6.3.1. From March 2019 Ms Brack did not consider the claimant for injury allowance and consequently the claimant's pay was reduced from April 2019. She received reduced sick pay rather than full pay. We know that the onus is on the employee to apply

for injury allowance. We know that the claimant knew nothing about injury allowance until Dr Taiwo brought it up on 18 September 2019. We find that there was unnecessary delay by the claimant in lodging her application for injury allowance and we know that the claimant accepts that the delay was not down to the respondent.

6.3.2. On 25 October 2019 the claimant, via Dr Taiwo, requested notes of the meeting on 18 September 2019 and that Ms Brack did not disclose them. Very simply they were not disclosed because they did not exist. They were used by Ms Twinn as an aide memoire and thereafter destroyed in accordance with her practice. It would have been quite easy for the claimant to appeal and/or lodge a grievance without those notes. Her representative chose not to take notes.

6.3.3. On 7 October 2019 and subsequently the claimant maintains that she was not allowed to be represented by Dr Taiwo of AWC. The fact is that there were no subsequent meetings and the respondent allowed Dr Taiwo to be involved in some correspondence. The respondent did its research and came to the view that AWC was not a trade union and did not comply with the respondent's policy.

6.3.4. On 7 October 2019 the claimant was invited to a meeting for 4 November 2019, which she considered was akin to a disciplinary hearing which may lead to dismissal and she was to be denied representation at that meeting or any appeal against the decision to move to Stage 2. The policy does not specify that a sickness absence review meeting is disciplinary. We have reviewed the position as to whether AWC gives the claimant entitlement to representation. We have found in any event that the claimant was a paid-up member of UNISON and could have been represented by them.

6.3.5. After the meeting on 18 September 2019 the respondent did not obtain relevant occupational health reports necessary to move to or justify a Stage 2 meeting under the respondent's procedure. We find that this is not correct. The claimant was referred to occupational health in readiness for the meeting on 4 November 2019 which the claimant chose not to attend.

6.3.6. In referring the claimant to occupational health after the meeting on 18 September 2019 Ms Brack claimed to have discussed the contents of the referral with the claimant but the claimant said she had not done so. We find that Ms Brack followed the occupational health process.

6.3.7. Ms Brack failed after the meeting on 18 September 2019 to refer to the claimant's complaints to a senior manager. We find that Ms Brack did so that very day.

6.3.8. The respondent did not promptly process the injury allowance application which the claimant submitted on 27 February 2020. The claimant in her evidence agreed that this was not so.

6.3.9. We find that no detrimental action existed which was averred by the claimant. Therefore, we are unable to find that the respondent treated the claimant less favourably than the respondent would have treated others. Therefore, the question of comparison with others does not arise. We find that there can be no relevance to the protected characteristic, which is disability.

6.4. In relation to failure to make reasonable adjustments:

6.4.1. The issues set out that the following provision criterion or practice (provision) was the requirement for the claimant's representative at formal meetings under the respondent's employee's well-being and managing attendance procedure to be a work colleague or trade union representative. If that was so did that provision put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not so disabled? The claimant alleges that the provision put her to the following substantial disadvantage in comparison with non-disabled persons, namely, that the claimant was denied representation or support by an organisation/someone who understood her predicament and who had been a great help to her, particularly with their knowledge of employment relations and mental health. The Tribunal finds that the claimant was denied representation in circumstances that did not put her at a substantial disadvantage. It was open to the claimant to comply both at the 18 September 2019 meeting and if she wanted at the 4 November meeting, having paid trade union dues, to be represented by UNISON. She also could have been represented by a work colleague, bearing in mind many years' service with the respondent. The claimant said that this was not possible as she worked on her own but certainly the trade union option was open to her.

6.4.2. In the circumstances the question of knowledge of the respondent was not relevant. The respondent took such steps as were reasonable to have taken to avoid the disadvantage. The claimant alleges that the respondent should have allowed Dr Taiwo to represent the claimant at formal meetings under its procedure but we have dealt with this matter above.

6.4.3. We find that the claimant did not establish detrimental action so that the duty to make reasonable adjustments did not arise. Consequently, there was no failure to comply with that duty and the provision did not put the claimant at a substantial disadvantage compared to non-disabled persons. As we have said knowledge is not an issue.

