EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Dr B Borgstein		Imperial College Healthcare NHS Trust

Heard at: London Central **On**: 25, 26, 27 and 28 April 2022

Before: Employment Judge H Stout
Tribunal Member Ms M Pilfold
Tribunal Member Dr V Weerasinghe

Representations
For the claimant: In person
For the respondent: Camille Ibbotson (counsel)

LIABILITY JUDGMENT

The judgment of the Tribunal is that:

(1) The Respondent did not contravene ss 13 and 39(2)(d) of the EA 2010 by directly discriminating against the Claimant because of her race and/or because of associative disability.
(2) The claim is dismissed.

REASONS

1. Dr B Borgstein (the Claimant) is employed by Imperial College Healthcare NHS Trust (the Respondent) as a Consultant Paediatric Audiovestibular Physician. In these proceedings she brings claims of direct race discrimination and direct associative disability discrimination under ss 13 and 39(2)(d) of the Equality Act 2010 (EA 2010) in respect of the handling and outcome of her request to retire and return to work on a part-time basis.

The type of hearing

2. This has been a remote electronic hearing under Rule 46 which has been consented to by the parties.

3. The public was invited to observe via a notice on Courtserve.net. Some members of the public joined. There were no connectivity issues.

4. The participants were told that it is an offence to record the proceedings. The participants who gave evidence confirmed that when giving evidence they were not assisted by another party off camera.

The issues

5. In the course of the hearing, the Claimant agreed to withdraw her claims in respect for delay in dealing with her request under s 1 of the Freedom of Information Act 2000 (FOI request) and these are struck-through in the list below. The issues to be determined by the Tribunal are accordingly:

Direct discrimination (race)

(1) Has the Claimant proved facts from which, in the absence of any other explanation, the Tribunal could decide that the Respondent treated the Claimant less favourably than it treated or would treat others (David Taube and/or a hypothetical white comparator), because of her race and contrary to EqA10, s13? In particular, the Claimant relies upon the following less favourable treatment:

a. The Respondent's decision to offer the Claimant a fixed term contract instead of a permanent contract following her application to retire and return.
b. The Respondent's delay in dealing with the Claimant's application to retire and return and failing to follow the Trust's policies.
~~c. The Respondent's delay in dealing with the Claimant's FOI request.~~
d. The Respondent's decision to refer the matter to WLCH, outside of the Flexible Working Policy.

e. The Respondent's failure to have her application considered or reviewed by a member of the BAME community.

Direct associative discrimination (disability)

(2) Did the Claimant's son and/or mother suffer from a physical or mental impairment which had a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities so as to constitute a disability within the meaning of EqA10, s 6 & Schedule 1?

(3) Has the Claimant proved facts from which, in the absence of any other explanation, the Tribunal could decide that the Respondent treated her less favourably than it treated or would treat others, because of her son and/or mother's disability, contrary to EqA10? In particular, the Claimant relies upon the following less favourable treatment:
   a. The Respondent's decision to offer the Claimant a fixed term contract instead of a permanent contract following her application to retire and return.
   b. The Respondent's delay in dealing with the Claimant's application to retire and return and failing to follow the Trust's policies.
   ~~c. The Respondent's delay in dealing with the Claimant's FOI request.~~
   d. The Respondent's decision to refer the matter to WLCH, outside of the Flexible Working Policy.

Remedy

(4) If the Tribunal finds that the Claimant was discriminated against:
   a. Is an injury to feelings award appropriate in the circumstances?
   b. If so, how much should this injury to feelings award be, taking into account consideration of the bands as set out in Vento v Chief Constable of West Yorkshire Police [2002] EWCA Civ 1871?
   c. Is it appropriate to make an award for financial losses, and if so, at what level?
   d. Should the Tribunal make appropriate recommendation(s)?

The Evidence and Hearing

6. We explained to the parties at the outset that we would only read the pages in the bundle which were referred to in the parties' statements and skeleton arguments and to which we were referred in the course of the hearing. We did so. We also admitted into evidence certain additional documents at the instigation of both the Claimant and the Respondent.

7. We explained our reasons for various case management decisions carefully as we went along.

8. We received witness statements and heard oral evidence from the Claimant and the following witnesses for the Respondent:

a. David Hrouda (Consultant Urological Surgeon, Clinical Director for Specialist Surgery and the Claimant's line manager);
b. Tom Connolly (General Manager for General and Vascular Surgery).

9. We also received a witness statement for Barney Langrish (Freedom of Information Manager).

10. With the agreement of the parties, we excluded from evidence the second and third sentences of paragraph 33 of the Claimant's witness statement, which referred to the content of without prejudice communications in respect of which the Respondent had not consented to waive privilege.

Adjustments

11. The parties confirmed at the start that no adjustments were required.

Minority view

12. As will be seen from this judgment, we were in this case able unanimously to conclude that the Respondent has not contravened the EA 2010, but a minority (Dr Weerasinghe) disagreed on parts of the reasoning. By virtue of Rule 49 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (SI 2013/1237) (the Rules) the decision of the Tribunal is that of the majority. However, in accordance with the guidance of the Court of Appeal in *Anglian Homes Improvements v Kelly* [2005] ICR 242 at [11]-[13] *per* Mummery LJ and *Eyitene v Wirral Metropolitan Borough Council* [2014] IRLR 944 at [11]-[16] *per* Underhill LJ, where, despite reasonable efforts to reach agreement, unanimity was not possible, this judgment sets out the views of the minority. Those views are not written wholly in his words because, as the Court of Appeal made clear in those cases, the responsibility for writing up the decision lies with the judge who must (electronically) sign the decision. Consistent with the Court of Appeal guidance that the minority views must be conscientiously recorded, however, we also record here, that the minority does not agree that the effect of those Court of Appeal judgments is that the judge should write up the minority's views, but considers that the minority should be permitted to write a dissenting or differing judgment in his own words.

13. In the judgment below, the views of the minority are indicated in *italics* so as to distinguish them from the views of the majority which constitute the Tribunal's decision in this case in accordance with Rule 49.

The facts

14. We have considered all the oral evidence and the documentary evidence in the bundle to which we were referred. The facts that we have found to be

material to our conclusions are as follows. If we do not mention a particular fact in this judgment, it does not mean we have not taken it into account. All our findings of fact are made on the balance of probabilities.

Background

15. The Claimant has been employed by the Respondent NHS Trust since 19 December 2001. She is currently a Consultant Paediatric Audiovestibular Physician in the Respondent's Paediatric Audiology Department. She describes herself as being of mixed African/Asian/White ethnicity. The Respondent is an NHS Trust providing acute and specialist healthcare across five hospitals and in the community of North West London.

16. This claim is concerned with the Claimant's request to 'retire and return', first raised by her in July 2018, and the Respondent's offer (first made in March 2020 by Mr Hrouda) that she could retire and return on a 12-month fixed term contract, and the process by which that offer was made and then reviewed.

17. The Respondent has three divisions: Surgery, Cancer and Cardiovascular (SCC), Medicine and Womens & Childrens. The divisional director of the SCC is Professor Katie Urch. Within each division sit various directorates. One of directorates in SCC is Specialist Surgery. Mr David Hrouda is the Clinical Director for Specialist Surgery and reports to Professor Urch. The Specialist Surgery directorate includes Ear Nose and Throat (ENT), breast surgery, urology, oral surgery and audiology (the department in which the Claimant works).

18. The Claimant's job is to provide medical input and care to children with hearing loss of all types, and their families. In addition to her clinical duties, the Claimant is a member of the pan London Paediatric Audiology Heads of Service group which meets three times a year at St Thomas' Hospital. She has in the past also been chair of the Children's Hearing Services Working Group, a multi-disciplinary and multi-agency group working together to ensure that local services across health, education, social care and the voluntary sector meet the needs of local families and are of the best quality. she is also a member of the North Thames Consultants Clinical Governance Group. She teaches and lectures medical students, paediatricians, trainee audiologists, speech and language therapists, and school nurses. She is chair of the Trust Local Negotiating Committee (LNC). She was until December 2021 a personal tutor at Imperial College, but resigned in December 2021 due to her own personal caring duties. She has likewise reduced her exercise of practising privileges at the Portland Hospital for Women and Children and her expert medico-legal work.

