



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss D Ryder

**Respondent:** Warmest Welcome Ltd

**HELD AT:** Leeds

**ON:** 3, 4, 8 and 11 August  
2017

**BEFORE:** Employment Judge Maidment

**Members:** Mrs L J Anderson-Coe  
Mr J Rhodes

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Mr T Wilkinson, Counsel

# JUDGMENT

The Judgment of the Tribunal is that:

1. The Claimant's complaint of unfair dismissal is well founded and succeeds.
2. The Claimant's complaint alleging a failure on the Respondent's part to comply with its duty to make reasonable adjustments pursuant to section 20 of the Equality Act 2010 is well founded and succeeds.
3. The Claimant having failed to pay the deposit ordered previously by the Tribunal at a Preliminary Hearing on 21 April 2017 to be paid as a pre-condition to her pursuing such complaints, the Claimant's complaints of disability related harassment pursuant to section 26 of the Equality Act are dismissed.

# REASONS

## 1. The issues

- 1.1. The Claimant's complaints in these proceedings are of disability discrimination and constructive unfair dismissal. The Claimant had initially brought separate complaints of disability related harassment which were made subject to a deposit order. No deposit was paid such that those claims must stand as dismissed.
- 1.2. The Claimant has been found to have been at all material times a disabled person by reason of her anxiety disorder at a Preliminary Hearing of the Tribunal held on 10 January 2017.
- 1.3. The Claimant's complaints of disability discrimination are limited to a complaint alleging a failure to comply with the duty to make reasonable adjustments. The Claimant maintains that the Respondent applied a provision, criterion or practice which required that individuals holding the role of activities co-ordinator should carry out group work sessions with residents as well as one to one work. The Claimant maintains that such practice put her at a substantial disadvantage when compared to non disabled employees in that group work gave her panic attacks. As reasonable adjustments the Claimant maintains that a support worker should have been provided to assist her, that she ought to have been removed from group work duties and/or that she ought to have been limited to one to one duties only and/or with additional administrative hours to make up her ordinary full contracted hours of work.
- 1.4. The Respondent had raised that such complaints might have been brought outside the requisite three month time limit, but it was agreed that the Tribunal would be required to hear all evidence and make relevant findings of fact before that could be determined.
- 1.5. The Claimant then also brings a complaint of constructive unfair dismissal where she maintains that she resigned in response to a breach of the duty of trust and confidence which arose out of the aforementioned alleged failures of the Respondent to make reasonable adjustments and also out of acts of harassment (although no freestanding complaints of disability related harassment are now pursued) in the way meetings were conducted with her and comments made to her, in particular, by the home manager, Mrs Julie Fieldman.

## 2. The evidence

- 2.1. The Tribunal had before it an agreed bundle of documents numbering in excess of 287 pages. To the original bundle had been added some brief documentation including some attendance sheets of residents taking part in group activities which it was accepted on behalf of the Respondent was not a complete record of activities undertaken by residents during the course of the Claimant's employment. The Claimant had received those documents in advance of the hearing and had had sufficient opportunity to consider them. However, she had not addressed them in her witness statement such that the Tribunal allowed such documents to be admitted

in evidence on the basis that the Claimant would have an opportunity when she gave her evidence in chief to comment on the documents.

- 2.2. Having identified the issues with the parties the Tribunal took some time to privately read into the witness statements exchanged between the parties and relevant documentation such that when each witness came to give her evidence she was able to simply confirm her statement and, subject to brief supplementary questions, then be open to be cross-examined.
- 2.3. The Tribunal heard firstly, over Thursday 3 and Friday 4 August, from the Claimant. The cross-examination of the Respondent's witnesses was then completed on Tuesday 8 August the Tribunal hearing from Julie Fieldman, home manager, Caroline Walters, director of care and Sally Jennings, finance director. The Claimant had no questions for Mrs Jennings. The Respondent had intended to call Julie Hudson to give evidence of a more general nature in respect of the duties of an activity organiser, such individual having served in that position at an alternative care home. Ms Hudson was only available to give evidence on Wednesday 9 August. However, it appeared that her evidence was uncontroversial and the Claimant confirmed that she had no questions to raise with Ms Hudson. The Respondent was therefore content to submit Ms Hudson's statement as a written statement of evidence which would be accepted and considered by the Tribunal.
- 2.4. The Tribunal (as was the preference and request of both parties) listened to the full recordings made by the Claimant of her meetings with Mrs Fieldman on 31 March and 6 April 2017.
- 2.5. The Tribunal heard submissions from the Respondent followed by the Claimant on the morning of 11 August 2017.
- 2.6. Having considered all the relevant evidence, the Tribunal makes the findings of facts as follows.

