

THE EMPLOYMENT TRIBUNALS



BETWEEN

Claimant
Mr S Daly

AND

Respondent
The Newcastle upon Tyne Hospitals
NHS Foundation Trust

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: North Shields

ON: 27, 28, 29, 30 & 31 March 2017
Deliberations 12 May 2017

EMPLOYMENT JUDGE HUNTER

MEMBERS: Mrs C Clayton
Miss E Jennings

Appearances

For the Claimant: Mr R Owen, Gateshead CAB

For the Respondent: Ms A Carver, Solicitor

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that the claims of unlawful disability discrimination and public interest disclosure detriment are not well founded and are dismissed.

REASONS

1 The claims

1.1 The claimant, who has a congenital deformity of his right hand and who has a history of stress and anxiety, worked 30 shifts on Ward 27 of the Freeman Hospital in Newcastle upon Tyne between 16 March 2015 and 14 May 2015. The claimant, referring to specific events which he recorded in his diary, invited the tribunal to conclude that there was a culture of disability discrimination prevalent on the Ward. He brought claims under section 15 Equality Act 2010 (EqA) (discrimination arising from disability) and section 26 EqA (harassment related to disability). The claimant also argued that his grievance amounted to a protected disclosure and that he suffered a detriment because he made that disclosure. The respondent accepted that the claimant was a disabled person by reason of his physical impairment, but

not in respect of any alleged mental impairment. The parties agreed that the claim should proceed on the basis only of the physical impairment.

2 The Issues

2.1 The parties had agreed a list of issues. At the beginning of the hearing the claimant abandoned any claim based on discrimination arising from a mental impairment. On Day 5 the claimant abandoned the reasonable adjustments claim and the respondent confirmed it was taking no issue in respect of time points. The parties also agreed that the hearing should be confined to the issues relating to liability.

2.2 The following is a summary of the agreed issues relating to those matters that survived.

Sec 15 - unfavourable treatment and Sec 26 Harassment

2.2.1 In respect of each claim set out in paras 1 a) to v) of the Further Particulars dated 27 January 2017 was the Claimant treated unfavourably because of something arising in consequence of his disability. The disability is congenital deformity of his dominant right hand and the “something arising” is the inability to carry out tasks requiring manual dexterity as quickly or accurately as staff without that disability.

2.2.2 In respect of each of the matters set out in the tribunal's findings of facts under italicised headings:

- On the balance of evidence, is the Claimants version accepted by the Employment Tribunal, if so;
- What was the unfavourable treatment?
- Was the treatment because of the “something arising”?
- If so, was the treatment a proportionate means of achieving a legitimate aim?
- What was the legitimate aim?
- Did the Respondent engage in unwanted conduct related to the Claimant's disability?
- Did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
- Was it reasonable for the conduct to have had that effect?
- Did the Respondent take all reasonable steps to avoid Harassment under s26 or Discrimination arising from disability?

Protected disclosures

2.2.3 Did the Claimant make protected disclosures?

2.2.4 The Claimant alleges he made the following disclosure listed at para 4* of his grievance document dated 29 September 2015 to Fiona Hindhaugh

and that this was a breach of Section 43B(1) (b) &(d) Employment Rights Act 1996.

2.2.5 The Claimant asserts he suffered a detriment by means of continuing harassment and discriminatory behaviour (including redeployment) by the Respondent resulting in an adverse effect on his mental health condition, is this accepted by the Tribunal?

*

Paragraph 4 of the grievance reads

“To summarise, what follows in the written account is my concerns which relate to:

- Unfair treatment due to disability (discrimination)
- Disability related harassment
- Breach of Confidential Information
- Detriment suffered as a result of raising concerns”

3 The Facts

3.1 The claimant was employed as a Health Care Assistant on 2 March 2015 starting on a 2-week placement at the Health Care Academy. He began working on Ward 27 at the Freeman Hospital Newcastle upon Tyne on March on 16 March 2015. He worked a total of 30 shifts before going off sick on 15 May 2015. He did not work again on Ward 27.

3.2 The claimant had previously worked as a mental health nurse with another NHS Trust. He had successfully pursued a disability discrimination claim against his former employer and had brought other disability discrimination claims. The claimant told us that he struggled to let anything that had happened go if he regarded it as an injustice.

3.3 The claimant kept a diary of events and relied heavily upon the diary entries in pursuing his claim. It is something he had done throughout his career.

