EMPLOYMENT TRIBUNALS

Claimant: **Mr J Sidhu**

Respondent: **Newcastle upon Tyne Hospitals NHS Foundation Trust**

HELD at Newcastle CFT (in person) **ON: 12 to 15 December 2022**

BEFORE: **Employment Judge Johnson**
Members: **Mr S Wykes**
Mr E A Euers

REPRESENTATION:

Claimant: **Miss S Ismail of Counsel**
Respondent: **Miss M Martin of Counsel**

RESERVED JUDGMENT

The claimant's complaints of unlawful disability discrimination are not well-founded and are dismissed.

REASONS

1. The claimant was represented by Miss Ismail of counsel who called to give evidence the claimant, Ms Odeth Richardson (head of service in occupational therapy) and Miss Laura Tweddle (trade union representative) to give evidence. The respondent was represented by Miss Martin of counsel, who called to give evidence Mr Phillip Powell (Directorate Manager), Miss Kathrine McRae (senior

sister) and Miss Wendy Johnson (senior HR manager). There was an agreed bundle of documents marked R1, comprising an A4 ring binder containing 325 pages of documents.

2. By a claim form presented on 20 January 2022, the claimant brought complaints of unlawful disability discrimination. The respondent defended the claims. In essence, the claims arise out of circumstances surrounding the claimant's return to work in July 2021, following a lengthy period of absence. The claimant alleges that the respondent agreed to make reasonable adjustments to accommodate his return to work, but that the respondent then failed to implement those agreed reasonable adjustments. The respondent denies any such failure, maintaining that it made those adjustments which were reasonable in the circumstances to remove any disadvantage caused to the claimant by his working conditions.

3. A case management hearing was conducted by Employment Judge Pitt on 25 March 2022, at which case management orders were made so as to ensure that the case was fully prepared for this final hearing. On that occasion Employment Judge Pitt agreed with both representatives a list of issues (the questions which would have to be decided by the Employment Tribunal at the final hearing). A summary of those issues is as follows:-

    (i) At all material times was the claimant suffering from a physical impairment which satisfies the definition of "disability" in S.60 of the Equality Act 2010?

    (ii) Did the respondent know, or ought it to have reasonably known that the claimant was disabled?

    (iii) Did the respondent apply a provision criterion or practice (PCP) which put the claimant at a substantial disadvantage in comparison with persons who were not disabled?

    (iv) What steps of the respondent reasonably to have taken to avoid that disadvantage?

    (v) Did the respondent engage in unwanted conduct related to claimant's disability which had the purpose or effect of violating the claimant's dignity or creating a hostile, degrading, humiliating or offensive environment for him?

    (vi) Did any of the alleged acts of discrimination take place outside the three month time limit imposed by section 123 of the Equality Act 2010? If so, would it be just and equitable for that time limit to be extended?

4. At the start of the Hearing, Miss Ismail and Miss Martin informed the Tribunal that the claims and issues had been narrowed down, so that there remained only 2 allegations of failure to make reasonable adjustments, both of which were also alleged to be acts of harassment. The first was the respondent's failure to ensure that the claimant only worked on Level 1 of the NCCC out-patient's department, rather than on Level 2. The second was to enable the claimant to have the opportunity to alternate between sitting and standing whilst carrying out his duties. The acts of harassment were continuing to require the claimant to work on Level 2 and failing to do so after confirming on 27 September 2021 that it would rota the claimant on to Level 1. Both counsel agreed that the PCP applied to the claimant by the respondent, which put the

claimant at a substantial disadvantage, was the requirement to attend work and perform his normal duties as a healthcare assistant. The claimant alleges that he suffers from a mental health impairment (diverticulitis), an injury to his left knee and ankle and a lack of grip in his hands. The injuries to the claimant's left lower limb and hands were as a result of a road traffic accident in May 2018, when the claimant was knocked from his bicycle. By the time of her closing submissions, Miss Martin for the respondent conceded that the impairment to the claimant's left lower limb amounted to a disability as defined in S.6 of the Equality Act 2010 and that the respondent knew or ought to have known about that disability throughout the relevant period. Miss Martin conceded that the claimant's difficulties with his grip, caused by the injury to his hands, also amounted to a disability as defined in S.6. However, Miss Martin maintained that the respondent did not know and could not reasonably have been expected to know that this injury amounted to a disability as defined in S.6. The claimant did not rely upon his diverticulitis as a mental impairment which could satisfy the definition of disability in S.6.