19. The Claimant's job plan currently includes the equivalent of 3 clinics and 7.5 Programmed Activities (PAs) for clinical work and a further two PAs for Imperial College Tutoring and Union activities. PAs are blocks of time in which contractual duties are performed, such as direct clinical care, clinical governance, professional development, appraisal and revalidation.

20. There is no dispute that the Claimant is a commended professional, committed to providing the highest standard of care to her patients. She has a genuine concern for the skill shortages in her field and the impact of shortages on patient care. The Claimant conducted her case diligently and with dignity.

The Claimant's son and mother

21. The Claimant has given affidavit evidence that her son was diagnosed with paranoid schizophrenia in 2012 and has, in the words of his psychiatrist from a letter in December 2018, an *"enduring mental illness that affects his day to day life and functioning notably in areas of attention, concentration and memory"*. The Claimant says she has significant caring responsibilities in relation to him.

22. The Claimant has also given affidavit evidence that her 88 year old mother has severe, disabling, complex valvular heart disease which is under the care of the Royal Brompton Hospital. Together with other conditions, this renders her largely immobile and unable to perform many basic tasks of daily living. She is dependent on support and the Claimant is the primary source of this.

23. The Claimant has refused to provide disclosure of medical evidence in relation to either mother or her son on the basis that it is confidential, but Mr Hrouda stated that he saw no reason to disbelieve the content of the Claimant's affidavit, and nor do we.

Flexible Working Policy

24. The Respondent has a Flexible Working Policy which provides, among other things, for Flexible Retirement. The NHS Pension Scheme permits employees to resign and start claiming pension but return to work in some form on a 'step down' basis.

25. The Claimant recalls that in 2018 when she first made her request to retire and return the policy on the intranet indicated that new contracts issued after a retire and return would be 12 months, but the Respondent has not been able to locate that version of the policy. We see no reason not to accept the Claimant's evidence that there was an earlier version of the policy because it appears to have been widely understood (as is agreed by the parties in the light of various documents in the bundle, in particular pp 117, 316 and 329) that historically the 'standard' offer where an employee retired and returned was for a 1-year annual contract.

26. The earliest version of the policy that the Respondent has been able to locate (version 3.0, ratified 24 November 2015) dealt with Flexible Retirement in Appendix 11. Materially, it stated that requests to retire and return should be viewed *"sympathetically"* and *"Where this can be practically accommodated*

staff will be offered re-employment and asked to sign a new contract of employment". The procedure was for there to be a break in service of at least two weeks and then a new contract. The policy states at paragraph 5.3.2 that *"Flexible working agreements should normally be for a fixed period"*, although nothing specific about length or type of contract was specified in the Flexible Retirement section. The policy provides a Flexible Working Request Form at Appendix 12. Timescales for consideration of applications were set out in section 5: 14-28 days for a first meeting; 14 days thereafter for a confirmed decision; appeals to be dealt with *"in accordance with the Trust's appeals procedure"* (see para 5.5.1 - we have not been provided with the appeals procedure).

27. The next version of the policy (version 4, ratified on 12 March 2019) (297) was materially identical, save that it stated that *"If there is no negative impact upon the quality or cost of service delivery, managers are expected to take reasonable steps to accommodate flexible retirement requests"*.

28. The 'new' version of the policy (version 4.1, ratified on 21 January 2020, but not uploaded to the intranet until the summer of that year) (511) states that *"The duration of any return should be determined by the needs of the service/role. A fixed term contract can be issued if the role is of a temporary nature and a substantive contract where the role is permanent. Where the role differs to the original role that was carried out then the usual recruitment process should be undertaken"*. Otherwise, the policy was materially the same as previous versions.

29. The British Medical Association (BMA) in its document *Working in the peri-retirement period; possible changes to working practices including retire and return* (p 482) has criticised the practice of hospitals offering short fixed term contracts to consultants who retire and return and argues that this is not necessary. In that document, the BMA states: *"Many consultants are deterred from seeking retire and return arrangements because they have only been offered a short contract of employment. … Employers have, in the past, shied away from offering a longer contract period fearing that it would establish enduring employment rights. This seems to be unnecessary caution; there is little evidence that long term contracts of employment in this context have become problematic for employers. Moreover, there are examples amongst trusts to offer open-ended contracts for nursing colleagues who have retired and subsequently returned to NHS employment under Agenda for Change contractual arrangements. It is not acceptable the different standards are applied for consultants in respect of their length of employment contract."*

<u>Applications of the Flexible Working Policy in individual cases other than the Claimant's</u>

30. On 2 October 2020 the Claimant made a request under s 1 of the Freedom of Information Act 2000 (FOI) for a *"list of consultants, who have been employed by the Trust, following retirement, on permanent or fixed term contracts, in the last 2 years and a breakdown of their ethnicity and gender"*.

The Respondent failed to respond to that request within the statutory 20-day timescale because Mr Langrish (who was handling the request and who provided a witness statement, but who the Claimant elected not to cross-examine) initially failed to forward the request to the Medical Resourcing Team, only doing this on 10 November 2020. On 20 November 2020 the Respondent provided the information requested, which was that there have been six consultants who have retired and returned to the Trust in the previous two years, four on fixed term contracts and two on permanent contracts.

31. From the evidence we have heard in these proceedings, we know that one of those who returned on a permanent contract was David Taube, Consultant Nephrologist and previous Medical Director for the Respondent. In his evidence, Mr Hrouda explained that Mr Taube worked in a different directorate and he had had nothing to do with his application.

32. Mr Hrouda himself has personally dealt with five applications to retire and return. Two of those were on the list provided in response to the FOI request (identified as White – British and White – Irish). They were offered (and accepted) 12-month fixed term contracts post retirement. Another White Consultant who wished to retire and return was offered by Mr Hrouda a 12-month fixed term return contract, but decided not to accept that offer. Since the FOI request, Mr Hrouda has dealt with the retirement and return of the Claimant's colleague in the Audiology department, Dr Mohamed Hariri, who is of Arab ethnic origin. Dr Hariri first indicated a wish to retire and return around the same time as the Claimant in 2018. He was also offered a 12-month fixed term return contract, which he accepted, retiring and returning with effect from the summer of 2021.

33. There is email evidence in the Claimant's additional documents that by November 2020 the anaesthetics directorate had agreed to some long-term contracts for those retiring and returning. We have not, however, received any witness or other evidence to support or explain this. We do not know what role the author of the email has or what his knowledge is of practice in anaesthetics, how many cases are involved or who made the decisions. We have accordingly been able to place only very limited weight on this evidence.

Job Planning Policy

34. The Respondent has a Consultant Job Planning Policy, which applies to both team and individual job planning. The purposes of the policy are to ensure equitable (para 3.3) and consistent (para 3.4) remuneration for work done. The planning works on the basis of units of professional activities, "PAs". 1 PA is a 4-hour unit of time. Full-time work is 10 PAs per week. PAs may be allocated to Direct Clinical Care (DCC) work (para 5.1) or Supporting Professional Activities (SPA) (para 3.5). The policy provides that an individual job plan must be agreed annually (para 3.4). The policy emphasises that the job planning process must be approached *"in a spirit of mutual trust,*

professionalism and openness" (para 3.10) and *"be based upon fact and evidence"* (para 3.13).

Equality and Diversity information

35. The Claimant has provided us with the Respondent's Workforce, Diversity and Inclusion Annual Report (2019/2020). In that document, she drew our attention to the Respondent's acknowledgment that its Board is not as diverse as it could be although recent appointments have improved diversity. She pointed out the Respondent's stated priority of improving equality, diversity and inclusion, but questioned whether that had been done in practice.

36. The Report states that the Respondent introduced the concept of diverse recruitment panels in December 2019 for which panel members should be trained, and notes that there is still work to do to 'embed' these new arrangements.

37. The Report records that the Trust employs proportionally more Black Asian Minority Ethnic (BAME) staff than are represented in the local population, but that BAME staff are under-represented in senior roles.

38. The Claimant has also drawn our attention to data obtained by her from the Royal College of Physicians Medical Workforce meeting in November 2020 which noted that being from a BAME background lowered rates of success at first consultant job application (51.1% success rate for BAME doctors compared to 68.3% for White counterparts).