### 3. The facts

- 3.1. The Claimant commenced her employment at Westfield House Care Home on 18 March 2014 as an activities co-ordinator working 20 hours per week. She reported to Julie Fieldman as home manager. After a Preliminary Hearing on 10 January 2017 it was determined that, by reason of her anxiety, the Claimant was a disabled person within the meaning of section 6 of the Equality Act from December 2015 to 15 April 2016 when she resigned from her employment. On 21 December 2015 the Claimant's GP recorded the Claimant as having suffered a "*few month history of feeling anxious and depressed*". On 30 December 2015 she was recorded as suffering from "*ongoing anxiety*" and was referred to a service offering Improving Access and Psychological Therapies. Her anxiety was said to manifest itself in the Claimant seeking to avoid normal social interaction, in particular avoiding circumstances in which she felt she would be on show or the centre of attention.
- 3.2. The Claimant's role within the Respondent and throughout her period at work followed a consistent pattern. The Respondent's care home housed up to 24 residents, all aged, but with a range of physical and mental capacities. The Claimant worked four days each week. Each morning she would spend two hours from 10.30am to 12.30pm on one to one sessions

with residents. This might involve reading to them, helping with a jigsaw, assisting them in tasks they had to complete such as writing greetings cards or wrapping up a present. Sometimes she might take a resident out. Over lunch she would assist and talk to residents. On afternoons, from 1.45pm to 3.30pm, she would conduct group sessions. This might involve games such as bingo or musical activities and sometimes involved the attendance of an external entertainer. Other care home workers would typically be in the vicinity of these activities and might become involved in assisting residents to take part.

- 3.3. The Claimant had no particular qualifications relevant to her work, but is a creative individual. The activities she carried out were planned by her in advance and timetabled in a monthly activity calendar. This planning was not a particularly onerous task. The activities were by and large standard and repeated ones and were slotted in to take place at appropriate points each month. The number of residents wanting and physically able to take part in group activities fluctuated and depended in part on the profile of residents in the home from time to time. It was unpredictable and residents might choose to dip in and out of particular activities or join them part way through. In reality, no resident who wanted to take part would be turned away. No specific care plans for targeted activities tailored to particular residents existed. One to one sessions with residents were simply logged onto their care plans and activity logs of attendees on group activities were kept. Whilst not in any prescriptive form, the Care Quality Commission ('CQC') expected to see evidence of stimulation provided to care home residents. Julie Fieldman was fully aware of how the Claimant organised the residents' activities and there is no evidence of her ever interfering with the Claimant's routine or requesting any change in emphasis.
- 3.4. Around late September 2015, the Claimant started to experience feelings of anxiety when taking larger group activities. This occurred at around the time the Respondent took over the care home, but that is coincidental only. Mrs Fieldman continued as manager as before and there is no evidence of any change in practice. There may have been a fitter group of residents in terms of profile with more wanting to take part in activities, but again numbers could and did fluctuate all the time and groups would typically range from around 8 to 10 residents. A larger group indeed was an indication of a successful activity and the Respondent hoped to persuade as many residents as possible to have the benefit of activities at the home. There is no evidence of the Claimant's feelings of anxiety coinciding with a particular upsurge in attendance. The Claimant herself talks of an increase in numbers having been gradual. It is more likely that the Claimant's anxiety with group sessions arose out of a change in her own equilibrium.
- 3.5. From September 2015, there were no overt indications discernable to anyone else that the Claimant was struggling to conduct sessions. She carried on delivering the sessions and did not raise any difficulties with Mrs Fieldman or anyone else.
- 3.6. In December, an issue arose regarding an accidental overpayment of the Claimant's wages.

