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EMPLOYMENT TRIBUNALS

Claimant

Miss J Henry

AND

Respondents

Central North West London NHS
Foundation Trust

Heard at: London Central

On: 29-30 April 2019
1-2 May 2019
11-12 July 2019 (Chambers)

Before: Employment Judge Stewart

Members: Mrs C Ihnatowicz
Mr D Carter

Representation

For the Claimant: Mrs K Liebert, Solicitor

For the Respondent: Mr G Barker, Counsel

JUDGMENT

The unanimous judgment of the tribunal is that all claims are dismissed as the tribunal lacks jurisdiction; alternatively, all claims are dismissed on their merits.

REASONS

1. Over the course of the hearing we heard evidence from the Claimant and, on behalf of the Respondent, from the following witnesses, Mr David Bailey, Ms Jackie Shaw, Mr Raj Boyjoonauth, Ms Patricia Devane, Ms Sisa Mayo and Mr Wayne Bailey.

Facts

2. On 13 February 2006 the Claimant, being a woman born in 1965, began employment with the Respondent as a full-time Band 3 Medical Secretary in the Perinatal Mental Health Service. In May 2006, her job was reclassified as Band 4. In February 2013 the Claimant was involved in a car accident and took sickness absence until June 2013. When she returned to work, she still suffered effects

from the accident: depression, fatigue, headaches, back pain, sensitivity to noise and confined spaces, dizziness and problems with concentration. After her return to work she had several more periods of sick leave.

3. In July 2014, the Claimant was moved to a room that she described as being “hot desking”. This description was inaccurate. The room was not used for hot desking: there were approximately six desks in the room that were allocated to individual members of staff. The room lacked windows. She found the room to be claustrophobic and noisy and, for those reasons, she found it difficult to work in that room. Previously, she had been working on reception, a job that she appeared to enjoy.

4. In October 2014, she underwent an occupational health assessment. The result of this assessment was a recommendation that the Claimant should have a work place assessment which could take into account her musculoskeletal symptoms and her difficulty working in a noisy room. Another recommendation was that she should be allocated a mental health support worker.

5. Later, in October 2014, Mr Ben Andrews of Remploy was assigned to support the Claimant. He produced a support plan which provided an outline of the agreed support and provisional timescales for the Claimant. This provided, firstly, that he would support the Claimant both arranging and conducting mediation between her and her Line Manager and Service Manager. This was to ensure that a clear plan was in place for an effective return to work in November 2014 with boundaries to be agreed by both parties to reduce the feelings of anxiety. Secondly, the results of the mediation were to be documented and regular review meetings conducted between the Claimant and her Line Manager to discuss progress on each of the actions agreed upon during mediation. And, thirdly, the Claimant was to consider completing a stress management assessment with her Line Manager. This could be used to help identify barriers resulting in conflict and to produce a focused agenda for the mediation session. She should complete this assessment prior to November 2014. Fourthly, Mr Andrew would maintain regular telephone contact throughout this support period.

6. In March 2015, the Claimant saw Doctor Anna Stern of the Occupational Health Service during a period of annual leave. Dr Stern reported, by letter dictated on 16 March 2015, that the Claimant described significant limitations in her ability to perform day today functions but that she considered herself to be improving and that she thought she would be able to return to work as planned at the end of the period of annual leave. The advice given by Doctor Stern to the Respondent was that the Claimant had suffered a flare up of anxiety and depression, she was under the care of her GP and was receiving appropriate treatment. With regard to her head injury of two years past, she had stated that she remained under the care of an appropriate specialist and was receiving further assessment of her cognitive function. Doctor Stern expressed the opinion that it was likely that both the physical and psychological ill health that she suffered would be considered to be disabilities under the Equality Act due to the long-term nature of her symptoms and their negative impact on her functional status. However, Dr Stern pronounced her

fit to attend the work place although she remained at risk of further absence. Further, her performance at work might be impaired due to either the psychological symptoms or the long-term effects of the head injury she had received in the car accident. Dr Stern thought that psychological symptoms were likely to resolve with further treatment although the timescale was uncertain. However, it was likely to be at least two to three months to full recovery and maybe significantly longer. Dr Stern suggested she returned to work with adjustments previously agreed.