39. The Respondent expects staff to undertake an annual online Equality and Diversity module, which the Claimant, Mr Hrouda and Mr Connolly have all completed. In addition, Mr Connolly has undertaken a 1-day course at the King's Fund on unconscious bias and in a previous organisation he received training on protected characteristics in order to chair appeals. Mr Hrouda added in oral evidence (and we accept) that although he would welcome more training, he has a track record in improving equality and diversity in his directorate, which under his charge now has only one White male and one White female consultant, with half of the new appointments made by him being BAME candidates and all three of the consultants that he has supported in moving to Professor status being BAME.

40. The Claimant pointed to a document headed Equality, Diversity and Inclusion Work Programme that suggested that a commitment to sending more managers on training had not been actioned, but we do not consider we can place any weight on this document as that part of it only seems to be concerned with what happened during a short period in November 2020 and no witness is able to give first hand evidence about the Work Programme.

2018-2020

41. The Claimant first requested to retire and return on a part-time basis in July 2018. This was because of her caring responsibilities for her son and mother, which were increasing, but she did not tell the Respondent at this point so the Respondent was unaware of the reasons for her request.

42. On 18 July 2018, the Claimant requested to meet with her line manager, Mr Hrouda. They met on 13 August 2018. There is a dispute between the parties as to whether this was a meeting specifically to discuss the Claimant's request to retire and return or whether it was the annual job planning meeting for the Claimant. We do not need to resolve that dispute as the parties are agreed that, whatever the nature of the meeting, the Claimant did ask at this meeting about retiring and returning on a part-time basis. Mr Hrouda then went on holiday for a period.

43. On 21 August 2018 the Claimant emailed other members of the Management team asking for an update as she had heard nothing from Mr Hrouda. On 5 September 2018, the Claimant emailed Mr Hrouda asking for an update, and stating that she wished to retire at the end of December. Mr Hrouda responded on 12 September 2018, indicating that he had had some discussions within the Directorate and that the preferred option was to appoint a full-time audiovestibular physician to meet her aspirations to return on a 5 PA contract. He promised further 'concrete information' within about 10 days.

44. The other audiology physician in the department, Dr Mohamed Hariri, was also looking to retire and return on a 5 PA contract and Mr Hrouda felt a possible solution to both requests would be to recruit a full-time audiology physician to cover the reductions in both the Claimant's and Dr Hariri's role.

45. By email of 26 September 2018 to Veronica Grant (Medical Personnel Projects Manager) the Claimant informed her that she had met with Mr Hrouda to discuss her potential retirement and explained that her wish was to retire and return *"working 5 PAs for the Division and 1 for the LNC with a five year contract"*. She said she had not heard back from him and that *"We are short of a consultant in the specialty and capacity is not satisfactory or safe. Urgent planning is therefore crucial so that we can recruit accordingly. I would like to go at the end of December"*.

46. By 3 October 2018, Mr Hrouda had not responded to the Claimant, but the Claimant had in the meantime sought advice from the Trust pensions officer and HR. The Respondent's Pension Manager by email of 3 October 2018 advised the Claimant *"Usually when a member retires and returns they are offered one year contracts (albeit can be rolling if necessary)".*

47. On 10 October 2018, the Claimant received a reply from Ms Grant, in which she advised the Claimant that *"the way it would normally work is that you would resign giving three months notice and send to David including your request to return for 5 PAs and the tenure and he would respond. If a return*

is agreed, you would then notify me of your leaving date especially if you plan on taking your pension. Also you will need to sort out with Andy how much of a break you will need to have i.e. one day or one month. If you have a one day break you can only return on a maximum four PAs per week for one month and then increase your PAs..." It is apparent from a later email of 1 February 2019 from Farah Cheema (the Claimant's Trade Union representative who was assisting her from early 2019 onwards) that Ms Grant was not aware there was a specific policy on retire and returns and she did not advise the Claimant to complete the Flexible Working request form in the policy, so the Claimant never completed that form.

48. After further chasing by the Claimant, on 1 November 2018 Mr Hrouda wrote to the Claimant apologising for the delay, explaining that it was because he was waiting for Hina Khalid to start as the department's new General Manager and inviting the Claimant to meet with them to discuss a new job plan.

49. A meeting was then scheduled for 21 November 2018. On the morning of the meeting Mr Hrouda cancelled the meeting and rescheduled it for 12 December 2018, and then again to 17 December 2018. The reasons for these cancellations were not explored in evidence by either party.

50. On 17 December 2018, the Claimant met with Mr Hrouda and Hina Khalid (nonclinical manager). At the meeting the Claimant's proposal to retire and return to the service on a 5 PA contract doing two clinics was discussed, but Mr Hrouda and Miss Khalid explained that the Respondent's usual allocation was 1.25 PAs for all clinics (including specialist clinics) and any associated administrative work, so they proposed the Claimant return on a 5 PA contract, carrying out three clinics, consisting of 3.75 PA for direct clinical duties and 1.25 PA for supporting professional activities. The Claimant considered that this was an 'undoable' job plan. The possible length of the contract was not discussed at this meeting.

51. By email of 7 January 2019 (p 101), the Claimant asked Miss Khalid to confirm who it was who had *"decreed that all 'retirers and returnees' were to come back on a 5 PA, 4:1"* contract. She added, *"I also seem to remember that there was a fixed term for contracts – is that correct?"* She acknowledged that she had been asked to draw up a job description for the proposed new consultant post, but indicated that she was having difficulty understanding how that would help her case and was therefore reluctant to spend time on it. She stated that she could send job descriptions from other trusts if needed. By email of 22 January 2019, the Claimant provided more information in support of her contention that in a 5 PA contract she ought only to be expected to do 2 clinics rather than 3. Her argument in this email was (in outline) that the audiovestibular department at the Respondent was under-resourced and so an allocation of 1.25 PA per clinic (i.e. 5 hours of time for each 4 hour clinic) was unreasonable.

52. Mr Hrouda acknowledged her view, but considered that an allocation of 1.25 PA per clinic was equitable and consistent with the Claimant's colleagues

because that is what the Respondent allocated for all clinics in the Trust that he was aware of (including specialist clinics), and the only other audiovestibular physician at the Respondent (Dr Hariri) also had that allocation for his clinics, even though on average (as he dealt with less complex cases) he saw more patients in each clinic than the Claimant.

53. By email of 1 March 2019, Dr Geoff Smith (Consultant Gastroenterologist, Associate Medical Director (Professional Development)) advised Mr Hrouda that from the HR point of view, there was no requirement to agree a request to retire and return. If a retire and return was appropriate from a service point of view, he said it was *"usually a 4 DCC + 1 SPA annually renewed contract"*, although he was not aware of a specific policy on that. He indicated that if mediation was appropriate, he could assist.

54. By email of 5 March 2019, Mr Hrouda accordingly thanked the Claimant for her email and research and acknowledged that there was more DCC for admin related to clinical care in her specialty than others. He reiterated that, when the Claimant retires, the service would require a full-time audiology physician to lead the service, but in the meantime, having failed to agree a retire and return job plan, he stated that his understanding was that her preference was to continue with the current working arrangements. The Claimant replied the next day reiterating her view the retire and return job panel offer was not just unappealing, it was undoable. She emphasised that in her view the services at Charing Cross (where Dr Hariri is based) and St Mary's (where she is based) were quite different. There was then more email correspondence in an attempt to reach agreement.

55. From 4 September 2019, Mr Hrouda was trying to arrange a team job planning meeting for October 2019 with himself, the Claimant, Harry Monaghan (General Manager for Specialist Surgery) and Dr Hariri to discuss the current state and future direction of the service. The Claimant replied asking for a paediatrician to attend the meeting. Mr Hrouda agreed and arranged for Dr Nigel Basheer (Consultant Paediatric Neurologist and Clinical Director for Paediatrics) to attend. Due to the availability of those attending, the team job planning meeting could not be arranged to take place until 30 October 2019. Dr Basheer is a paediatric neurologist carrying out specialist work and is involved in job planning other complex areas of paediatrics. Mr Hrouda had no contact or discussion with him in advance of the meeting other than asking him to attend. At the meeting, Dr Basheer was asked to provide his opinion on what would be a reasonable number of PAs to be allocated to each paediatric audiology clinic. He advised that 1.25 PAs would be reasonable and in line with other colleagues. It was decided at the end of the meeting that Mr Hrouda would meet separately with Dr Hariri and the Claimant to agree job plans on this basis.

56. On 5 November 2019, Mr Hrouda emailed the Claimant and Mr Monaghan to arrange a further meeting to discuss individual job planning, but because of the availability of those involved it could not take place until 11 December 2019.