5. There are 21 occupational health reports in the hearing bundle, the first of which is dated 10 May 2018 and the last of which is dated 23 August 2021. The report dated 9 October 2018 (page 145) specifically refers to the claimant suffering from pain in his hand. Subsequent reports refer to the claimant having "a number of active underlying conditions" the majority of which are likely to be considered as covered by the disability provisions of the Equality Act. Whilst it is clear from those reports that the claimant's knee injury was the principal obstacle to his return to work, the Tribunal was satisfied that there was sufficient information in those reports to put the respondent on notice that the claimant also suffered from impairment to his hands, which adversely affected his ability to perform his normal duties.

6. The claimant's duties included "observations" of patients attending the respondent's hospital and conducting tests including checking blood pressure, height, weight and obtaining blood samples. Most of the claimant's work was performed on Level 1 and Level 2 at the respondent's National Centre for Cancer Care (NCC). Level 1 is the radiotherapy department and Level 2 is the main out-patients services department. It was accepted by all those who gave evidence to the Tribunal that Level 2 tends to be busier on a daily basis than Level 1.

7. In March 2021 the claimant was certified as unfit for work and he underwent surgery on his left knee on 15 March 2021. The claimant remained absent from work and was invited to attend a case conference on 7 July 2021, at which the possibility of the claimant returning to work was discussed. A further referral to occupational health was made and a report prepared on 7 July, which appears at pages 224-226 in the bundle. At page 224 under the heading "planned summary", it states, "fit to return to work week commencing 2 August 2021 with adjustments." At page 225, the report records that the following matters were discussed at the case conference. The letter from occupational health states, "The following was agreed in the case conference and I would recommend in order to support Mr Sidhu's return to work:-

    (i) To have mediation with a specific line manager in July 2021 (exact date to be confirmed) which will be facilitated by P Powell.

    (ii) To return to work on Level 1 of the NCCC out-patients.

(iii) A workplace adjustment programme/gradual increase in working hours over six weeks was agreed to support his return to work.

(iv) During the first two weeks of his return, to have time to undertake administrative duties eg emails, ESR mandatory training and ensure that his competencies are up to date.

(v) To gradually increase his clinical work.

(vi) To have the opportunity to rotate between sitting and standing during the working day.

(vii) To have flexibility to attend any medical/physiotherapy appointments, if they unavoidably fall within his working hours.

8. At the time of this meeting, the claimant was being line managed by Mr Phillip Powell. Mr Powell's notes of that return to work meeting appear at pages 227-229 in the bundle and are dated 15 July 2021. The meeting was attended by Mr Sidhu and his trade union representative Poonam Singh. In attendance were Mr Powell, David McLinton and Karen Rucroft (senior sister). It was common ground between both parties that when Ms Rucroft had been the claimant's line manager, there had been relationship difficulties between them to the extent that the claimant made it clear that he did not wish to be managed by Ms Rucroft. Mr Powell's notes in section 4 on page 227 record the following:-

- Mandatory training to be completed by 15 August 2021.
- Paperlite training – a member of this team will assist JS in reviewing new system with the aim of becoming competent in its use within six weeks.
- Co-ordinator competency to be completed within a set time frame, working with Lisa Pashby (clinical educator).
- To achieve phlebotomy competency.
- Working with other members of staff to increase confidence in this skill (JS was able to undertake this skill prior to his period of leave).
- Link nurse role – diabetes to be achieved by 2 November 2021.
- JS will work with Syeda Ahmed (junior sister) during his return to work where and when possible.
- JS will meet at the end of each week to ensure that he is supported.
- Any concerns should be raised by via junior charge nurse RC, junior sister SA or senior sister KR.