3.4 The two Ward Sisters (Sisters Kerridge and Cowey) both knew that the claimant had been a nurse. They, however, had not told any of the other ward staff. The only other persons who knew were those whom the claimant had told.

3.5 At a meeting with Sister Kerridge, prior to his commencement in the role, the claimant said that he believed that he would be able to perform all tasks required of him on the ward, but they may just take a little longer.

Findings of fact in relation to the matters referred to in the issues

a. On the 16 March 2015, the Claimant’s first day of employment with the Respondent, a Healthcare Assistant Victoria Carroll commented to him that she was aware that he had previously been a registered nurse which indicated to the Claimant there had been a breach of confidentiality by the Respondent.

3.6 Ms Carroll did show the claimant around on his first day of employment. He told her that he had previously worked in mental health, but Ms Carroll was unaware

that he had been a nurse. He came across to her as a nice friendly gentleman. There had been no breach of confidentiality, as alleged by the claimant.

b. On 17 March 2015 the Claimant was unfairly reprimanded by the nurse in charge Hilary Sexton for being too slow in making patients' beds. He was slower because of his disability.

3.7 Hilary Sexton is a staff nurse. She was the coordinator of the day. The claimant was working alongside another healthcare assistant making beds in Bay 1. Staff Nurse Sexton told both healthcare assistants that patients were already queuing in the day room and it was going to be a busy day. Beds needed to be made quickly. There was no reprimand to either healthcare assistant. There was no criticism of the claimant. She did not say or imply that he was slow because of his disability

c. On 24 March 2015 because of difficulty using the hand scanner as a result of his disability Ward Manager Rose Kerridge got him to try different arm and hand positions to try to use the scanner. This caused him extreme discomfort and humiliation and embarrassment as it was done in a public area.

3.8 Staff sign in on the ward using a biometric hand scanner with their right hand. The claimant was unable to use the scanner using his right hand. Sister Kerridge, after contacting the hospital's technical department and on their suggestion, asked the claimant to try the scanner using his left hand turned upside down. The claimant has no deformity of that hand, but it was nonetheless uncomfortable and difficult for him. This method did not work and as a result, the claimant was asked to sign in by logging on to a computer. The claimant did not complain to Sister Kerridge at the time that he had been humiliated or embarrassed and there is no other evidence to suggest that he had been. We are satisfied that Sister Kerridge was simply trying to identify a suitable reasonable adjustment for the claimant. Although she tried to assist the claimant, putting his left hand on the scanner, she did not do this in a demeaning or humiliating way

d. On 27 March 2015 the Claimant was undermined and unfairly reprimanded by Victoria Carroll (a Healthcare Assistant) in front of a patient after advising the patient who was due to be discharged that he could rest on his bed after it had been made up by the Claimant ready for the next patient.

3.9 The claimant had a disagreement with Ms Carroll. The claimant believed that Ms Carroll had told a patient that he could not go back to bed. She explained that the protocol was to encourage patients to become mobile before being discharged. There was no reprimand and the claimant was not undermined. The claimant acknowledged in cross examination that this incident was not related to his disability except in the widest sense that Ms Carroll was treating him unfavourably because she regarded him as being weak as a result of his having previously been a nurse. This is not the case because Ms Carroll did not know that the claimant had formerly been a nurse.

- e. On 30 March 2015 the Claimant was unfairly reprimanded by Jolene Syrett (Healthcare Assistant) over calling for assistance for a patient who was bleeding following a surgical procedure.***

3.10 On this occasion Ms Syrett reminded the claimant that there was a procedure in situations such as this, which was to sound a buzzer. This incident similarly had nothing to do with the claimant's disability other than in the sense described above. We are satisfied that this was a reminder of a procedure from an experienced health care assistant to another who was new to the ward. It did not amount to bullying or demeaning behaviour. There was no reprimand.

- f. Again on 30 March 2015 the Claimant was unfairly criticised in front of work colleagues by Hayley Cusack (nurse in charge) over the shaving of a male patient in the groin area which he found particularly difficult because of his lack of manual dexterity.***

3.11 This was a routine task. The claimant had not said that he could not perform it. We are satisfied that help was offered to him and that he declined it. The claimant seems to have been upset that Ms Cusack had apparently told him that if he found the task uncomfortable in any way he should have said no when asked to do it. Ms Cusack disputes the claimant's version of the event, but even if we were to accept the claimant's version we do not think that it amounts to unfair criticism by Ms Cusack.