7. In that month, the Claimant sought advice from the Pensions Manager of the Respondent concerning how to apply for ill health pension and was informed of there being two types of pension payable if her application was successful. A Tier 1 employee would receive the pension they had accrued at the date of the successful application without a reduction and a Tier 2 employee would receive an enhanced pension based on the member being unable to work at all. In April 2015, the Claimant applied for early ill health retirement. Unfortunately for her, her application for early health ill health retirement was rejected in May 2015.

8. In June 2015, the Claimant suffered further injury in the course of what she describes as an assault by a Police Officer and she sustained injury to her knee, shoulder, back and also psychological damage which exacerbated the psychological symptoms that she suffered from the car accident. She was unable to work because of her injuries for nine months and during that time she appealed against the rejection of the early ill health retirement. In November 2015, she learned that her appeal was successful, she was offered a Tier 1 pension for ill health retirement, an offer which would remain open for one year.

9. In late December 2015, the Claimant attended a meeting with Mr David Bailey to discuss options regarding her work situation, Mr Bailey was the Service Manager for the Respondent's Child and Adolescent Mental Health Services. She told him that she was not comfortable with the idea of early retirement. Mr Bailey resisted the Claimant's desire to return her substantive post on reception as he felt that that role, the Perinatal Administrator's, was now very high pressured and required a great deal of concentration and focus. It was in a team that was very busy: the administrator dealt with many aspects including general enquiries, new referrals, team meetings and meeting lists as well as helping the team manage and keep safe a high number of high-risk cases relating to Perinatal Mental Health. His view was that there was a need for quick and clear thinking and responses. There were a number of pressures and stresses to deal including highly anxious and irritable patients. His concern was that even with adjustments the Claimant would struggle in this particular role and patient care would be impacted as well as the Claimant's own health. He decided he needed a further report from Occupational Health.

10. But Mr Bailey and the Claimant agreed on a phased return to work plan albeit that the Claimant was somewhat reluctant to accept Mr Bailey's view that she should not return to reception. He wanted her to work in the shared office away from the reception area with Mr Bailey monitoring to see how she progressed there. And she would be able to undertake some light administrative duties and some dictation typing for the consultants who made use of the administrative services in the shared office area.

11. In March 2016, the Claimant met with Dr Stern for the further occupational health assessment. The Claimant told Dr Stern she was feeling much improved and, despite having been granted ill health retirement, now wanted to return to work. Dr Stern stated that she was fit to return to work subject to having a phased return and an adjustment as previously agreed of working in a quiet environment. Dr Stern referred the Claimant to People at Work, the staff welfare and support service used by the Respondent, suggesting that they carry out a workplace assessment and provide a report on her current abilities within the workplace. Dr Stern indicated that she was prepared to liaise with People at Work to provide a report and any further adjustments that were required. Dr Stern also repeated her opinion that it was likely that her condition would be considered a disability under the Equality Act and recommended the adjustment previously in place of her working in a quiet environment to allow her to concentrate as accurately on her work as possible and that would be an adjustment that would need to remain.

12. On 24 March 2016 the Claimant returned to work on the phased return programme that had been agreed with Mr Bailey. As agreed, she recommenced work in the room she described as the “hot desking” room. Previously, she had not enjoyed working there. In her statement, she described the work environment there as:

intolerable: the office was noisy claustrophobic and had no windows, I was sharing a small office with five clinicians who talked about their cases all day, the noise of which made it difficult for me to concentrate. This made me stressed and anxious and I could not cope working in this environment.

13. On 1 April 2016 the Claimant met Mr Raj Boyjoonauth. Mr Boyjoonauth had worked in the NHS since 1972 and had been employed by the Respondent as the Deputy Director of Mental Health in 1986 through to his retirement in 2007. Since his retirement, he had returned to work as an interim manager in various capacities for periods of time. During this time, he had also worked for the United Nations. In 2015, he had undertaken the role of interim Deputy Director for CAMHS (Child and Adolescent Mental Health Services). His meeting with the Claimant on 1 April 2016 was the first time they had met. The Claimant advised that she was considering, and had not ruled out, the option of taking early retirement on medical grounds. They discussed the Claimant’s phased return to work plan as agreed by her and Mr David Bailey. The Claimant advised Mr Boyjoonauth that she was happy with a phased return to work. She also advised that Mr Bailey’s rationale for her working in the shared office and not in the reception area was to reduce the noise and stress to the Claimant.