Under "Role within out-patient" the following is noted:-

- Agreed that JS is returning to his role that he holds a substantive contract in.
- There is an expectation to work across the two floors of out-patients.
- The demands of the day will dictate where staffing or resources are best placed.
- During the pandemic staff had been allocated based on service demand.

9. At paragraph 8 on page 228 it records the following, “KR asked regarding any outstanding issues or concerns from an OHS point of view – JS stated that there were none and he is fit to work from 2 August 2021”.

10. At page 229 is a note made by Mr Powell following a private meeting between himself and the claimant which took place after that case conference. Mr Powell records that the claimant had asked if he could meet privately. Mr Powell’s note records the following:-

    - JS wanted clarity around where he would be based on his return, Level 1 (his preference) or Level 2. PP advised that as per their conversation and as discussed at the occupational health case conference, the directorate/out-patient department are committed to facilitating him working on Level 1.
    - PP further advised that during the current staffing crisis primarily due to the track and trace system, it may be necessary for JS to work on Level 2 until the staff on sick leave due to being “pinged” by the NHS Covid App are able to return. Furthermore during the period of phased return some of the re-training would be carried out on Level 2 rather than Level 1, due to the nature of the skills (eg phlebotomy). JS considered this and expressed some concerns, he does not wish to come into contact with Karen Rucroft in his day to day work. JS then started to recount details of previous issues with Karen Rucroft – PP advised JS that as agreed in the previous meeting a line had been drawn under these events and they should not be re-visited. JS asked how long it would be before he would be on Level 1 permanently. PP advised as soon as the current staffing crisis was over and he had competency signed off around nursing practices. JS reluctantly agreed to this but asked that this be kept to as short a period as possible.
    - A discussion followed regarding JS’s mobility and recovery after his knee operation and ongoing need for physiotherapy appointments.

11. The claimant’s case about these two meetings was that it had been agreed that he would return to work solely on Level 1 and that this had been promised to him as a reasonable adjustment to accommodate his disability, namely his left leg and his hands. In his witness statement at paragraph 28 the claimant states:-

    “I returned to work on 3 August 2021 with the following adjustments:-

    (i) Mediation with my line manager in July 2021;

    (ii) Return to work on Level 4 of the NCCC out-patients;

    (iii) Gradual increase in working hours over six weeks;

    (iv) First two weeks to do only administrative tasks.

    (v) Have the opportunity to alternate between sitting and standing during shifts;

    (vi) Flexibility to attend medical appointments.”

12. At paragraph 29 of his witness statement, the claimant says, “On my return I was put on a rota to work on Level 2, contrary to the occupational health report. I went to Level 1 but I was chaperoned into a room by Matron McLinton and Sister Rucroft. He was threatening in his manner and told me that he could

send me anywhere in the directorate. I explained to him that a reasonable adjustment had been agreed for me to work on Level 1 and I did not want to speak to him unless I had a witness present."