6.5. In relation to direct race discrimination/direct associative race discrimination:

6.5.1. The claimant raises the eight points which were raised under the heading of direct disability discrimination above and we find that our findings there apply equally to the claims of direct race

discrimination/direct associative race discrimination as they do to direct disability discrimination.

6.5.2. Additionally, the claimant says that Ms Brack initially refused allow Dr Taiwo to accompany the claimant into the meeting on 18 September 2019. We find that Dr Taiwo was not announced in advance. Ms Brack did not have the opportunity to find out who Dr Taiwo was. The respondent was perfectly entitled to consider its procedures before allowing a representative through the door. In the event Dr Taiwo did come through the door. We do not find the reference to the claimant being previously represented by a pastor of relevance to the claim.

6.5.3. Did the respondent treat the claimant less favourably because of her race? There is no doubt that what happened outside the door on 18 September 2019 was an unpleasant experience for all but was there less favourable treatment as a result? The respondent followed sickness absence procedures. The claimant had every opportunity to attend the next meeting but chose not to do so. The claimant was given many opportunities to lodge an appeal against the meeting of 18 September 2019 and/or a grievance and/or to complain but never did any of these.

6.5.4. In relation to the allowance of Dr Taiwo to come to meetings, the failure of Ms Brack to refer complaints to a senior manager and her refusal to allow Dr Taiwo to accompany the claimant into the meeting on 18 September 2019 we do not find that the respondent treated the claimant less favourably because of Dr Taiwo's race. Dr Taiwo's race is African.

6.5.5. In the case of direct race discrimination/direct associative race discrimination we find that there was no detrimental action relied on by the claimant so that we cannot find that the respondent treated the claimant less favourably than the respondent would have treated others. Therefore, the question of comparison does not arise. There can be no relevance to the potential characteristic, which is race.

6.6 In relation to victimisation the claimant contends and the respondent accepts that her verbal complaint of race discrimination on 18 September 2019 was a protected act.

6.6.1 If the claimant did the protected act, did the respondent subject the claimant to a detriment?

6.6.2 The claimant alleges that she was subjected to the following detriments:

6.6.2.1 The respondent threatened to progress with a Stage 2 sickness absence meeting without waiting for further advice from occupational health and without disclosing information or documents necessary for the claimant to file an appeal against the Stage 1 outcome. The Tribunal finds that the

respondent would have progressed to Stage 2 with or without an appeal complaint, which indeed never came, and in any event.

6.6.2,2 The respondent continued to deny the right to be represented by Dr Taiwo. The respondent was merely complying with its researches and policy and indeed did engage in some correspondence with Dr Taiwo, which was clearly on behalf of the claimant.

6.6.3 Did those two acts constitute a detriment? The Tribunal finds that there was no detriment and no detrimental action and no action by the respondent amounting to victimisation.

6.7 In relation to unauthorised deductions from wages:

6.7.1 The claimant alleges that the respondent made unlawful deductions from her wages when it paid her sick pay.

6.7.2 The claimant alleges that she should have received injury allowance. The claimant was paid in accordance with the respondent's procedure but in any event the Tribunal finds that the matter of sick pay is not part of this claim. This claim relates to injury allowance and it is clear from the evidence that it is now a matter of application by the claimant which has been made. Section 27 ERA sets out the meaning of wages. Wages are payable to a worker in connection with his or her employment. Injury allowance is a matter for adjudication and was not adjudicated upon at the time of the claim, the claimant lodging her application late. As to the other issues:

6.7.2.1 Was there a deduction? The Tribunal is of the view that there is nothing to deduct.

6.7.2.2 The question of whether a deduction was required or authorised to be made by virtue of a statutory provision or relevant provision does not apply.

6.7.2.3 The issue of whether or not the claimant agreed to any deduction does not arise.

6.7.3 Whilst it is clear that the claimant is worker we find that this is not a claim in respect of wages, and even if it was there is nothing to deduct as a decision on injury allowance had not been adjudicated upon at the time of the claimant's application to the Tribunal there can be no question of financial loss.

6.8 Therefore, for the reasons set out above, each of the claimant's claims hereby dismissed.

Employment Judge Shulman

Date 11 January 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

Date 16 January 2021