- 3.7. From 24 December the Claimant was absent due to sickness with the fit note provided to the Respondent stating anxiety to be the reason.
- 3.8. On 28 January 2016 the Claimant texted Mrs Fieldman asking for a chat and saying that she thought she should try to come back to work the following week. The Claimant attended work on 1 February with a fit note recording that she could return to work with some alteration to duties and on a phased basis initially. The Claimant said that she came to her own appreciation that she was a disabled person during this period of absence but not before. She thought that Mrs Fieldman ought to have drawn this inference of her being a disabled person from, what she termed as, her long period of sickness.
- 3.9. Unfortunately, the Claimant's attendance for the meeting at work on 1 February had been arranged at a time when Mrs Fieldman was off on leave such that the discussion could not take place then. The Claimant suggested a meeting on 3 February which was arranged and took place. The Tribunal has been referred to a note of this meeting taken by Mrs Fieldman. The Claimant maintains that this is fabricated but has given no basis for that assertion other than that it was not signed by her. The note on its face appears as a contemporaneous document which Mrs Fieldman is adamant she compiled at the time. She suggested that there was no purpose in her writing up the note in this form otherwise and the Tribunal does not consider that the note was constructed to serve any ulterior purpose. The note, the Claimant agrees, does accurately record her concern voiced that she was being asked by care staff to become involved in aspects of personal care of residents which fell outside her remit. There was also a discussion regarding more residents at that time being able to benefit from group activities and concerns about limited space in the lounge. The Claimant was shortly to depart on a three week holiday in Asia and it was agreed that she would attend work for two days before this leave to get to know the new residents and put together a newsletter.
- 3.10. The Claimant, the Tribunal finds on balance, did describe herself as feeling more positive by the end of the meeting which was reflected in her ability to return to work, which she did, on 4 and 5 February. The Claimant did not at this meeting raise that she was disabled or request reasonable adjustments. Mrs Fieldman did not consider any phased return or alteration to duties beyond the Claimant easing herself back into work on 4 and 5 February without any specific requirements being placed on her in terms of the activities she undertook. Mrs Fieldman did not refer to the Claimant as a 'risk' – the Claimant suggested for the first time that she had done so when being cross-examined and indeed after she had already been asked about what had been said at this meeting. There was no mention of this in her witness statement.
- 3.11. On 5 February the Claimant was unable to cope and left work early. She never returned to work at the home. The Claimant texted Mrs Fieldman on 5 February apologising and saying that she had a panic attack. She raised no complaint that she had been asked to do something she said she was unable to do.

- 3.12. The Claimant saw her doctor on 1 March, after her return from her holiday, and said she was not able to do large group work and if she couldn't do small groups only it was unlikely she would go back to work.
- 3.13. The Claimant attended the home with a further fit note on 1 March and spoke to Mrs Fieldman. Again, the Claimant made no references to disability or reasonable adjustments. Mrs Fieldman had no appreciation that the Claimant was disabled. The Claimant did, however, say that she couldn't carry out group activities and that these made her anxiety worse. Mrs Fieldman referred to how important it was that group activities were carried out. There was a discussion as to whether the Claimant could limit herself to one to one sessions but Mrs Fieldman said that she did not think that would work. There was a discussion about the possibility of the Claimant applying for a 12 hour per week administrative role which was becoming available on a retirement. It was left that the Claimant would go away and think about what she wanted to do. There was no ultimatum given to the Claimant regarding her returning to work or resigning but Mrs Fieldman did allude to the Claimant having to consider whether she wanted to stay in her job or explore alternatives elsewhere.
- 3.14. Mrs Fieldman texted the Claimant on 14 March asking if she had made a decision. The Claimant said she would come in for a chat which she did. The subsequent meeting which took place still on 14 March was along similar lines to that on 1 March. The Claimant suggested that she be transferred to the administrative role. Mrs Fieldman said that she could apply on an equal footing to anyone else but undertook to get more information on the role from Caroline Walters, director of care, and Sally Jennings, finance director. She indeed then did so and texted the Claimant at 2.25pm on 14 March to say that there would be further discussions about the administrative role and if it might be carried out instead to head office. If not, the Claimant could apply. She said that Mrs Walters agreed that the activity role could not be limited to small groups only, so that the Claimant's decision was needed in order that, if necessary, a replacement could be found. At no stage was there any suggestion that if the Claimant took the administration role she would lose her period of continuous service with the Respondent.
- 3.15. The Claimant subsequently said by text that she would be interested in a 12 hour per week administrative role but asked if she could keep some of her existing activity hours to do the one to one sessions with residents. Mrs Fieldman responded that she would not be able to retain her activity hours as the Respondent would struggle to recruit someone for less hours. The Claimant made the point about the administrative role to be recruited for being on a 12 hours per week basis only.
- 3.16. A further meeting between the Claimant and Mrs Fieldman took place on 31 March. The Claimant made the decision before that meeting to record it without asking or telling Mrs Fieldman. She said that she had done so due to her anxiety and Mrs Fieldman's negative attitude and refusals at the previous meetings.
- 3.17. The Tribunal, on the facts as found regarding earlier discussions, does not accept such basis of justification for making a recording of the meetings.