13. Each of the respondent's witnesses gave evidence to the effect that, following the claimant's return to work, he would whenever possible be allocated work on Level 1. All confirmed that the claimant had never been told or assured that he would never have to work on Level 2. The claimant conceded under cross-examination that his re-training would have to take place on Level 2 and that there would inevitably be days when he would be required to work on Level 2. The claimant insisted that the minutes of the case conference on 7 July amounted to a binding agreement between himself and the respondent that he would only be required to work on Level 1, because this was a reasonable adjustment to accommodate his disability. The Tribunal preferred the evidence of the respondent's witnesses in this regard. The Tribunal found that, whenever possible, the claimant would be allocated to Level 1, where the volume and intensity of work was less than that on Level 2. However, it was never agreed that the claimant would only be required to work on Level 1 following his return to work. At paragraph 44 of his witness statement the claimant lists 18 occasions between 3 August 2021 and 24 February 2022 when he was required to work on Level 2. That is 18 occasions in 7 months. In cross-examination, the claimant somewhat reluctantly accepted that his training had to be carried out on Level 2, until he had proved his competency in the various skills which he had been unable to perform during his lengthy absence from work. In his answers to questions in cross-examination, the claimant insisted that the respondent had deliberately delayed "signing off" those competences, so that he was effectively detained in Level 2 rather than being transferred to Level 1. That allegation was denied by the respondent. Again, the Tribunal preferred the evidence of the respondent's witnesses in this regard.

14. The claimant's main objections to working on Level 2 were that he had to stand for lengthy periods of time in order to undertake his normal duties, particularly the taking of blood samples from patients. The claimant's case was that the room in which he was required to work was small and cramped, which made it difficult if not impossible for him to sit on one of the stools provided for nurses to attend to patients who were sat in a chair. The claimant's evidence in that regard was contradictive completely by the respondent's witnesses. Their consistent evidence was that in the room in which the claimant worked, there were three chairs for patients and three stools upon which nurses would sit when taking blood samples. The Tribunal rejected the claimant's description of the size of and facilities within the room. The Tribunal found it likely that nurses and healthcare assistants would be able to sit on the stool provided at any time when they so wished.

15. The claimant also complained that his hands became tired and his grip adversely affected by the frequency of having to take blood pressure samples. Undertaking that task involves applying a strap to the patient's arm and activating a small pump to obtain a blood pressure reading. The claimant further complained that the regularity with which he was required to obtain blood samples, also meant that his hands became tired and his grip was adversely affected, due to his disability with his hands. The claimant alleged that, when he asked about taking breaks when his hands became tired, he was told that any time taken on such breaks would be added on to the end of his shift. Each

of the respondent's witnesses denied any knowledge of any such policy and all denied ever having heard such a practice being implemented. The respondent's witnesses' evidence was that all of the nursing staff are allowed to take breaks as and when required and none could recall an occasion when a nurse or healthcare assistant had been refused permission to do so.

16. The claimant alleged that the respondent applied to him a PCP of requiring him to attend for work to perform the normal duties associated with the healthcare assistant. The application of that PCP was admitted by the respondent. The claimant alleged that application of that PCP put him at a substantial disadvantage because of his two physical impairments relating to his left lower limb and his hands. The claimant alleged that having to stand for lengthy periods of time led him to suffer from fatigue, which would have been alleviated had he been able to sit down. The claimant maintained that he was not able to sit down because of the lack of space in the cramped room where he worked. The claimant alleged that the requirement to undertake normal duties meant that he was required to take numerous blood samples and blood pressure tests, which caused his hands to become tired and his grip to become weakened. That disadvantage would be removed had he been permitted to take breaks at appropriate times. The claimant's case was that, had he been allowed to work on Level 1, where the volume and intensity of the work was less than that on Level 2, then such an adjustment would have removed those disadvantages.

17. The main thrust of the claimant's case was that at the case conference on 7 July 2021, a binding agreement had been reached between himself and the respondent that he would only be required to work on Level 1 and that this had been identified as the reasonable adjustment to remove the disadvantages described above. The claimant's case was that by failing to adhere to that agreement, the respondent had failed to make the reasonable adjustments required by sections 20-21 of the Equality Act 2010.