14. In response to enquiries from the Claimant as to what other jobs might be available Mr Boyjoonauth indicated that they could look together at other administrative posts within CAMHS and the rest of the Trust, subject to those posts being within the Claimant’s competency, being located within a reasonable travelling distance and the demands of the post not being detrimental to the Claimant’s recovery and return to work.

15. The following day the Claimant wrote an email to her immediate supervisor Ms Julie Daniel pointing out that Doctor Stern had “instructed management to make sure I sit at my original desk – at reception, which has not been followed”. Ms Daniel reported back to the Claimant that it had been decided that for now she

was to sit in the group room while she was on her four-week return to work plan to make things easier for her as she gradually got into her normal work routine. Ms Daniel indicated that she would look into the seating arrangements after the Claimant had completed her return to work plan.

16. On 4 April the Claimant had an appointment with a neuropsychiatrist who in the letter sent to her GP confirmed that she had told him she had decided not to retire and to continue working, a plan that the neuropsychiatrist thought to be a good idea.

17. There followed a period of several weeks during which time the Claimant indicated that she was less than happy working where she was working and requested her immediate Line Manager Ms Daniel if she may work in reception, this was refused by Ms Daniel for reasons related to Mr Bailey's view about reception being a stressful post requiring considerable concentration, something neither he nor Ms Daniel thought the Claimant was up to providing.

18. Mr Boyjoonauth was alerted to the Claimant's dissatisfaction by an email from the Claimant to Ms Daniel dated 21 April 2016, copied to him, in which she stated she was "willing to come to work only if I am able to sit at my desk at the reception" and that her "work situation" was having a detrimental effect on her health. Mr Boyjoonauth was very concerned about this and spoke to Ms Jackie Shaw the Service Director the same day about various options the Respondent could put in place to assist the Claimant's return to work and rectify the issues that she was experiencing. He emailed the Claimant later that day stating:

I have since tried to call you on your private number but to no avail. I hope that you are able to access this email. Jennifer, would you get in touch with me ASAP via my mobile ... I have a number of options which I've been exploring like to discuss these with you for your consent. These are equally supported by HR too.

19. As a result of this email, the Claimant met with Mr Boyjoonauth and Ms Shaw on 25 April 2016. Following that meeting, Mr Boyjoonauth sent an email to HR outlining what had been agreed. For an interim period, the Claimant was going to work at Collingham Gardens providing support to Ms Shaw and Mr Boyjoonauth, as well as to a number of other staff, and clearing a certain amount of backlog of work. He listed the pieces of work that they would be giving the Claimant and that they had agreed to work with a revised flexibility of hours which the Claimant was happy to follow. The flexibility on hours meant that the Claimant would be working from 9 – 3 pm for the remainder of that week and the same for the following week. Further, that there would be a monitoring of her work assessment on a week by week basis.

20. Thus, the Claimant began work at Collingham Gardens on a part-time basis on 26 April 2016. On 9 May 2016, she met with Mr Boyjoonauth and Ms Shaw again and this time she was supported by Ms Leslie Healey from People at Work. At that point, she said that she wanted to reduce her hours to 30 instead of the 37.5 that was the requirement in her contract of employment. Mr Boyjoonauth agreed to extend her phased return but with a plan that she would return to work full-time in the week commencing 23 May, subject to the proviso that she would let them know if she found the hours difficult.

21. Mr Boyjoonauth indicated that the Collingham Gardens position was temporary and other options had to be considered. It was agreed that the first step would be for Ms Healey to carry out a work place competency assessment to determine hours and competencies. Mr Boyjoonauth was concerned that the Claimant was trying to push herself further than she was medically fit for at that stage: he stated “we would have to look a different scenarios, what is available and how you would fit in it”.