- g. On 7 April 2015 the Claimant was unfairly reprimanded by Jolene Syrett over the ordering of patients' meals. This was done in front of staff and patients which belittled the Claimant.***

3.12 Having listened to the evidence we are satisfied that Ms Syrett was simply explaining ward procedure to the claimant. There was no unfair reprimand and it was not done in a way that would belittle the claimant.

- h. On 14 April 2015 when the Claimant asked Healthcare Assistant Chris Dickson on two occasions if he could shadow her for a few tasks she rejected his requests in a dismissive manner stating condescendingly on the first occasion "you don't need to shadow me man, you're a nurse".***

3.13 Ms Dickson has been employed by the Trust for 31 years and has been a healthcare assistant on the Ward 27 for 6 years. She is regarded by the others as a mother figure. The claimant told Ms Dickson that he had previously been a nurse. Ms Dickson does not recall the incident. She did tell us that the claimant had been unpleasant to her, leaning up to her and telling her that if he needed her help, he would ask for it. Ms Dickson had taken fright over this.

- i. On the same shift he advised Jolene Syrett he would have difficulties removing a Venflon and she also responded in a dismissive and condescending way by saying "Venflon practice eh".***

3.14 A Venflon is a cannula. Ms Syrett did demonstrate the technique of removing one by placing one on her own arm. This was done with Sister Kerridge observing. This was not done in a dismissive or condescending way.

j. On 15 April 2015 when the Claimant spoke to Laura Grant (Staff Nurse) about dietary needs of patients in her bay she snapped at him in an aggressive manner stating “we will not always be available to help you, you need to find that out yourself”.

3.15 Miss Grant told us that she always tried to help newly appointed staff and that the help was freely given. She said that she had told the claimant about dietary needs on two previous occasions and that she was frustrated with the claimant. She said that she could be blunt with people, but does not intend to be rude. We are satisfied that Miss Grant's attitude arose not from any matter arising from the claimant's disability, but because she felt that he was uninterested in his role as a healthcare assistant.

k. On 20 April 2015 whilst delegating tasks for the Claimant Victoria Carroll spoke to him in a patronising and unpleasant manner stating “I will leave the dinners for you so you get experience. At this time it was the norm for the other Healthcare Assistants to leave all the housekeeper duties (as the housekeeper was off work sick) for the Claimant to do rather than share them out equally.

3.16 The evidence suggests that the claimant preferred to concentrate on the housekeeper duties and that he would undertake these before the other healthcare assistants had the chance to do them. We find it highly unlikely that the incident occurred as described by the claimant.

l. On 22 April 2015 the Claimant was interrogated in a very confrontational and critical manner by Ian Grey from the kitchen over the food which he had ordered. The Claimant was left to deliver all the patients' meals on his own.

3.17 This conversation must have been by telephone because the claimant said that he had never met Mr Grey and Mr Grey would not have known the claimant had a disability.

m. On 23 April 2015 whilst the Claimant was discussing meal choices with patients staff Nurse Glenda Teasdale and Jolene Syrett shouted abruptly at him in a demeaning manner in front of a patient saying he should not give them a choice but just to give them sandwiches.

3.18 This version of events was denied by Ms Syrett. Ms Syrett was explaining the procedure to be followed when a patient had returned from a cardioversion procedure. We think the claimant has misrepresented the nature of the conversation.

n. Later in the day Jolene Syrett unfairly reprimanded the Claimant in an aggressive manner over an issue relating to a patient stating he felt he had a swollen arm following a procedure.

3.19 The claimant described this incident in a grievance raised against Ms Syrett thus:

“I was furious again both in the way and manner I was not being passed vital safety information but also by the way a young girl seemed to be enjoying another opportunity to berate an ex-registered nurse.”

We are satisfied that Ms Syrett was explaining procedure and that the claimant resented this coming from a younger person who was less experienced and qualified than him.

o. On 24 April 2015 whilst the Claimant was protocolled to a different and unfamiliar ward and explained his manual dexterity problems Helen (a staff nurse) snapped at him in an angry manner saying “go and get Brian and he can show you how to do it”.

3.20 The claimant did not elaborate on this in his evidence and the tribunal heard no other evidence about it. The claimant is not suggesting that being protocolled to another ward had anything to do with his disability. He said he felt it was a punishment for what happened on the previous day. All staff work on another ward on a rotational basis. Given our findings in relation to the claimant’s allegations concerning staff members of Ward 27, we approach with caution the suggestion that he was similarly treated on another ward.

p. On 27 April 2015 Sister Cowey refused to allow the Claimant to attend two Equality and Diversity talks which he had requested to attend and which it was previously indicated he could attend.