18. Having returned to work on 3 August 2021, the claimant submitted a formal grievance 2 days later on 5 August, a copy of which appears at page 236 in the bundle. The claimant prepared this grievance with the assistance of his trade union representative Laura Tweddle. The grievance reads as follows:-

> "I wish to raise a grievance in accordance with the Trust's grievance procedure. Despite attempts to deal with these issues informally throughout this week, and believing a resolution had been reached, the Trust has continued to behave in an inappropriate way in contravention of the Equality Act 2010 and I am aggrieved on the following matters:-
>
> - Despite an agreed return to work that was arranged in conjunction with myself, occupational health and managers in my area of work, the agreed plan has not been upheld by the Trust.
> - Actions in relation to the arranged plan have not been implemented in a timely manner, for example a need for mediation in advance of my return.
> - The Trust has failed to implement reasonable adjustments that were recommended by OH and agreed upon as part of my return to work, that the Trust are obliged to make to meet the requirements placed upon them by the Equality Act 2010.

- Despite raising concerns throughout the week to address the stress and anxiety this has caused me during my return to work the Trust failed to respond putting me under further undue pressure on my return to work."

19. The grievance dated 5 August 2021 is an important document. It establishes that by then, the claimant was in full possession of the facts necessary to enable him to present a claim to the Employment Tribunal about alleged breaches of the Equality Act 2010, namely the alleged failure to make reasonable adjustments.

20. A grievance meeting took place on 22 September 2021 attended by Mr Powell, the claimant, Miss Tweddle and a note taker (Wendy Johnson). By a letter dated 24 September (page 254-255) Mr Powell wrote to the claimant thanking him for attending the meeting and setting out his response in the following terms:-

> "Laura explained that as a reasonable adjustment to support your return to work OH advised you should work on Level 1, but since your return to work you have been required to work on Level 2. I explained that we had previously discussed the need for you to work on Level 2 for around six weeks after your return to ensure you were signed off on all relative competencies again due to the length of the time you have been absent from work to ensure your role and patient safety. My understanding was that after that period you would predominantly work on Level 1 as per the OH recommendation. I confirmed that I will discuss this with senior sister Naden and ensure this happens. You also raised that, despite a further recommendation that you are able to take breaks to rest your knee when required, you had not done so as you were concerned this break time would need to be added to the length of your staff as other colleagues told you it would. You confirmed you had not discussed this with senior sister Naden. I clarified that as this is a reasonable adjustment recommended to support your well-being any reasonable break time would not be added to the length of your shift and again I will speak to senior sister Naden to clarify this. In view of my assurance that both of these adjustments will be implemented as agreed, Laura agreed to hold this grievance in abeyance until you agree these are working practices at which time you confirm to me this grievance can be withdrawn."

21. By a letter dated 27 September, Miss Tweddle again wrote to the respondent on behalf of the claimant stating as follows:-

> I caught up with Jeff this morning regarding an up date on whether his working pattern had been moved to Level 1 as per the OH report and agreement at two meetings (a previous one with Phil and the recent one last week). Jeff is on leave this week but it is his understanding that when he returns next Monday he will be reporting to Level 2. I am struggling to understand why it is taking the department so long to rota Jeff on to Level 1 and I am concerned that it is exacerbating Jeff's condition the longer he consistently remains on Level 2. Please can you help address the reluctance/impasse that is preventing Jeff from being assigned to Level 1?"

22. Wendy Johnson replied from the HR department to Miss Tweddle in the following terms by a letter later the same day:-

> "I have contacted Phil Powell who has confirmed he will speak to Sister Naden today to ensure Jeff is working on Level 1 when he returns from leave next week. He has confirmed this couldn't be implemented immediately last week as shifts had been rostered and the service had to be maintained but they are re-arranging things this week to ensure this is implemented on Monday."

23. By a letter dated 5 October (page 262) Miss Johnson wrote to Miss Tweddle in the following terms:-

> "I can only apologise sincerely for this. Phil is on leave this week and Karen is not at work when I have contacted the department today. I have spoken to the Band 6 who is in charge and asked that the agreed adjustment that Jeff works on Level 1 is implemented with immediate effect. Jeff was with her and she confirmed this would be actioned immediately. I can only assume this occurred as both Karen and Phil aren't around this week and I don't know but I get the impression Karen's absence wasn't planned. I fully understand and appreciate your frustration and disappointment and will discuss what has happened with Phil upon his return. Please be assured this will be addressed."