22. On 23 May 2016, the Claimant began working full-time hours at Collingham Gardens covering for a colleague on long term sick leave for two days per week and on the remaining three days assisting management. On 6 June she had a work place competency assessment conducted by Ms Leslie Healey who reported that the Claimant found working a full-time week very tiring and considered working 25 to 30 hours per week over five days would be manageable for her. Ms Healey added that it would be unfortunate for the NHS to lose her skills.

23. Ms Healey emailed the Claimant her final work place competency assessment on 17 August 2016 and on the following day the Claimant discussed this assessment with Mr Boyjoonauth. The Claimant asserts that Mr Boyjoonauth told her to resign from the full-time post and come back to work on a part-time contract at Collingham Gardens for two years. She further asserts that Mr Boyjoonauth told her draft a letter for him. The Claimant thus wrote a letter in Mr Boyjoonauth’s name on NHS headed paper, dated 19 August 2016 addressed “TO WHOM IT MAY CONCERN”. The letter reads as follows:

Re: Ms Smeeta Jennifer Henry (nee Wilfred) of [*her given address*]

This is to confirm that Ms Henry is unable to continue with her full-time post as Perinatal Administrator due to Police Assault incident on 6.6.15, which caused her to be off sick from work for nine months.

Upon her return to work a work place competency assessment was carried out in June 2016 by Leslie Healey, People at Work and it has been established that Ms Henry cannot continue on a full-time basis. As per the assessment it has been decided that Ms Henry will resign from her full-time post and the Trust will give her an interim contract on part-time basis, 25-30 hours per week. Ms Henry will work from Collingham Child and Family Centre, 1a Beatrice Place, London W8 5PL which is a reasonable distance from her home.

Miss Henry needs CBT intervention and with the element of PTSD, as recommended by her treating consultant and GP. Ms Henry also struggles with public transport finding it difficult to travel where the mode of transport is claustrophobic; this is exacerbated by length of travel time.

Yours faithfully

Raj Boyjoonauth

Interim Deputy Director

24. The Claimant asserted that she sent this letter by email to Mr Boyjoonauth’s private email address from which, she says, it initially bounced due to her error in typing the email address. She then resent it to the correct address and the email did not bounce. Mr Boyjoonauth says he cannot recall asking her to draft this letter and finds it improbable that he would have done given that such a matter would be

something that he would leave to be dealt with by HR. We have been shown a copy of the email which the Claimant says that she sent to Mr Boyjoonauth. That email is addressed to Mr Boyjoonauth's email address but with an error in the typing of that address - an "e" having been inserted where there should be an "a". We have not seen an indication that such an email had bounced nor have we been shown any covering email for the letter that was sent to the correct email address.

25. We find the idea that an experienced Senior Administrator such as Mr Boyjoonauth should ask the Claimant to draft a letter in his name extremely unlikely. He says – and we accept – that he would have left the writing of a letter to HR. Further, we cannot think that any Senior Administrator would have written a letter indicating such personal medical – and thus confidential - information that was contained in this letter and addressing such a letter "TO WHOM IT MAY CONCERN". If it had been agreed that she was to be given an interim contract on a part-time basis of 25-30 hours per week, the letter would have been addressed to her.

26. We also note that six minutes after the Claimant asserts that she wrote and sent the written letter to Mr Boyjoonauth she was writing to Ms Patricia Devane an email in which she said the following:

"Dear Patricia

I would like to know the process of how to get the ball rolling from my ill health retirement, i.e. what do you need from me, will you fill the form for me and what do I need to do with immediate effect.

Thanking you

Kind regards

Jennifer"

27. The Claimant had been advised as to what the difference was between tier one and tier two retirement, and such advice would have included the fact that tier one retirement precluded being able to continue to do the work that she had been employed to do. That being the case, it seems to us that her enquiry of Ms Devane was inconsistent with the draft letter she sent to Mr Boyjoonauth six minutes earlier. She would not be entitled to ill health retirement were she to return to work after resigning her full-time position and taking up a part-time position.

28. So, for all the reasons that we have set out above we consider the assertion made by the Claimant that Mr Boyjoonauth had required her to write the letter that we have seen that is dated 19 August 2016 addressed "TO WHOM IT MAY CONCERN" is false. Our finding in this respect has caused us to treat with caution all uncorroborated assertions of fact made by the Claimant.