3.21 Sister Cowey told the Claimant when he mentioned the training that he would need to request any days off for equality and diversity training on the off-duty rota and put the details on the board. She told the claimant that she could not always guarantee that the rota can be manipulated to allow certain days off. She told him that he could undertake equality and diversity training in his own time, but would need to request a late shift to be on that day or indeed request annual leave. The claimant did not do so. The claimant, as part of the Healthcare Academy, had undertaken equality and diversity training and had only been in his post for a month when he made the request.

q. On 29 April 2015 when discussing shifts with Victoria Carroll the Claimant stated he would not volunteer to do night shifts but would do them if asked. Shortly after she said to colleagues in his hearing in a critical manner that he was not willing to do night shifts misrepresenting what he had in fact said to her.

3.22 Victoria Carroll denied this. The claimant said the discussion took place on the morning of 29 April 2015, but Victoria Carroll was not working then. We are not satisfied that Victoria Carroll had knowingly misrepresented what the claimant had said, but if she had it was not connected to the claimant’s disability.

- r. On 6 May 2015 Victoria Carroll told the Claimant that he might have to swap with her and go to another unfamiliar ward which he said he would find difficult as he had when he had been sent previously to another unfamiliar ward. He was shocked as this demonstrated a lack of understanding of his disability issues.**

3.23 Ms Carrol had been sick and returned to work on a phased return. She was working on another ward and asked if she could take additional breaks because of a back problem. Sister Cowey had said that if she needed to do this she should arrange cover for the duration of the breaks from someone on Ward 27. It was in that context that she had approached the claimant. In the event, Ms Carrol did not need to take the breaks and the claimant did not need to cover for her.

- s. On 8 May 2015 Victoria Carroll and Jolene Syrett were discussing the night shift rota and again in the Claimant's hearing Victoria stated loudly that "Seamus is not going to volunteer for nights as he told me". This was said in a mocking and critical manner.**

3.24 The claimant told Ms Carrol and Ms Syrett that he was willing to work nights if asked, but that he would not volunteer to work them. Ms Syrett explained to the claimant that there was a procedure for those who were prepared to volunteer and that there was an advantage sometimes in working nights prior to taking holiday entitlement. We are not satisfied that this was done in a mocking or critical manner or that it had anything to do with the claimant's disability.

- t. On 11 May 2015 the Claimant was unfairly denied the opportunity to attend the Equality and Diversity talk at a time when things were very quiet on the ward and there was adequate staff cover on the ward.**

3.25 The claimant was denied the opportunity to attend training on this occasion because the minimum staffing were on shift that day with the Claimant working an early shift, Jolene Syrett working her long day and Victoria Carroll working a late shift. A Monday morning is often one of the busiest days on Ward 27 with new patients coming onto the ward. The decision was not linked to the claimant's disability.

- u. On 14 May 2015 the Claimant was again unfairly reprimanded by Sister Rose Kerridge in front of patients for being slow in making beds when the reason for this was well known.**

3.26 This was the last day the claimant worked on the ward. The claimant had started his shift at 7.30 am. There was an expectation that all the beds would be made by 9.30 am at the latest. At around 8.45 am the claimant was working with Ms Syrett making the beds. Sister Kerridge, noting that the task was behind schedule, said that they needed to speed up. The claimant had no difficulty in making the beds at the required pace. He and Ms Syrett had been delayed on this occasion because of breakfast chores and attending to patients' needs. There was no reprimand by Sister Kerridge.

- v. When he spoke to her afterwards pointing out that he would always be slower because of his disability, Sister Cowie interjected, showing a lack of understanding and sensitivity, saying that they would have to make an occupational health referral and that perhaps redeployment was the only option.**

3.27 The claimant was feeling very stressed on 14 May 2015. He approached the two Ward Sisters in their room. They say that he was very angry. They say he said that he would make beds at his own pace and if that was not acceptable to them he wanted to know what they would do about it. Sister Cowey took the view that the claimant was asking for adjustments to be made and decided to refer him to Occupational Health. She asked the Occupational Health adviser to consider whether redeployment was appropriate.