24. Mr James Deaville (assistant director/manager) was appointed to hear the claimant's grievance. His report appears at pages 309-315 in the bundle. The full hearing took place on 23 March 2022 and the outcome letter dated 25 April 2022, appears at pages 316 to 323 in the bundle. The respondent's alleged failure to comply with the agreement to enable the claimant to return to work on Level 1 is the first of the grievance issues. The claimant's grievance in that regard was not upheld.

25. The claimant presented his claim form to the Employment Tribunal on 20 January 2022, having entered into ACAS early conciliation on 21 December 2021.

The law

26. The claims brought by the claimant engaged the provisions of the Equality Act 2010.

6 Disability

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

(2) A reference to a disabled person is a reference to a person who has a disability.

(3) In relation to the protected characteristic of disability—

(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—

(a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and

(b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.

(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).

(6) Schedule 1 (disability: supplementary provision) has effect.

20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring

that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—

(a) removing the physical feature in question,

(b) altering it, or

(c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—

(a) a feature arising from the design or construction of a building,

(b) a feature of an approach to, exit from or access to a building,

(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d) any other physical element or quality.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

26 Harassment

(1)A person (A) harasses another (B) if—

(a)A engages in unwanted conduct related to a relevant protected characteristic, and

(b)the conduct has the purpose or effect of—

(i)violating B's dignity, or

(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2)A also harasses B if—

(a)A engages in unwanted conduct of a sexual nature, and

(b)the conduct has the purpose or effect referred to in subsection (1)(b).

(3)A also harasses B if—

(a)A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b)the conduct has the purpose or effect referred to in subsection (1)(b), and

(c)because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4)In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a)the perception of B;

(b)the other circumstances of the case;

(c)whether it is reasonable for the conduct to have that effect.

(5)The relevant protected characteristics are—

- *age;*
- *disability;*

- *gender reassignment;*
- *race;*
- *religion or belief;*
- *sex;*
- *sexual orientation.*

123Time limits

(1)Proceedings on a complaint within section 120 may not be brought after the end of—

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

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

(2)Proceedings may not be brought in reliance on section 121(1) after the end of—

(a)the period of 6 months starting with the date of the act to which the proceedings relate, or

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

(3)For the purposes of this section—

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

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

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

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

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

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 Special Educational Needs Tribunal for Wales;

(f)an Additional Support Needs Tribunal for Scotland.

27. The respondent concedes that the claimant's lower limb injury is and was at all material times a disability as defined in section 6 of the Equality Act 2010 and that it was aware throughout the relevant period of that disability. The respondent now concedes that the claimant's injury to his hands, which adversely affects his grip, also amounts to a disability. However, the respondent denies that it knew or ought reasonably to have known that this impairment amounted to a disability. The Tribunal found that there was no valid basis for the respondent to contend that it remained in general ignorance of the claimant's disability relating to his hands. The Tribunal found that there was an abundance of factual information within he occupational health reports to at the very least put the respondent on notice that the claimant's condition may amount to a disability. The EHRC Employment Code states that employers must "do all they can reasonably be expected to do" to find out whether an employee has a disability. This indicates that reasonable enquiries should be made. The respondent did in fact make those enquiries by making regular referrals to its occupational health specialists. The Tribunal was satisfied that the respondent knew or ought reasonably to have known that the claimant's injury to his hands amounted to a physical impairment which had a long term and substantial adverse effect in his ability to carry out normal day to day activities. Anyone who suffers an impairment which causes a reduction in their grip and dexterity would be likely to have an impairment which amounts to a disability.

28. Sections 20-21 of the Equality Act 2010 require the Employment Tribunal to apply a three stage test as follows:

    (i) Identify the provision criterion or practice (PCP).

    (ii) Identify the substantial disadvantage caused to the disabled employee.