29. In the course of the weeks that followed the 19 August 2016 the Claimant sent her draft letter purporting to come from Mr Boyjoonauth to Ms Healey and sought advice from Ms Healey as to how to get the part-time contract sorted out. She also sought to obtain from Mr Boyjoonauth further advice. She did not hear from Ms Healey although she obtained legal advice from an organisation that was recommended by Ms Healey. The advice was to the effect that she should be given part-time work without having to retire. She obtained financial advice and was told,

unsurprisingly, that early ill health retirement was detrimental to her overall financial position. As a result of this further advice on 13 September 2016, she emailed Mr Boyjoonauth, HR and Ms Healey saying that, having received advice, she did not wish to take early health retirement and that she thought her hours should be reduced with immediate effect. On 29 September 2016, the Claimant, again accompanied by Ms Healey, attended a meeting with Mr Boyjoonauth and HR. Mr Boyjoonauth put the outcome of that meeting in a letter dated 30 September 2016, emailed to the Claimant on 2 October 2016. The body of the letter reads as follows:

I explained the purpose of the meeting which was to discuss your ill health retirement application which was approved by the NHS Pension Agency. I explained that I would hand over to Aminata Mansaray as the Senior HR Advisor to explain the next step.

Aminata explained that the ill health retirement approval lasts for one year and the one year expires on 9 November 2016. You have not made the definitive decision to accept the ill health retirement or not. However, Aminata explained that you will have until 8 November 2016 by which you are to be engaged in paid employment with the Trust if you wish to take advantage of the approved ill health retirement. If you do not accept the ill health retirement, then this will expire on 9 November 2016. Also, she informed the meeting that if this elapsed, then the Trust will not be in a situation to make another application for ill health retirement.

Aminata and I explained that if you decide to take the ill health retirement, you can then register on the Trust Bank for Admin roles within the Trust which are different to that of your substantive role. The reason for this is that once you are made ill health retired, you cannot come back and do the same job in any capacity. We urged you to contact Pat Devane in the Pensions Department as soon as possible if you would like to take your ill health retirement so she can start the process.

We therefore ask you to go away and think about a decision and get back to us with a decision by 7 October 2016.

I informed the meeting that your floating post in Collingham Child and Family Centre is temporary and will end on 31 March 2016 (sic – should be 2017). You will then return to your substantive post at Chelsea and Westminster Hospital on 1 April 2017.

You have indicated to me a few weeks ago that you would like to reduce your hours as you are struggling with full-time hours. Aminata asked you to complete the flexible working application form and submit it to your manager at the Chelsea and Westminster Hospital. The flexible working application will be applicable to your substantive role at the Chelsea and Westminster Hospital.

Aminata also explained that before you submit your flexible working application, that I will refer you to occupational health. The reason you said you wanted to apply to reduce your hours is because you are struggling at work and finding travel a challenge. Raj informed you that he will keep the manager at your substantive role up dated. Aminata explained that if occupational health at any time suggest redeployment then you should know that this is an eight weeks process only. If during the eight week process you are unable to secure alternative work then the Trust will set up a haring where you employment may be terminated.

I look forward to hearing from you soon. In the meantime, if you have any queries, please feel free to discuss them with me or Aminata Mansaray.

30. On 6 October 2016 the Claimant requested Dr Stern by telephone to write a letter stating that she was not fit to work full-time and that part-time work would be her best chance of recovering from the trauma of the 2015 police assault. The Claimant gave Dr Stern her authority to email the letter to Mr Boyjoonauth. On 20 October 2016 the Claimant decided to make her application for ill health retirement. She did two things, first she wrote a letter that she sent to Mr Boyjoonauth at 11:29 hours saying:

Dear Raj

I hereby give my notice as of today from my full-time post as the Perinatal Team Administrator.

As agreed, I will work this week and take three weeks annual leave from next Monday 17 October 2016. Please ask Aminata to calculate my remaining annual leave, which I was told will be paid with my final salary.

It has been a pleasure to work for the Perinatal team and I hope I can use my experience and skills I have gained in the last ten years to enhance my career.