- w. The Claimant was also told that day by staff nurse Hayley Cusack that he had to notify her every time he left the ward and in particular every time he went to the toilet.**

3.28 All staff were aware that if they left the ward, be it for the toilet, for a break, to take a patient to theatre or collect from another area of the hospital, they always had to let somebody know where we were, so that arrangements could be made to ensure that sufficient staff were available to deal with an emergency. Ms Cusack reminded everyone of this. This was not an instruction specific to the Claimant.

- x. Later that day at a meeting, Sister Cowie admitted that the Claimant had been under surveillance as she had had reports from Hayley Cusack and other Healthcare Assistants that he was avoiding duties. These reports were false.**

3.29 At the meeting on 14 May 2015, Sister Cowey told the claimant that complaints had been made about him that day by the other Health Care Assistants and that these needed to be investigated. The complaints were basically that the claimant was refusing to undertake some healthcare assistant duties, that he was intimidating, that he had poor communication skills, that he was unapproachable and sometimes difficult to contact. These complaints were spontaneous and did not arise from any surveillance of the claimant.

- y. On 29 September 2015, the Claimant made a formal grievance which amounted to a protected disclosure regarding the manner in which he had been treated since the start of his employment. During the investigation process the Claimant faced false allegations made against him such as hiding in the toilets, deliberately avoiding duties, being intimidating towards colleagues and harming a patient's skin when shaving him. The Respondent refused his requests for any relevant statements and evidence to support these allegations.**

3.30 The claimant raised a grievance on 29 September 2015. He complained of treatment relating to his physical impairment and a mental impairment (anxiety and stress). The grievance and the claims before the tribunal are based on the same allegations. The claimant argues that the written grievance (without analysing the

grievance further) is a disclosure of information which in the claimant's reasonable belief was made in the public interest and which tends to show that the respondent had failed, was failing, or was likely to fail to comply with a legal obligation to which it was subject and or that the health or safety of any individual is being, or is likely to be endangered. The claimant complains that he suffered a detriment on the ground that he made the disclosure, namely the matters set out under the next two headings.

z. The investigation was not carried out reasonably. In particular by not reviewing relevant documents including the original Occupational Health referral and not investigating my complaints about the discriminatory behaviour during the redeployment process.

3.31 The grievance was investigated by Matron Fiona Hindhaugh. She was concerned that Sister Kerridge had failed to open an enclosure to an Occupational Health report sent to her electronically when the claimant first started to work on the ward. This informed the respondent that the claimant was likely to be regarded as a disabled person and recommended that risk assessments should be carried out to consider reasonable adjustments. Ms Hindhaugh considered the failure to open the report had been unintentional and recommended that in future copies of all such reports should be sent to HR as well as the Ward Sister. On 18 December 2015 Sister Kerridge wrote a formal apology to the claimant. Matron Hindhaugh carried out an investigation. She did not uphold the grievance. The investigation was thorough. The claimant appealed the decision. Matron Kinnersley undertook the appeal. He agreed with Matron Hindhaugh's conclusions.

aa. During the redeployment period from September 2015 to January 2016 the Respondent's officers involved in the process consistently showed a negative attitude to employing the Claimant in alternative roles. In particular, the Claimant identified some potential roles but was told he could not apply for them.

3.32 The claimant remained on the sick after 14 May 2015 with stress and anxiety. Side by side with the grievance investigation, the respondent took further advice from Occupational Health and placed the claimant on its redeployment register for a period of 14 weeks, extending the normal period of 8 weeks as an adjustment. The claimant turned down the opportunity to apply for 6 roles. In addition, he turned down the offer of employment in five other positions. He accepted a role as a radiography assistant at the Freeman Hospital and now works in that capacity. We are not satisfied that the claimant was prevented from applying for roles.

3.33 The claimant felt that on two occasions when he investigated roles offered to him, the staff involved had not shown a positive attitude to disability. The claimant, however, was not specific about this and did not make a supplementary grievance.

4 The Law Discrimination arising from disability

4.1 Section 39 Equality Act 2010 (EqA) provides:

- (2) An employer (A) must not discriminate against an employee of A's (B)-
 - (a) as to B's terms of employment;
 - (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
 - (c) by dismissing B;
 - (d) by subjecting B to any other detriment.