    (iii) Identify the adjustment which, if made, would remove that disadvantage.

The Tribunal must then consider whether in all the circumstances of the case it was reasonable for the employer to make that adjustment.

29. Miss Ismail and Miss McRae agreed that in the claimant's case the respondent did apply to him a PCP of requiring him to attend for work and to undertake his normal contractual duties. Those normal contractual duties included attending upon patients throughout the day to obtain blood samples, to take blood pressure and to undertake various medical tests. It was eventually conceded by the respondent's witnesses that the application of this PCP to the claimant put him at a substantial (ie more than trivial) disadvantage, in that he found it difficult to stand for lengthy periods of time to undertake those duties and also that his hands became tired during periods when he was repeatedly required to take blood pressure readings. The Tribunal must be satisfied that the application of the agreed PCP did indeed place the claimant at a substantial disadvantage when compared to persons who were not disabled.

30. The next question for the Tribunal was what, if any, adjustment could or should have been made and which, if made, would have removed that disadvantage. The claimant's case was that appropriate adjustment would have been to permit him to work on Level 1 rather than on Level 2, because the volume and intensity of work on Level 1 was less than that on Level 2, so that he did not become as fatigued because he could take more frequent breaks to rest his legs and hands. The claimant in particular relied upon what he considered to be an "agreement" reached at the case conference on 8 July 2021. The claimant's evidence to the Tribunal was that this was a binding agreement to make a reasonable adjustment and that the respondent was bound by that agreement.

31. The Tribunal found that the claimant placed far too much reliance upon what he perceived to be a binding agreement. In **Project Management Institute v Latif [2007 IRLR 579]** the Employment Appeal Tribunal confirmed that the duty on the employer is to actually make the adjustment which removes the disadvantage caused by the application of the PCP. The process by which the employer arrives at that adjustment is not particularly helpful. An employer may follow the most perfect procedure, but still end up failing to make the necessary adjustments. If so, the employer falls foul of the statutory provisions. Alternatively, the employer may do everything wrong in terms of process, practice or procedure but then, by good luck rather than good judgment, make the necessary adjustment. If so, then the employer has complied with the duty to make the reasonable adjustment. The claimant's case here was that, by failing to comply with the agreement to permit him to work on Level 1, then the respondent had failed to comply with its duty to make a reasonable adjustment. The Tribunal found that not to be the case. The respondent's failure to comply with the agreement (even if it had failed to comply) is not of itself a failure to make reasonable adjustments.

32. One of the disadvantages caused to the claimant by the application of the agreed PCP was that he became fatigued when having to stand for lengthy periods. It was accepted by the claimant that the disadvantage was removed by allowing him to sit as and when he felt it necessary to do so. The claimant's case was that it was difficult for him to sit down on the stools provided in Level 2, because the room was overcrowded. The Tribunal rejected the claimant's evidence in this regard and accepted the evidence of the respondent's witnesses. The Tribunal found that there were stools provided and that there was sufficient space within the room to enable the claimant to sit as and when

he felt it necessary to do so. By providing facilities for the claimant to sit when he felt it necessary, the respondent complied with its obligation to make a reasonable adjustment which removed the disadvantage caused by the application of the PCP.

33. In terms of the injury to his hands, the claimant maintained that his hands became tired when he was frequently required to take blood pressure tests from patients. That disadvantage would have been removed had he been permitted to take breaks as and when his hands became tired. The claimant's case was that these breaks could only be taken on Level 1, where the level and intensity of work was reduced. The Tribunal rejected the claimant's evidence in its regard and accepted the evidence of the respondent's witnesses. That evidence was that the claimant was permitted to take as many breaks as he felt necessary, at times when he felt appropriate. The Tribunal was satisfied that this amounted to a reasonable adjustment which removed the disadvantage caused by the application to the claimant of the PCP.

34. For those reasons, the claimant's claims of failure to make reasonable adjustments are not well-founded and are dismissed.