- 3.18. The Claimant has sought to characterise the behaviour of Mrs Fieldman during the 31 March meeting as acts of harassment and bullying of her, showing a disregard for her feelings and concerns. That characterisation on a reading of the transcript and listening to the recordings made by the Claimant is completely rejected. During the meeting of 31 March there was a brief interruption by another employee. Mrs Fieldman received some messages on her telephone and took one call of almost 10 minutes towards the end from an employee reporting sickness absence. Such interruptions were unfortunate but there was nothing dismissive or inappropriate in Mrs Fieldman's treatment of the Claimant. The Claimant might not have welcomed the content of the meeting, but there was nothing improper in its tone which was calm, conversational and friendly (on both sides). Whilst Mrs Fieldman initially maintained that the Claimant would have to apply for the administrative role by the end of the meeting she was persuaded, despite noting an element of risk given the Claimant's sickness absence, that Mrs Walters would agree to such a quick solution for the recruitment and the Claimant would not have to go through a competitive process.
- 3.19. The Claimant reiterated her difficulty in performing in front of a larger group. Mrs Fieldman, however, again rejected the Claimant's proposal of splitting the activities role. She referred to having got someone who wanted the activity role but who wanted and needing the 20 hours. She had received a call from a prospective candidate out of the blue, albeit she did not know the individual and had not interviewed her. Nevertheless, the Claimant gave the impression that she was positive about staying with the Respondent in the administrative role. Again, at this meeting the Claimant made no reference to disability and/or reasonable adjustments.
- 3.20. The Claimant sent an email to Mrs Fieldman on the evening of 31 March. This said that she was pleased to be offered the administrative role as she had been told in a text that afternoon shortly after her meeting. However, she said she was making a request for flexible working as an activities co-ordinator saying: *"my anxiety is a long-term condition which falls under the Equality Act 2010 which means I am entitled to reasonable adjustments in the workplace"*. She said she could not control her anxiety in larger groups and was prepared to give up 12 hours for someone else to do this. She would work therefore alongside another activities co-ordinator but not on the larger group work. In her evidence, the Claimant described this email as informing the Respondent that she considered herself to be disabled and entitled to reasonable adjustments. This again corroborates such matters being raised by her now for the very first time. Mrs Fieldman was taken aback by the email and found it hard to take in what the Claimant was saying. She did not consider the Claimant to be disabled and despite the 31 March email did not even address her mind to the possibility. She disbelieved the Claimant's assertions regarding her difficulties at work – that is her evidence before the Tribunal.
- 3.21. Mrs Fieldman took advice from Mrs Walters but did not forward the email to her or mention its implicit assertions regarding disability status. Mrs Fieldman was told to send the Claimant a flexible working request form which she did on 1 April. The Claimant completed this seeking 12 hours of

administrative work and 8 hours on activities each week. She was invited to a meeting to discuss this on 6 April.

- 3.22. The Claimant attended with a colleague Sue Edwards. Nothing inappropriate occurred in the meeting which the Claimant again recorded. The tone remained conversational and friendly. The Claimant it had, it appears from listening to the recording, formulated a list of questions she wanted to ask (she agrees, indeed, in her head) and was able to go through those in turn noting, without any sign of distress and indeed often with an expression of acceptance, the explanation for the rejection of her various proposals before moving on to the next question. The Claimant was told that the Respondent was not recruiting anyone for administration within the home but that, to save costs, it would be work absorbed centrally at head office. This is in fact what occurred. Mrs Fieldman said that she did not feel 8 hours of one to one activities were needed. She referred to a problem recruiting someone for 12 hours from experience in recruiting activities co-ordinators in the past. She also said that she hadn't thought they would get an administrator for just 12 hours. She said the Respondent needed consistency from one person in the role.
- 3.23. The Claimant said it was difficult for her to give up her job, but she would have to if there were no reasonable adjustments. Mrs Fieldman told the Claimant that she hadn't got any care hours left with in fact already too many care staff. Gardening and maintenance tasks she said were covered centrally. She said that she couldn't see the Claimant "*in the kitchen*" to which the Claimant laughed signifying her agreement. The Claimant asked about other homes within the Respondent's group but was told that there were no vacancies. It was left that the Claimant would think further about her situation.
- 3.24. Mrs Fieldman wrote to the Claimant on 7 April saying that her working 8 hours on activities would not benefit the residents. She stated: "*What is needed is one highly motivated, well organised flexible person who can effectively plan, organise and initiate each activity involving as many residents as possible, but also create a plan for care staff to follow when they are not in the home. I also believe that recruiting a second activity person for 8-10 hours per week will be extremely challenging given the location of the home and the rate of pay.*"
- 3.25. By a letter of 15 April 2016 the Claimant resigned from her employment "*because of a fundamental breach of contract based on the fact that you have failed to make reasonable adjustments under the Equality Act 2010*" in terms of less hours and reduced/altered duties. Due to stress and anxiety and a belief in no different an outcome, the Claimant said that she had decided not to appeal Mrs Fieldman's decision. She made no mention of Mrs Fieldman's alleged conduct at the 31 March or 6 April meetings or otherwise.
- 3.26. The Respondent's home employed about 33 employees, predominantly care workers, and had and still used bank staff when additional hours were required. Mrs Fieldman considered that one person was required for the co-ordinator role and that a second person's hours would still need to be planned if the Claimant was limited to 8 hours. She did not feel that on limited hours the Claimant could plan the activities of another employee.