57. On 11 December 2019, the Claimant met with Mr Hrouda to discuss her then current job plan as well as retirement request. Based on Dr Basheer's advice and normal practice at the Respondent, Mr Hrouda and Mr Monaghan maintained that in the Claimant's current job plan each outpatient clinic, including the administration with it should be allocated 1.25 PA (i.e. 4 hours for the clinic and 1 hour for further administration). The Claimant continued to disagree on the basis that on average she would see 5 patients in a 4-hour clinic, spend 1 to 1.5 hours writing up and then further time checking the typed up letters. She indicated that she wished to appeal and Mr Hrouda and Mr Monaghan agreed that it was appropriate for the matter to go to appeal.

58. Mr Hrouda emailed her after the meeting to confirm what he believed had been discussed (109). The Claimant in reply reiterated that she considered the offer of retiring and returning on a 5 PA job plan including three outpatient clinics was unacceptable, given in particular that she was on a 7.5 PA contract currently doing the equivalent of 3 clinics. In addition to the points noted in Mr Hrouda's email, she added that when doing clinics in special schools more time was required as she did not have access to the Respondent's computer system while at those sites. The Claimant further expressed the view that, *"We did not appear to be engaging in meaningful mutually trusting negotiation in line with the principles of the job planning policy"*. She said that she wanted mediation rather than appeal and so this was arranged. The Claimant's case is the only one in Mr Hrouda's experience where he has had to go to mediation over a job plan.

59. A job plan mediation meeting was arranged to take place on 12 February 2020, this being the earliest date that all attendees could make. The meeting was with Dr Roseanne Meacher (Associate Medical Director and Consultant in Critical Care Medicine and Anaesthesia). A further meeting was arranged for 4 March 2020 to enable the Claimant to bring more evidence. During the mediation, agreement was reached as to the Claimant's current job plan, and Dr Meacher proposed by way of compromise a retire and return contract for the Claimant consisting of two clinics for 4.5 PA or three clinics for 5.5PA. Mr Hrouda indicated that that would be a 1-year contract. This is the first time that Mr Hrouda informed the Claimant of the proposed length of the contract.

60. Mr Hrouda emailed the Claimant on 6 March 2020 to confirm the offer although he got it wrong in that email and corrected this in a subsequent email to confirm that the offer was two clinics 4.5 PA. In his first email (118) he stated that the offer of a 12-month contract was *"in line with Trust policy"*. He stated in his second email: *"I sought advice and I was told that a one year fixed term contract was the policy"*. The Claimant was in agreement with the offer of two clinics on a 4.5PA contract, but not happy with the offer of a fixed term contract. In her reply to Mr Hrouda's first email she stated that the offer of a one-year fixed term contract was *"breaching Trust policy and against legal advice given to the Trust"* but she did not explain further what she meant by this or identify the policy or advice in question.

61. The Claimant did not reply directly to Mr Hrouda's second email in which he emphasised that the advice he had received was that a 12 month contract

was Trust policy. Instead, having unsuccessfully sought assistance from the Director of HR (Kevin Croft) and her Trade Union (HCSA), by letter of 3 July 2020 (122), the Claimant wrote formally to request Mr Hrouda to reconsider his decision.

62. In this letter the Claimant acknowledges that Mr Hrouda's *"given reason for not offering me a permanent contract is that reorganisation of paediatric audiology in North West London is imminent"*. There is thus no dispute that by this point Mr Hrouda had sought to justify maintaining his decision that the return contract should be a 12-month fixed term contract by reference to the impending reorganisation of paediatric services. However, Mr Hrouda was clear in oral evidence that the reason why the Claimant was offered a 12-month fixed term contract in the first place was because that is what he has offered every other consultant who has applied to him for retire and return, i.e. that it was 'his policy', albeit based on his understanding that it was the norm at the Respondent in the light of the advice received from Dr Smith by email of 1 March 2019 and also from his conversations with his own line manager, Professor Urch (Divisional Director for Surgery, Cardiovascular and Cancer). In oral evidence, he added by way of further explanation (and we accept) that the retirement of a consultant (usually after 25 or 30 years of service) is a significant moment for a Trust and it is considered important for the return contract to be a 12-month fixed term to allow time for reflection as to whether the service should be organised differently in future. He explained that new consultant appointments are also usually on a 1-year locum basis as well because locum appointments can be made quite quickly during the 3 months' notice period that applies to consultant contracts and it gives the Trust the advantage of enabling time to reflect before offering a permanent role to a consultant who is likely to remain in post for 25-30 years.

63. In her letter to Mr Hrouda of 2 July 2020 the Claimant expressed doubt as to whether there was indeed any impending reorganisation of the service and pointed out the significant shortage of paediatric audiology consultants nationally and urged the Respondent to take advantage of available expertise. She also queried why it had taken two years and a mediation meeting come to some agreement. She wrote that she had been made aware of at least one other consultant in the division who had retired and returned on a permanent contract. (We interject that we have not been given any evidence about this person in these proceedings.) She pointed out that her reasons for wanting to retire and return had not been explored (but still did not give the reasons). She stated that the timeframes in the flexible working policy had not been followed and she had not been offered a right of appeal. We note that this is the first time that either party in writing has acknowledged the application to the Claimant's request of the Flexible Working Policy.

64. By email of 15 July 2020, Mr Hrouda informed the Claimant that he had reviewed the decision made, but that the department was not in a position to confirm at that time that the vacancy created by her retirement would be a permanent role. He explained that paediatric surgery, including paediatric ENT, was the subject of a sector wide review and that it is was unclear whether or not elective services would remain on the St Mary's site. He said

there was therefore a possibility that service needs would change and thus a need for flexibility, although it may "of course" be that the role could become permanent as things become clearer over the next 12 months. He said that what sort of contract was offered under retire and return arrangements was to be determined by reference to the needs of the service and could be either fixed or permanent. He said that he thought agreement had been reached following the mediation in March 2020, but that if she wished to appeal, she need only say so.

65. On 20 July 2020 Mr Hrouda was contacted by Fiona Percival (Divisional Director of People), as a result of a request by the Claimant, with a view to seeing if there was any chance of avoiding a formal appeal. Mr Hrouda explained to Ms Percival why the Respondent was not able at that time to offer more than a 12 month contract.

66. We pause here to note that the Covid-19 pandemic and national lockdown began in March 2020 and both parties agree that this placed significant pressure on services during the period from March 2020 and accounted in some part for the delays in the events with which we are concerned subsequent to that point.

The appeal

67. By email of 28 July 2020 the Claimant appealed on the grounds: a) delaying the process and a lack of robust process; b) inconsistency of the application of the policy; and c) the needs of the service. For the first time in this letter, she explained that the reason she wished to retire was because she had long-term carer responsibilities for her 87-year-old mother and her son who has schizophrenia.

68. There were difficulties arranging a date for the appeal hearing as a result of the availability of those who needed to attend (137-140, 155-161), and this was eventually arranged for 9 December 2020, which was a long way outside the two-week timeline that the Claimant and her Trade Union representative expected to apply. The only dates that the Claimant could not do between July and December 2020, of those proposed, were 9 to 23 November 2020 when she was on holiday.

69. By email of 25 November 2020 (132-133), Mr Hrouda provided a written response to the appeal. In this, he made clear that, as far as he was concerned, colleagues retiring and returning had always been offered 12-month fixed term contracts. He explained that the reason for much of the delay had been the difficulty in agreeing the Claimant's current job plan and thus in agreeing on a 'base' from which to determine what the Claimant's retire and return job plan should be. He continued:

> The challenge in agreeing a current job plan resulted in a delay and the process was overtaken by events this year. The new North West London (NWL) Integrated Care System model is resulting in the landscape of NWL changing across many services particularly paediatrics where Imperial is in the process of changing the

> services offered. Elective paediatric operating sessions are relocating to C&W and emergency paediatrics is coming back from C&W to ICHT. There are also broad plans for London NWH to transfer their work into C&W. We are still the opening stages of these new configurations and as we are seeing in Urology and ENT whole pathway changes are being examined from the outpatient referral bases and community settings, changes where SMH becomes mainly a non-elective site. Both ENT adult surgery and Urology have already relocated away from SMH and elective paediatric ENT lists have moved to Chelsea & Westminster Hospital.
>
> Nicola Grinstead, Director of West London Children's Healthcare has advised us that 'West London Children's Healthcare will need to review all appointments into senior roles, including but not limited to all consultant appointments, nursing leadership roles, all service/business/general manager roles. This includes substantive appointments, locum roles and retire and return applications.'