35. Turning now to the allegations of harassment contrary to S.26 of the Equality Act 2010, the claimant alleges that the respondent requiring him to continue working on Level 2 and that by failing to act after confirming on 27 September that it would rota the claimant on to Level 1, it committed acts of harassment contrary to S.26. The "unwanted conduct" was rostering him on to Level 2 on numerous occasions "in spite of the agreed adjustment that he should return to Level 1". The claimant's case was that, by failing to roster him permanently or regularly on Level 1, the respondent was showing "no consideration for my health which was annoying and evidence of their disregard towards me". The claimant maintained that, "my employer not making reasonable adjustments caused me lot of emotional distress. I was constantly anxious going in to work as I did not know what to expect from my employer".

36. Lastly, the claimant appears to allege that the respondent's failure to make reasonable adjustments itself amounted to harassment contrary to S.26. The Tribunal found that the respondent was not in breach of its obligation to make reasonable adjustments and therefore it must follow that the claimant could not have been subjected to harassment by any such alleged failure.

37. The Tribunal accepted the claimant's evidence that he would have much preferred to work on Level 1, rather than on Level 2. The reduced intensity of the work on Level 1 may well have been a factor in the claimant's preference. The Tribunal however also found that the claimant's ongoing difficult working relationship with Miss Naden was a far more material factor in his preference to work on Level 1. The definition of "harassment" in S.26 requires the respondent's conduct to be "related to a relevant protected characteristic", in this case the claimant's disability. The Tribunal found that the claimant was placed on Level 2 because of the respondent's service needs and requirements following a period when the claimant had agreed to be re-trained on Level 2. The reason for the claimant being required to work on Level 2 was not related to his disability in any sense whatsoever. Accordingly, the complaint of harassment is not well-founded and is dismissed.

38. The facts which gave rise to the claimant's complaints of both failure to make reasonable adjustments and harassment, occurred when he returned from work

following a lengthy absence due to illness. The case conference when the alleged agreement was reached for the claimant to return to work on Level 1, took place on 8 July 2021. The claimant returned to work on 3 August 2021 and raised his grievance about being required to work on Level 2, on 5 August 2021. The claimant entered into ACAS early conciliation on 10 November 2021, obtained the ACAS early conciliation certificate on 21 December 2021 and presented his claim form on 8 January 2022.

39. Any act which took place before 11 August 2021 is therefore prima facie out of time pursuant to S.123 of the Equality Act 2010. Miss Ismail and Miss Martin accepted that S.123(1)(b) states that a failure to do something is to be "treated as occurring when the person in question decided upon it." Furthermore, S.123(4) clarifies that a person decides not to do something when, in the absence of evidence to the contrary, they do something inconsistent with doing that thing.

40. The claimant's case and indeed his evidence, was that the respondent required him to return to work on Level 2 on 3 August 2021. That was an act inconsistent with the claimant's alleged case that the respondent had failed to make reasonable adjustments. It is also the date upon which any alleged act of harassment is said to have taken place.

41. At the preliminary hearing on 25 March 2022, Employment Judge Pitt identified that one of the issues to be decided by the Tribunal was that relating to time limits and in particular whether the claimant's claims constituted a continuing course of conduct which occurred after 11 August 2021. Accordingly, the claimant was alive to the time limit point and would be expected to deal with that in his evidence and in submissions on his behalf. The claimant has not sought to provide any explanation in his pleaded case or statement, as to why his claim was not presented within the time limit. Furthermore, the claimant has not presented any evidence as to why it would be just and equitable for the Employment Tribunal to extend time in accordance with the provisions of S.123. The Tribunal found that the claims of failure to make reasonable adjustments and harassment were both presented outside the statutory time limits. The Tribunal was not satisfied that it would be just and equitable for the time limit to be extended. Accordingly the Tribunal does not have jurisdiction to hear those claims which are in any event dismissed.

Employment Judge Johnson

Date: 20 January 2023