4.2 Section 15 EqA provides:

- (1) A person (A) discriminates against a disabled person (B) if—
 - (a) A treats B unfavourably because of something arising in consequence of B's disability, and
 - (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
- (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

4.3 In *Pnaiser v NHS England* [2016] IRLR 170, the following guidance as to the correct approach to a claim under section 15 EqA was given:

“(a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The “something” that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see *Nagarajan v London Regional Transport* [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises.

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between

the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in *Land Registry v Houghton* UKEAT/0149/14 a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.”

4.4 The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the reasonable needs of the undertaking. It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no room to introduce into the test of objective justification the 'range of reasonable responses' which is available to an employer in cases of unfair dismissal. *Hardys & Hansons plc v Lax* [2005] IRLR 726

Harassment

4.5 Section 40 EqA provides:

- (1) An employer (A) must not, in relation to employment by A, harass a person (B)—
 - (a) who is an employee of A's;

4.6 Section 26 EqA provides:

- (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.
- (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.

Subsection (5) sets out the relevant protected characteristics and these include disability.

Public Interest Disclosure

4.7 Section 43B Employment Rights Act 1996 (ERA) reads:

(1) In this Part a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following-

- (a) that a criminal offence has been committed, is being committed or is likely to be committed,
- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject
- (d) that the health or safety of any individual has been, is being or is likely to be endangered
- (e) that the environment has been, is being or is likely to be endangered

4.8 Section 43C ERA reads:

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure -

- (a) to his employer

4.9 Section 47B ERA provides:

(1) A worker has the right not to be subjected to any detriment by any act or any deliberate failure to act by his employer done on the ground that the worker has made a protected disclosure

(2) this section does not apply where –

- (a) the worker is an employee, and
- (b) the detriment in question amounts to dismissal (within the meaning of Part X)

4.10 There must be a disclosure of information as opposed to an allegation Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38. The dichotomy, however, between information and allegation is not one that is made by statute and the two are often intertwined. The question is whether it is a disclosure of information Kilrairie v London Borough of Wandsworth [2016] IRLR 422. To express an opinion and disclose unhappiness about it is not a disclosure of information Goode v Marks & Spencer plc UKEAT/0442/09.

4.11 Several communications can be aggregated to constitute a protected disclosure, especially if it can be seen as part of a series Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540.

4.12 The test is whether an employee held a reasonable belief in the disclosed information, not whether it was true. The information should in the reasonable belief of the worker show that it is probable or more probable than not that the employer

will fail to comply with the relevant legal obligation. Kraus v Penna plc [2004] IRLR 260.

4.13 Whether the discloser's belief is reasonable has to be determined objectively and the personal circumstances of the discloser are relevant. Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4.

4.14 In a detriment claim under section 47B, the employee has to show that that the disclosure was a material reason for the treatment, in the sense of being more than a trivial influence. NHS Manchester v Fecitt 2011 EWCA Civ 1190

4.15 In section 43A a belief can be reasonably held and yet be wrong. Babula v Waltham Forest College [2007] ICR 1026.

5 Analysis

5.1 In issue there are 27 incidents, relating to 13 different members of staff. The claimant told us that he accepted that not all the matters he has cited were related to his disability. He explained that he believed that all the staff had been told that he had previously been a registered nurse, but could no longer pursue that career. He felt that they had formed the view that he was weak because of his disability. He believed that that the behaviour he experienced was demeaning and amounted to bullying and arose because the staff knew that he was starting a new career for a reason connected to his disability.

5.2 When questioned, the claimant admitted that there was no evidence of deliberate discrimination. He simply felt that he was being treated unfavourably and was being humiliated because of his disability. He submitted that it was his perception, that the perception was genuine and it was reasonably held.

5.3 The respondent argued that the claimant's perception had been distorted. Their argument was that, having been discriminated against by a previous NHS employer, he had come to judge neutral situations in a biased way.

5.4 We approach this case in the realisation that crude overt disability discrimination is rare. Very few people would deliberately treat a person with a disability unfavourably or create a humiliating environment for them. We are mindful that discrimination can be unintended. It may be innocent in the sense that people do not realise they are doing it. When accused, many people are deeply hurt by the allegation. We are also mindful that persons with a disability may be the first to recognise discrimination, simply because they are most affected by it.

5.5 In deciding whether there was discrimination and whether it was intended, we are alert to the fact that discrimination can be insidious, i.e subtle and stealthy but nonetheless evil.

5.6 The assertion by the claimant that there had been a breach of confidentiality by Sisters Kerridge and Cowey by telling the other members of the ward that he had previously been a registered nurse is untrue. It only become known to those ward

staff when the claimant told them. The behaviour complained of, therefore, must be judged in that light.