70. He attached to his email the document at p 136 of the bundle, circulated by Nicola Grinstead, which is referred to in other emails in the bundle as the "recruitment statement". West London Children's Healthcare (WLCH) was not at that point a legal entity, nor is it yet. It was supposed to have been created by legislation with effect from April 2022 (i.e. now), but there has been a delay in the Parliamentary process so that the timeline is now for this to happen in July 2022).

71. The recruitment statement includes the following:-

> **West London Children's Healthcare**
> **Recruitment into senior posts**
>
> Chelsea & Westminster NHS Foundation Trust and Imperial College Healthcare NHS Trust have committed to implementing 'West London Children's Healthcare' which will bring together all paediatric services under a single governance structure and strengthen our approach to working collaboratively with other providers engaged in improving the health and well-being of children and young people in West London.
>
> Critical to our success will be working together and differently, thinking beyond the traditional boundaries of our organisations and focusing on new and innovative ways of coming together to meet the needs of the half million population of children we serve.
>
> One way in which we will achieve this is to review recruitment into our senior posts; challenging ourselves to consider if a 'like for like' replacement is the best approach, reviewing if we can collectively problem solve through sharing resources or planning services changes and exploring how collaboration may help fill traditionally difficult to recruit to roles.
>
> **In/Out of scope**
> □ In scope – all appointments into senior roles. Including but not limited to all consultant appointments, nursing leadership roles, all service/business/general manager roles. This includes substantive appointments, locum roles and retire and return applications.
>
> **…**
>
> **Process**
>
> □ Decision making – when a post becomes vacant the person responsible for recruitment will liaise with their counterpart in the partner trust to explore all options

> for filling the post. The vacancy control process for each Trust will include a check to ensure this step has been completed. The Monthly Joint Directorate meeting for paediatrics will be updated on recruitment into these key posts to ensure no opportunity to collaboration/transformation has been missed.
>
> …
>
> Recruiting – it will be expected that in all appointments into senior roles (as defined in the in-scope section) representatives from both Trust will be involved in shortlisting/interview panel and decision making.

72. In his response to the appeal Mr Hrouda continued:

> Thus, there is executive support for the position that we have taken with respect to Retire & Return. Given the uncertainties about the final structure of paediatric services it makes sense to appoint retire & return Consultants to fixed term positions so that opportunities for collaboration/transformation across the sector are not missed. Given the uncertainty of the location and ownership of the service in the upcoming year we are not in a position to offer a substantive appointment and this would also apply if we were to advertise for a new post now. This adds to my previous statement on internal reviews for pathway changes and supported by the WLCH recruitment into senior posts position statement (WLCH recruitment statement which has been agreed by both Trusts attached).

73. In oral evidence, Mr Hrouda confirmed (and we accept) with reference to this part of the email that any new post would at this time also have been advertised on a 12-month fixed term contract.

74. Mr Hrouda concluded his response to the appeal by stating that this was the first he had heard of the Claimant's caring responsibilities, and seeking to reassure the Claimant that his decision-making was no way discriminatory.

75. In advance of the appeal hearing, the Claimant raised objections (396-397) to Mr Connolly dealing with the appeal on the basis that he sits in the same division as Mr Hrouda (SCC division), and also complaining that both Mr Connolly and the HR representative were White and male when the Claimant and her Trade Union representative were BAME and female (395).

76. In response, the HR representative was changed to a White female from a different division (Mia Oliver) (399). At the time the Claimant accepted that the hearing should go ahead on that basis and thanked them at the start of the hearing for changing the panel, although in oral evidence she said (and we accept) that she did this not because she was happy with arrangements but because she was tired and did not want to keep complaining.

77. The Claimant obtained, and submitted in support of her appeal, a large number of documents, including the results of her FOI request (see above) and letters of support from (in particular) Dr Charlotte Agrup of the British Association of Audiovestibular Physicians (who explained the shortage of audiovestibular consultants in the UK) (176) and Gareth Tudor-Williams (Professor of Paediatric Infectious Diseases) (who set out the Claimant's significant achievements and commitments in training the next generation of doctors).

78. The appeal hearing took place on 9 December 2020 via Microsoft teams (269). It was attended by Mr Connolly, Ms Oliver, Mr Hrouda, the Claimant, her Trade Union representative and a notetaker. During the course of the appeal hearing both Mr Hrouda and the Claimant reiterated their previous positions. Mr Hrouda added by way of information in response to the Claimant's appeal materials that he personally had at that time agreed 12 month fixed term retire and return contracts with two members of staff within ENT, both of whom were White males. The Claimant gave more detail about her son's and mother's medical conditions. She also argued that her circumstances had not been considered by reference to FREDA principles (Fairness, Respect, Equality, Dignity and Autonomy). The Claimant's representative stated that the offer of a fixed term contract was discriminatory on grounds of age and referred to the public sector equality duty (PSED).

79. By email of 18 December 2020, Mr Connolly confirmed the outcome of her appeal (215). He upheld the Claimant's complaints about the delay in the process, both overall, in relation to the time to agree her job plan and in relation to the appeal. He noted that part of the reason for this was the Covid 19 pandemic. He did not uphold her appeal about inconsistency in the application of the policy. He accepted in general terms what Mr Hrouda had said about the needs of the service and the two White males who had also been offered fixed term contracts, but partly upheld her appeal on the basis that the needs of the service may point towards a need for more permanent contracts. He noted the Claimant's concerns about the make-up of the panel hearing the appeal, but stated that he felt he was able to be fair and impartial as he was based in an entirely separate directorate. He noted her personal circumstances and stated that he hoped the job plan that had been agreed would enable more flexibility for her to allow her to carry out her caring role. As he had upheld some elements of her appeal, he recommended that her application for retiring and returning on a substantive contract should be reconsidered, specifically taking the request through the relevant process with WLCH for their consideration and review in the context of the wider changes to children's services across the sector. He further stated that the directorate was to take the outcome of the WLCH review into consideration when reviewing the substantive aspect of the Claimant's request.

80. Mr Connolly's decision to refer the matter to WLCH was because of the aforementioned recruitment statement and anticipated changes to the landscape of services with the introduction of WLCH. Mr Connolly confirmed in oral evidence that he was aware in general terms that statistics indicate that BAME consultants may be disadvantaged as regards recruitment in comparison to White colleagues, and acknowledged that the Claimant had raised the question of compliance with the PSED. He took this into account, but his focus was on whether the Claimant had been treated fairly and reasonably in her particular case. Likewise, he said he took account of the Claimant's son's and mother's ill health and her family circumstances, but focused on whether the Claimant was treated fairly and reasonably.

81. Mr Hrouda then took the Claimant's request to WLCH (Nicola Grinstead) for their consideration and review and asked for a response by no later than 22 January 2021. Mr Hrouda chased on 13 and 29 January 2021, and received a response on 5 February 2021 from Miss Grinstead (168-171). In her email she confirmed that WLCH should look into the broader contract context of paediatric audiology provision across the sector. She explained that to achieve consistency and equality across clinical services children in North West London, there was to be a review of all services, to take place within the next 12 months and that this therefore supported the approach suggested for a 12 month retire and return contract.

82. Mr Connolly forwarded Ms Grinstead's email to the Claimant and asked for her comments. The Claimant was keen to meet with Ms Grinstead, but after further correspondence, and delays occasioned by the availability of all parties, the Claimant asked instead to send in comments in writing (165), which she did by email of 4 May 2021 (164). Mr Connolly forwarded these to Ms Grinstead for her comments and she replied on 7 May 2021 stating that the points made by the Claimant illustrated why a review of audiology was needed and that a taskforce had been set up to address the immediate issues. Mr Connolly forwarded these comments to the Claimant and asked whether she would like a further meeting, which she did and they met on 23 June 2021. Mr Connolly then formally concluded the Claimant's appeal, writing to her by letter dated 29 June 2021, confirming that his recommendations had been actioned and that although there had been no change to the decision this concluded the appeal process. He noted the Claimant's views that the appeal process was "null and void", but said that it was not within his remit as appeal chair to make a decision about the contract the Claimant should be offered.