Due to the police incident last June 2015, I have had to take a long-term sick leave. I came back thinking I would be able to fulfil my role in the Perinatal team working full-time but the psychological and physical injuries proved greater and I am only able to manage part-time hours.

I will register on the Bank and will come back to work with Andrea and Sisa from second week of November 2016 at 1b Beatrice Place as agreed until March 2017.

Thank you, Raj, for your (*sic*) support and I would also like to thank Jackie for her support

Best regards, Jennifer

31. Secondly, the Claimant wrote to Ms Devane at 1331 hours on 10 October saying:

Dear Patricia

I have given my notice as of today and would like to request that you start the process of my ill health payment.

I was supposed to give my notice last Friday 7 October, but I could not as I was awaiting an urgent confirmation, which I received today.

Please let me know what I need to do from my side.

Thanking you.

Kind regards

Jennifer

32. The Claimant then registered on 13 October with the Bank and on 7 November 2016 her employment ended in accordance with her resignation letter. During the time of working out the notice she took the remainder of her annual

leave and went to India. When she returned, she then attended work at Collingham Gardens on 7 November 2016 to be told that what she considered was her part-time job had been given to a colleague. As a result of this she emailed various people including Mr Boyjoonauth asserting:

I gave my notice on the basis that I would be working 30 hours at 1b Beatrice Place until March 2017, 9am-3pm.

I was supposed to cover (deleted name) long term sick leave for two days and the rest of hours to work with (three named people).

I came back to work after visiting my sick mum and taking three weeks annual leave from my notice period and I would like to confirm this arrangement. Please get back to me with the upmost urgency.

33. Mr Boyjoonauth responded the same day saying:

Jenny

I just read your email. If you recall, I advised you to register on the Bank after your termination notice. My understanding that any post termination employment would be via the Bank and not as a continuity of contact of employment as before your resignation status.

I did discuss covering [X's] sickness but also reassert that we were not able to give written confirmation to this.

I will talk to Guy and yourself on my return after 18 Nov.

34. Ms Moyo, who was one of the people who was emailed along with Mr Boyjoonauth on 10 November, replied to the Claimant asking her to contact People at Work for support of this matter and then saying:

Unfortunately, as discussed with you, the Collingham team expressed dissatisfaction with the work you produced. I did discuss this with you before you left and explained that, as the arrangement was via Bank, they have the option to nominate the person who would cover the position.

We did think this could have been a temporary option that you could take up via Bank but this fell through as the team were not happy with the output. I am however not aware that commitment was made to provide you work until March 2017 as this was covering someone on sick leave.

I discussed the other option we had available to cover Out of Hours (4-10pm) and you felt this was not suitable.

We did suggest that you contact Bank and see if there [are] any other options in K&C an area you can only travel to and Guy will contact as soon as something becomes available.

Please contact Imogen in the meantime and see if there have post they require Bank staff. [sic]

35. On this basis the Claimant has advanced her claim. She presented her case to the Employment Tribunal on 11 March 2017 having entered early conciliation with ACAS on 29 December 2016 with the final ACAS certificate issued on 12 February 2017. The Claimant's last day of employment was 7 November 2016. We calculate that there were 46 days during which time she was engaged with the ACAS early conciliation process, going back three months plus 46 days from the

11 March 2017 takes us to 26 October 2016. It would therefore seem that the acts or omissions that are complained of prior to the 26 October 2016 are out of time.

36. We have been advised on the law by both advocates. And because the preliminary hearings in this matter had produced adjustments on a list of issues Mr Baker for the Respondent had produced a composite list of issues taking into account the different renditions and adjustments to the list of issues that had been made at the preliminary hearing. We understood this composite list to be agreed.

37. In respect of the failure to make reasonable adjustments pursuant to s.20 of the Equality Act 2010, we note that there was a term in the Claimant's contract on employment which required her to work 37.5 hours per week. We did not accept that such a term amounts to a provision, criterion or practice within the meaning of s.20 of the Equality Act 2010. It was, after all, a term of the Claimant's contract and applied to her and to her alone. The questions that flow thereafter are not applicable - whether it put the Claimant at a substantial disadvantage in comparison with people who are not disabled and, if so, did the Respondent take such steps as was reasonable for it to have to take to avoid the disadvantage.