5.7 We were asked to focus on specific matters and we have done so. The case was pleaded on the basis that the unwanted treatment was afforded not only because of the claimant's physical impairment, but also a mental impairment, namely anxiety caused by depression. The claimant abandoned the case based upon his mental impairment. The incidents listed as d,e,g,h,j,k,l,m,n,p,q,t,w and x cannot be said to be unfavourable treatment because of the inability of the claimant to carry out tasks requiring manual dexterity as quickly or accurately as staff without that disability. Nor can they be characterised as unwanted conduct that was connected to the congenital deformity of the claimant's right hand.

5.8 It will be apparent from our findings of fact that we do not accept entirely the claimant's version of events in respect of incidents, a,b,d,f,g,h,i,k,m,n,o,q,s,u and w. We are not satisfied in these instances that there was unfavourable treatment or unwanted conduct related to the claimant's disability.

5.9 Item c relates to the hand scanner. We do not consider that Sister Kerridge's actions amounted to unfavourable treatment. She was trying in good faith to find a suitable adjustment for the claimant. To the extent that the claimant considered her conduct to have violated his dignity or to have created the environment proscribed by section 26 Equality Act 2010, we do not consider it was reasonable for the conduct to have had that effect.

5.10 Incident r relates to the request to the claimant that if necessary he could relieve Ms Carroll who was on another ward, should she need to take a break. The claimant was at pains to point out that he could undertake all the duties of a Healthcare assistant, albeit that he might need a bit more time than others. It seems to us that the claimant is making a mountain out of a molehill. He had simply been asked to cover for breaks if necessary and as it turns out, he was not called upon. To the extent that this could be classed as unfavourable treatment because of his inability to carry out tasks requiring manual dexterity, we consider that the respondent has satisfied us that the request for him to cover if needed, was reasonably necessary and proportionate in order to ensure the smooth running of the hospital which is a legitimate aim. We do not think that this was unwanted conduct related to his disability and there is no evidence that it had the purpose or effect of violating his dignity or creating the proscribed environment.

5.11 Incident v relates to the meeting on 14 May 2015 and the decision of the two Ward Sisters to refer the claimant to the Occupational Health Service. In hindsight it is clear that the claimant was feeling stressed and that his outburst at the meeting was out of character. We are satisfied that he did give the impression to the Ward Sisters that their expectations of him were too great and that he was looking for them to make some adjustments. In that context, their decision to refer him to the Occupational Health Service cannot be regarded as unfavourable treatment. To the extent that it was unwanted conduct that violated his dignity or created the proscribed environment for him, we find that that was not its purpose and it was not reasonable for it to have had that effect.

5.12 Incidents y and z are essentially complaints about the way in which the grievance was investigated and aa relates to the alleged treatment received by the claimant when investigating posts offered to him during the redeployment process. It will be rare indeed when a complainant is fully satisfied with the investigation of a grievance, or indeed the handling of redeployment. In our view, both were handled in a reasonable way. Matron Hindhaugh was assisted throughout by a highly competent and independently minded human resources officer. We cannot characterise the handling of the grievance or the conduct of the redeployment process as unfavourable treatment because of the claimant's inability to carry out tasks requiring manual dexterity as quickly or accurately as staff without that disability, nor was it unwanted conduct related to the claimant's disability. The complaints made against those who interviewed the claimant in respect of alternative posts were far too vague. Given that offers were made to the claimant by those he criticised, it is unlikely that their attitudes to disability were, in reality, negative.

5.13 Mr Owen in his submissions was frank enough to say that the claimant's protected disclosure case was not the strongest. We agree with him. The grievance was just that. It was framed in a similar way to this claim. It consisted of a string of allegations and complaints. It could not sensibly be characterised as a disclosure of information that meets the test in Kilraine.

5.14 Moreover, the detriment relied upon were the matters set out in items y & z. These essentially relate to deficiencies in the investigation of the grievance. The claim is therefore, that the motive for an incomplete or imperfect investigation was that the claimant had made a grievance. We reject that argument.

**EMPLOYMENT JUDGE HUNTER
RESERVED JUDGMENT SIGNED ON
23 May 2017
JUDGMENT SENT TO THE PARTIES ON
30 May 2017
AND ENTERED IN THE REGISTER**

G Palmer

FOR THE TRIBUNAL