Conclusions

Direct discrimination

The law

83. Under ss 13(1) and 39(2)(c)/(d) of the Equality Act 2010 (EA 2010), we must determine whether the Respondent, by subjecting her to any detriment, discriminated against the Claimant by treating her less favourably than it treats or would treat others because of a protected characteristic. The protected characteristics relied on by the Claimant are her race and/or her association with her son and mother who she alleges have disabilities within the meaning of s 6 of the EA 2010.

84. A detriment is something that a reasonable worker in the Claimant's position would or might consider to be to their disadvantage in the circumstances in which they thereafter have to work. Something may be a detriment even if there are no physical or economic consequences for the Claimant, but an unjustified sense of grievance is not a detriment: see *Shamoon v Chief*

Constable of the Royal Ulster Constabulary [2003] UKHL 11, [2003] ICR 337 at [34]-[35] per Lord Hope and at [104]-[105] per Lord Scott. (Lord Nicholls ([15]), Lord Hutton ([91]) and Lord Rodger ([123]) agreed with Lord Hope.)

85. 'Less favourable treatment' requires that the complainant be treated less favourably than a comparator is or would be. A person is a valid comparator for this purpose only if there is no material difference between their circumstances and that of the claimant (s 23(1) EA 2010). If the circumstances of a named comparator are materially different to those of the complainant, that person is not a valid comparator. However, we may also consider how a hypothetical comparator would have been treated, and in so doing must consider the evidence of how other people were treated (even if they are not valid comparators under the statute).

86. The Tribunal must determine *"what, consciously or unconsciously, was the reason"* for the treatment (*Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48, [2001] ICR 1065 at [29] per Lord Nicholls). The protected characteristic must be a material (i.e non-trivial) influence or factor in the reason for the treatment (*Nagarajan v London Regional Transport* [1999] ICR 877, as explained in *Villalba v Merrill Lynch & Co Inc* [2007] ICR 469 at [78]-[82]). It must be remembered that discrimination is often unconscious. The individual may not be aware of their prejudices (cf *Glasgow City Council v Zafar* [1997] 1 WLR 1695, HL at 1664) and the discrimination may not be ill-intentioned but based on an assumption (cf *King v Great Britain-China Centre* [1992] ICR 516, CA at 528).

87. What matters is what was in the mind of the individual taking the decision. It is also important to remember that only an individual natural person can discriminate under the EA 2010; the employer will be liable for that individual's actions, but the legislation does not create liability for the employer organisation unless there is an individual who has discriminated. As Underhill LJ explained in *CLFIS (UK) Ltd v Reynolds* [2015] EWCA Civ 439, [2015] ICR 1010 at [36]:

> 36. … I believe that it is fundamental to the scheme of the legislation that liability can only attach to an employer where an individual employee or agent for whose act he is responsible has done an act which satisfies the definition of discrimination. That means that the individual employee who did the act complained of must himself have been motivated by the protected characteristic. I see no basis on which his act can be said to be discriminatory on the basis of someone else's motivation. If it were otherwise very unfair consequences would follow. I can see the attraction, even if it is rather rough-and-ready, of putting X's act and Y's motivation together for the purpose of rendering E liable: after all, he is the employer of both. But the trouble is that, because of the way [what is now the EA 2010 works], rendering E liable would make X liable too …. To spell it out: (a) E would be liable for X's act of dismissing C because X did the act in the course of his employment and—assuming we are applying the composite approach—that act was influenced 'Y's discriminatorily-motivated report. (b) X would be an employee for whose discriminatory act E was liable under [EA 2010, s 109] and would accordingly be deemed by [EA 2010, s 110] to have aided the doing of that act and would be personally liable. It would be quite unjust for X to be liable to C where he personally was innocent of any discriminatory motivation.

88. In relation to all these matters, the burden of proof is on the Claimant initially under s 136(1) EA 2010 to establish facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent has acted unlawfully. This requires more than that there is a difference in treatment and a difference in protected characteristic (*Madarassy v Nomura International plc* [2007] EWCA Civ 33, [2007] ICR 867 at [56]). There must be evidence from which it could be concluded that the protected characteristic was part of the reason for the treatment. The burden then passes to the Respondent under s 136(3) to show that the treatment was not discriminatory: *Wong v Igen Ltd* [2005] EWCA Civ 142, [2005] ICR 931. The Supreme Court has recently confirmed that this remains the correct approach: *Efobi v Royal Mail Group Ltd* [2021] UKSC 33, [2021] 1 WLR 38

89. This does not mean that there is any need for a Tribunal to apply the burden of proof provisions formulaically. In appropriate cases, where the Tribunal is in a position to make positive findings on the evidence one way or another, the Tribunal may move straight to the question of the reason for the treatment: *Hewage v Grampian Health Board* [2012] UKSC 37, [2012] ICR 1054 at [32] per Lord Hope. In all cases, it is important to consider each individual allegation of discrimination separately and not take a blanket approach (*Essex County Council v Jarrett* UKEAT/0045/15/MC at [32]), but equally the Tribunal must also stand back and consider whether any inference of discrimination should be drawn taking all the evidence in the round: *Qureshi v Victoria University of Manchester* [2001] ICR 863 per Mummery J at 874C-H and 875C-H.

90. We have also directed ourselves to the guidance given in *Bahl v Law Society* [2003] IRLR 640, at [99]-[103] *per* Gibson LJ as to the relevance of unreasonable treatment in the context of a discrimination claim. We have reminded ourselves that unreasonable treatment is not to be equated with discrimination, and our focus must be on the *reason* for any unreasonable treatment.

Conclusions

Disability

91. We have first considered whether we accept that the conditions of the Claimant's mother and son meet the definition of disability in s 6 of the EA 2010. It is highly unusual for us to be asked to make such a determination without seeing medical evidence or hearing evidence from the individual in question. However, in this case, we accept the affidavit evidence of the Claimant as to the medical conditions of her son and mother, and her description of the impact that those conditions have on their ability to carry out day-to-day activities. We accept on the basis of her evidence that they are both suffering from physical or mental impairments that have a substantial (i.e. more than minor or trivial: see EA 2010, s 212) effect on their ability to carry out day-to-day activities and therefore that they are disabled within the meaning of s 6 of the EA 2010.

92. We now consider each allegation of discrimination in turn, taking into account as we do so the whole picture:-

The Respondent's decision to offer the Claimant a fixed term contract instead of a permanent contract following her application to retire and return

93. We accept that this constituted a detriment for the Claimant because a fixed term 12-month contract does not bring with it the same level of job security as a permanent contract.

94. In so saying, we make the following observations, which were not raised with parties at the hearing, but which we include in this judgment in order to explain in part why a difference in view has arisen between the majority and minority in this case. We recognise that the termination of a fixed term contract is a dismissal in law (see Employment Rights Act 1996, s 95(1)(b) (ERA 1996)) in respect of which employment rights can be enforced in much the same way as for other dismissals and that a permanent contract that is terminable on three months' notice (as we were told consultant contracts are) is in legal terms no more or less secure than a fixed term contract prior to the two-year mark at which employees gain the right to claim 'ordinary' unfair dismissal and become entitled to statutory redundancy payments. *The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002* also prevent less favourable treatment of fixed-term employees without objective justification. We further note that, so far as the right to claim 'ordinary' unfair dismissal and statutory redundancy pay are concerned, whether or not that right is lost at the point that an employee retires and returns will depend on whether there is a break in continuity of employment for the purposes of ss 210(4) and 212(1) of the ERA 1996. If there is a break in continuity of employment, then a returning consultant will have no right to claim unfair dismissal or statutory redundancy pay for two years post return, whether they return on a permanent contract or a 12-month fixed term contract. In this case, the Respondent's Flexible Working Policy stipulates that matters should be arranged on retire and return so as to effect a break in continuity of service, but other documents in the bundle (pp 332-333 and 490) indicate that possibly only a 24-hour break in service is currently required by the Respondent, thus preserving continuity of employment under s 212(1) of the ERA 1996, along with the Claimant's statutory rights in respect of unfair dismissal and redundancy pay. We have heard no evidence as to what was actually proposed in the Claimant's case, or what happened in the cases of her actual or evidential comparators. The majority considers therefore that it cannot make any findings as to what was proposed for the Claimant as it heard no evidence on the matter and the issue formed no part of either party's case. *The minority (Dr Weerasinghe), however, concludes on the basis of the Respondent's Flexible Working Policy that there will be a breach in the Claimant's continuity of employment if she retires and returns on the Respondent's current offer and thus that the Claimant's statutory rights in respect of unfair dismissal and redundancy pay would be affected.*

95. Whatever the position as to continuity of employment, it is apparent that, conceptually, from both parties' points of view the difference between a 12-month fixed term contract and a permanent contract is regarded as a significant one. From Mr Hrouda's perspective it was (even before any specific proposals for service reorganisation, such as the WLCH plan, were on the horizon) intended to preserve flexibility in workforce planning and to enable a period of reflection to consider the structure of the service following the retirement of a long-serving consultant. But intended flexibility for the Respondent equates (as the BMA has pointed out) to intended lack of security for the Claimant, with the undesirable prospect of having to renegotiate her contract in only nine months' time. We accordingly accept that the Claimant reasonably perceived the offer to be detrimental. This is especially so given that it led her to conclude that she could not take up the offer and has thus continued working longer hours than she wishes to while fulfilling her caring responsibilities.