38. In respect of issue number 5 on the list of issues, the question is "Did the Respondent's policy of hot desking place the Claimant at a substantial disadvantage compared to persons who are not disabled?" Our answer to this is based on our finding that there was no policy of hot desking. The Claimant herself accepted that staff were allocated desks in the room which she sat with some five other people. And so, we simply did not regard the questions asked about alleged hot desking to be applicable to the Claimant's case at all.

39. In respect of direct discrimination pursuant to s.13 of the Equality Act 2010, we do not accept that there was less favourable treatment of the Claimant by the Respondent through the Respondent telling her to retire on the grounds of ill health to secure part-time work. We regard the use of the verb "telling" there to be the equivalent of "ordering" her to retire. We are satisfied on the evidence that we have had that the Claimant was advised as to what her options were with regard to ill health retirement. We are satisfied that her decision to retire on the grounds of ill health expressed on 10 October 2016 was hers alone, and not merely compliance to something she had been ordered to do .

40. Issue 9: "Was the less favourable treatment suggesting ill health retirement?" Our view is that the Claimant was properly advised on the options open to her as a result of her health condition. The fact that one option included her deciding to retire on the grounds of ill health does not represent unfavourable treatment.

41. In respect of issue 10, "Has the Claimant suffered dismissal or any other detriment?" our answer is "No, the Claimant did not suffer dismissal or indeed any other detriment".

42. As regards to discrimination arising from disability pursuant to s.15 of the Equality Act 2010, we accept the Claimant did have a need to work part-time that arose from her disability. We do not accept that the Claimant was repeatedly told - in the sense of instructed or ordered - to take ill health retirement. We do not consider that the advice she was given as to what her options were with regard to ill health retirement constituted unfavourable treatment pursuant to s.15.

43. In respect of issue number 14, we repeat: we do not consider the Claimant suffered dismissal or any other detriment. We regard issue 15 as not being applicable, that is: "Can the Respondent show that offering the Claimant to take early ill health retirement was proportionate means of achieving a legitimate aim?" Telling the Claimant what the benefits were of ill health retirement could be a legitimate aim, but issuing her with an instruction to take ill health retirement is not, something which we find did not happen.

44. We were told that there had been a resolution of the claim for unpaid holiday pay and we saw that there were arrears of pay had been paid to the Claimant on 21 December 2018. We were also provided with no evidence in respect of unlawful deduction of wages. There appears to have been some negotiations between solicitors regarding the monies that were outstanding, but we were not appraised of any evidence on such sums as those discussions may have left outstanding. In the circumstances, there is no evidence upon which we can come to any conclusion on the issue of unlawful deduction of wages.

45. We revert now to limitation: all the Claimant's complaints appear to be out of time. We not satisfied that the acts form part of any continuing course of conduct. We bear in mind the guidance provided by Auld LJ in *Robertson v Bexley Community Centre* [2003] IRLR 434 (CA):

It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule. It is of a piece with those general propositions that an Appeal Tribunal may not allow an appeal against a tribunal's refusal to consider an application out of time in the exercise of its discretion merely because the Appeal Tribunal, if it were deciding the issue at first instance, would have formed a different view. As I have already indicated, such an appeal should only succeed where the Appeal Tribunal can identify an error of law or principle, making the decision of the tribunal below plainly wrong in this respect.

46. We have received no evidence from the Claimant as to why we should regard it as just and equitable that we should treat her claims relating to discrimination as being within time. Her witness statement did not address this issue at all. She did not put forward any evidence in her oral evidence as to why it would be just and equitable for us to treat her claims as being within time and so we must dismiss the Claimant's claims in total.

47. As for the two claims for unpaid holiday pay and unlawful deduction of wages, we note that the Claimant had legal advice within two weeks of 10 November 2016. On that basis, it clearly was reasonably practicable for her to have made her claims on those two matters within time.

48. Thus, we dismiss all claims on two bases: that we lack jurisdiction and on their merits.

Employment Judge Stewart

Dated: 6 August 2019

Judgment and Reasons sent to the parties on:

7 August 2019

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For the Tribunal Office