96. We next have to consider whether the Claimant has been less favourably treated than her named comparator, Mr Taube. This requires us to consider whether the Claimant has shown that there is no material difference between her case and Mr Taube's. We have, however, been provided with very little evidence about Mr Taube's case. We do not know anything about his personal circumstances, other than that he is White. We do know that he worked in a different directorate and that Mr Hrouda had nothing to do with his application. Given that the evidence is that it is a matter for the discretion of individual managers what sort of contract is offered to a consultant on retire and return, and that as a matter of law liability for direct discrimination can only be established if it is shown that a particular individual has discriminated, it is a material difference between the Claimant's case and that of Mr Taube that his application was not dealt with by Mr Hrouda.

97. We then have to consider whether the Claimant has adduced evidence from which we could infer that Mr Hrouda would have offered a White consultant a permanent contract if they had been in the Claimant's position. However, there is no evidence from which we could draw that conclusion. In this case, we have evidence of five evidential comparators, all of whose applications were dealt with by Mr Hrouda, and all bar one of whom were White, and Mr Hrouda offered all of them fixed-term 12-month contracts. Further, not all of them were happy with that offer: one White consultant decided not to accept the offer.

98. Moreover, the majority of us consider that Mr Hrouda's conscious reasons for having a policy of offering only 12-month fixed term contracts to retiring and returning consultants (i.e. in order to preserve flexibility and give time for a period of reflection on the structure of the service post the retirement of a long-serving consultant) are reasons that would apply in the case of the retirement of any long-serving consultant. As time has passed over the course of the events with which we are concerned, he has justified his decision by reference to the evolving situation with proposals for service reorganisation (including WLCH and other plans). However, his evolving justification is not indicative of any inconsistency in his reasoning, which

remains that flexibility is required. The proposals for service reorganisation merely serve as further support for his reasoning. Nor does the evolving nature of the justification advanced by Mr Hrouda provide any basis for an inference that the Claimant's race has influenced the decision to offer (and maintain the offer) of a 12-month contract. The justifications have evolved because time has passed, not because of anything to do with the Claimant's race. Yet further, there is no evidence that Mr Hrouda has a track record of favouring White consultants from which it could be inferred that he would treat a retire and return application from a BAME consultant less favourably.

99. *The minority, Dr Weerasinghe, agrees with the majority that there was no less favourable treatment because of race. However, he considers that Mr Hrouda's real reason for offering fixed term contracts to retiring and returning consultants was to actively restrict their employment rights as noted by the BMA in its paper on the subject. The minority does not accept that Mr Hrouda's reason for offering a one year contract was anything to do with impending service reorganisation. The minority reaches that conclusion as follows:-*

    a. *The Claimant in her letter of 3 July 2020 to Mr Hrouda said that the audiology management was unaware of the impending service reorganisation. Given that WLCH was not a legal entity at the time, and is not yet, the intended reorganisation would have been at an embryonic stage with no definite start date or finish date at the time.*
    b. *Mr Hrouda wrongly approached WLCH in order to 'legitimise' his decision by seeking approval instead of first consulting with the "partner trust" to "explore all options" as the recruitment statement indicates should have happened (see further below).*
    c. *At paragraph 38b of his witness statement, Mr Hrouda states: "Given the uncertainty of the location and ownership of the service, I explained that the Trust was not in a position to offer a substantive appointment". Upon questioning as to why it was not possible to relocate the Claimant if need be, he said that he did not want to 'tie down' the Trust partner. The minority considers that this approach was not consistent with the WLCH recruitment statement which required him to "explore all options" with the Trust partner in a collaborative manner.*
    d. *The minority accepts that Mr Hrouda's stated aim of preserving flexibility is, taken on its own, a legitimate management aim, but considers that the means by which it was implemented (offering a 12-month fixed term contract) was disproportionate.*
    e. *The Claimant had originally stated in correspondence that she wanted a five year contract in September 2018. Mr Hrouda did not address this issue of the length of the contract until March 2020, when for the first time a one year contract was offered. In email communications with the Claimant Mr Hrouda presented his decision as being 'Trust policy', but in oral evidence he acknowledged that it was his policy and not the policy of the Trust, albeit based on advice he had received as to what was 'normal'. Moreover, his initial explanation to the Claimant of his decision was one that related*

solely to 'policy' and not to wishing to preserve flexibility for the purposes of service reorganisation.

100. For all these reasons, therefore, we find (unanimously) that the Claimant has not discharged the initial burden of proof on her of adducing evidence from which we could conclude that the offer of a 12-month fixed-term contract was direct discrimination because of her race.

101. As Mr Hrouda was unaware of the medical condition of the Claimant's son and mother when deciding to offer her a 12-month fixed-term contract, that cannot have formed any part of his unconscious or conscious reasons for making that offer. Nor, for the avoidance of doubt, do we accept that his failure to change his decision once he became aware of that situation was because of their medical conditions. The Claimant has adduced no evidence that someone without a disabled son or mother would have been offered a permanent contract and, given Mr Hrouda's policy, it is improbable that they would have been. The Claimant's argument, understandably, is that once she revealed her home circumstances at the appeal stage, that should have provoked a more compassionate approach. However, equally understandably, Mr Hrouda did not consider that their medical conditions provided any reason for him to change his mind at the appeal stage and treat the Claimant more favourably than he had treated others with regard to retirement. There was no discrimination here.

102. We add that we have considered the Claimant's submissions concerning the PSED in s 149 of the EA 2010. However, these submissions are of limited relevance to a claim of direct discrimination. The PSED imposes a procedural duty on public bodies to have 'due regard' to the statutory needs to 'advance equality of opportunity', 'remove or minimise disadvantages suffered by persons who share a protected characteristics', 'take appropriate steps to meet the different needs of people who share a relevant protected characteristic' and 'foster good relations' between people of different characteristics. It is not a duty to achieve (or avoid) a particular result in a particular case. Even if there was a wholesale failure to comply with the PSED, it would not follow that Mr Hrouda (or Mr Connolly) treated the Claimant less favourably because of her race or her association with her son and mother.

103. As it is, the Claimant's substantive submissions regarding the PSED in her witness statement are, first, that *"of the 6 people who retired and returned in the past 2 years, all of whom were white, 4 being issued with fixed-term contracts and 2 with permanent ones, it seems that I was the first BAME member to apply and so it feels that the disadvantage was connected to my race"*, but that is a non-sequitur. What the statistics indicate is that, to date, it is mostly White consultants who have been disadvantaged by the Respondent's general approach to retire and return contracts. The Claimant has speculated that BAME consultants may have been deterred from applying because of the policy, but there is no evidence to that effect and there is no reason to suppose that BAME consultants may have been any more likely to be deterred from applying than White consultants. Secondly,

the Claimant argues that her needs were not considered as the mother of a disabled son and daughter of a disabled person, but both Mr Hrouda and Mr Connolly confirmed that (once they knew these facts) they took them into account, they were just not a reason for treating the Claimant more favourably. Thirdly, the Claimant argues that being offered a permanent contract would promote equality of opportunity by encouraging *"doctors of colour with disabled relatives to participate in an activity* [i.e. retiring and returning] *in which participation by such persons is disproportionately low"*, but that is an argument in favour of positive discrimination, which is permitted where it falls within EA 2010, s 158, but otherwise risks amounting to unlawful negative discrimination against those who are not treated 'positively'. A failure to treat a person more favourably because of their protected characteristic is not direct discrimination. It follows that there is nothing in the points that the Claimant makes about the PSED from which we could draw any inference that there was direct discrimination (on grounds of race or associative disability) in her case.

The Respondent's delay in dealing with the Claimant's application to retire and return and failing to follow the Trust's policies

104. There is no doubt that there were very significant delays by the Respondent in dealing with the Claimant's application to retire and return and we accept that the delay was detrimental to the Claimant and unreasonable. However, the Claimant has not identified a comparator for this part of her claim and we have virtually no evidence about how such applications have been dealt with in relation to other people. The only shred of evidence we have is that it took from the latter part of 2018 until the summer of 2021 for Dr Hariri's retirement and return (on a fixed term 12-month contract) to be arranged and agreed, which is on any view also a very long time.

105. The Claimant's request was dealt with in timescales far exceeding the 28-42 days provided for in the Respondent's Flexible Working Policy, but as faulty advice had meant that neither the Claimant nor Mr Hrouda were aware that the Flexible Working Policy applied to the Claimant's request until the Claimant raised this in her letter of 2 July 2020, little weight can be placed on the failure to comply with the policy before that point. After that point, the appeal process started and that also took a very long time indeed: nearly six months to the appeal hearing on 9 December 2020, which was a long way outside the two weeks that the Claimant and her Trade Union representative understood to be specified in the appeals policy.

106. The explanations for the delays between July 2018 and March 2020 when Mr Hrouda first made the retire and return offer were: (i) the difficulty in arranging mutually convenient dates for meetings; and, (ii) the difficulty in agreeing either the Claimant's current job plan or a potential return job plan. We accept those were the reasons, and there is nothing to suggest that either of these difficulties had anything to do with the Claimant's race or that a White consultant in materially the same circumstances would have been treated differently. The Claimant has not discharged the initial burden of proof. The

dispute in relation to the job plan was a dispute that arose because the Claimant wished to be given a more generous allocation of time for clinic administration than any other consultant at the Respondent of whom Mr Hrouda was aware. While her arguments as to why she should have been allocated additional time had a reasonable basis (and were ultimately partly accepted by Dr Meacher in order to resolve the mediation), it cannot be inferred from Mr Hrouda's refusal to make an exception for the Claimant prior to that point that he was treating her less favourably because of her race, particularly given that Dr Basheer and Dr Hariri agreed that in principle 1.25 PA was the appropriate allocation of time for a clinic in that specialty.

107. As to the delays at the appeal stage, these were the result of diary co-ordination difficulties, exacerbated by the effect of the Covid-19 pandemic. There is nothing to suggest that the Claimant's race had any bearing on it.

108. We therefore find that the Respondent's delay in dealing with her application to retire and return, and failure to follow policies in that respect, was not direct discrimination because of the Claimant's race.

109. For the same reasons, it was not direct discrimination because of her association with her disabled son and mother. Their protected characteristics had no bearing on the reasons for delay.

The Respondent's decision to refer the matter to WLCH, outside of the Flexible Working Policy.

110. We accept that Mr Connolly's decision at the appeal stage to require Mr Hrouda to reconsider the decision by taking the request through the relevant process with WLCH was detrimental to the Claimant because it resulted in further delay between December 2020 and July 2021 in the conclusion of the appeal process. The majority of us do not, however, consider that it was wrong in principle for Mr Connolly to have required the Claimant's case to go through that process or that doing so was *'outside of the Flexible Working Policy'*. The substance of Mr Connolly's decision at the appeal stage was that the Claimant's application needed to be reconsidered by 'the directorate' (i.e. Mr Hrouda. By December 2020 preparation for the proposed reorganisation of paediatric services in North London under the auspices of the soon-to-be new legal body WLCH was underway and Mr Hrouda's and Mr Connolly's understanding was that WLCH wished to review all appointments into senior roles, including retire and return applications. The WLCH recruitment statement provided for all recruitment decisions, including decisions on retire and return applications, to be taken jointly by both Trusts. Consistent with that statement, and Mr Hrouda's and Mr Connolly's understanding of the process (an understanding which Ms Grinstead appeared to share as there is no suggestion in her emails that she did not consider she should have been consulted), Ms Grinstead needed to be consulted on the retire and return offer made to the Claimant. Accordingly, that was a process that needed to be undertaken, and was part of what was required at that time for consideration by the Respondent of any retire and return request under the Flexible Working Policy. As such, there was no breach of policy or

unreasonableness in the decision to make the referral, so no adverse inference can be drawn from that. Further, there is no other evidence from which it could be inferred that the Claimant's race or association with her disabled mother or son made any difference to Mr Connolly's decision. There is no comparator evidence in relation to this allegation, but it would be very surprising if any different approach had been taken to anyone else in the same circumstances. We are satisfied that there is no evidence from which we could conclude that the decision to refer the matter to WLCH was discriminatory. The Claimant has not discharged the initial burden of proof.

111. *The minority, Dr Weerasinghe, agrees that there is no basis for drawing an inference of race discrimination, but considers that it was incorrect of Mr Connolly to refer the matter back to WLCH to 'take it through its process'. The minority considers this to be a misinterpretation of the 'process' referred to in the WLCH recruitment statement which is: "when a post becomes vacant the person responsible for recruitment will liaise with their counterpart in the partner trust to explore all options for filling the post. The vacancy control process for each Trust will include a check to ensure this step has been completed." The minority considers that Mr Connolly should have referred the decision back to Mr Hrouda with an instruction to him to follow the laid down process because there was no evidence that Mr Hrouda had consulted with 'the partner trust' before making his decision, the minority being of the view that Ms Grinstead did not represent 'the partner Trust' as referred to in the recruitment statement. The minority further considers that there was a failure to 'explore all options' as required by the recruitment statement.*

112. (Lest there be any confusion as to the reasons for the difference of view between the minority and the majority, the majority adds that it was not contended by the Claimant that the recruitment statement required there to be consultation by Mr Hrouda with 'a partner Trust', nor was there any evidence before the Tribunal to suggest that Ms Grinstead did not represent 'the partner Trust' for the purposes of the recruitment statement. These points were not explored with the parties, nor was it necessary to do so given the way in which the parties put their cases and the Tribunal's unanimity as to the outcome in this case.)

The Respondent's failure to have her application considered or reviewed by a member of the BAME community.

113. What happened at the appeal stage was that the Claimant pointed out that both the appointed decision-maker and the human resources representative were White and male while she and her Trade Union representative were BAME and female. The Respondent then changed the human resources representative to a female, but did not substitute a BAME colleague in either role. We are prepared to accept that the Claimant, having questioned the composition of the panel, could reasonably consider it to be detrimental that a member of the BAME community was not substituted, but we have some reservations. Our reservations are that: (i) as the appeal was to be determined by a single management decision-maker this was not a situation

like a recruitment panel where a balance of representation could be achieved; and, (ii) in the ordinary course of events it would be unreasonable (and discriminatory) for an employee to assume that their appeal would be handled differently by a member of one race to another.

114. However, even accepting this constituted a detriment, we are satisfied that the Claimant has not discharged the initial burden of proof of proving facts from which we could conclude that the reason for this treatment was her race. We have no comparator evidence on this issue. As we have already indicated in our reservations in the preceding paragraph, there is nothing inherently discriminatory in a decision-maker being from a different racial group to the appellant. Further, we accept that the reasons advanced by the Respondent as to why a BAME person was not substituted were: that there was no requirement in the policy for this step to be taken; the Claimant did not specifically request it, but only made an observation about the panel composition; and nor did she make any further objection (on race grounds) to Mr Connolly or the appointed human resources representative dealing with her appeal once a change had been made to the human resources representative, but began the appeal hearing by thanking them for making the change. Those are full and complete explanations. In the circumstances, there is nothing here from which we could conclude that the Claimant's race had anything to do with the decision. This was not direct discrimination.

Overall conclusion

115. The judgment of the Tribunal is that:

(1) The Respondent did not contravene ss 13 and 39(2)(d) of the EA 2010 by directly discriminating against the Claimant because of her race and/or because of associative disability.
(2) The claim is dismissed.

_____

Employment Judge Stout

17 May 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

18/05/2022..

FOR THE TRIBUNAL OFFICE