She saw the activities role as autonomous and that residents would benefit from the continuity of one individual. She agreed that during absences she had tasked care workers with delivering activities but that, for instance, during the Claimant's sickness absences activities had averaged only 2 per week. A bank worker, Shannon, had been asked to deliver activities, but had only started planned sessions in March and had missed a number of sessions through her own sickness. Previously, during the Claimant's routine holidays the Respondent had tried to put an extra member of care staff on the rota.

3.27. Against those findings of facts the Tribunal reaches the following conclusions.

#### 4. Applicable law

4.1 In order to bring a claim of unfair dismissal an employee must have been dismissed. In this regard the Claimant relies on Section 95(1)(c) of the Employment Rights Act 1996 which provides that an employee is dismissed if she terminates the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate without notice by reason of the employer's conduct. The burden is on the Claimant to show that she was dismissed.

4.2 The classic test for such a constructive dismissal is that proposed in **Western Excavating (ECC) Ltd v Sharp 1978 IRLR 27CA** where it was stated:

*"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employer is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover he must make up his mind soon after the conduct of which he complains; or, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract".*

4.3 The Claimant asserts there to have been a breach of the implied duty of trust and confidence arising out of the unlawful discrimination she claims to have suffered.

4.4 In terms of the implied duty of trust and confidence the case of **Malik v Bank of Credit and Commerce International 1997 IRLR 462** provides guidance clarifying that there is imposed on an employer a duty that it *"will not without reasonable and proper cause conduct himself in a manner calculated [or] likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee"*. The effect of the employer's conduct must be looked at objectively. A failure to make a reasonable adjustment (see below) may

be (but is not necessarily) regarded as a breach of the duty of trust and confidence.

- 4.5 If it is shown that the Claimant resigned in response to a fundamental breach of contract in circumstances amounting to dismissal (and did not delay too long so as to be regarded as having affirmed the contract of employment), it is then for the Respondent to show a potentially fair reason for dismissal.
- 4.6 The duty to make reasonable adjustments in this case arises under Section 20(3) of the 2010 Act which provides as follows (with a “relevant matter” including a disabled person’s employment and A being the party subject to the duty):-
- “(3) The first requirement is a requirement where a provision, criterion or practice of A’s puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage*
- 4.7 The Tribunal must identify the provision, criterion or practice applied/relevant physical feature, the non disabled comparators and the nature and extent of the substantial disadvantage suffered by the Claimant. A substantial disadvantage is one that is more than minor or trivial and it must arise from her disability.
- 4.8 The case of **Wilcox –v- Birmingham Cab Services Ltd EAT/0293/10/DM** clarifies that for an employer to be under a duty to make reasonable adjustments he must know or reasonably ought to have known both firstly that the employee is disabled and secondly that she is disadvantaged by the disability in the way anticipated by the statutory provisions.
- 4.9 Otherwise in terms of reasonable adjustments there are a significant number of factors to which regard must be had which, as well as the employer’s size and resources, will include the extent to which the taking the step would prevent the effect in relation to which the duty is imposed. It is unlikely to be reasonable for an employer to have to make an adjustment involving little benefit to a disabled person.
- 4.10 In the case of The **Royal Bank of Scotland –v- Ashton UKEAT/0542/09** Langstaff J made it clear that the forerunner legislation, the Disability Discrimination Act, when it deals with reasonable adjustments is concerned with outcomes not with assessing whether those outcomes have been reached by a particular process, or whether that process is reasonable or unreasonable. The focus is to be upon the practical result of the measures which can be taken. Reference was made to Elias J in the case of **Spence –v- Intype Libra Ltd UKEAT/0617/06** where he said: *“The duty is not an end in itself but is intended to shield the employee from the substantial disadvantage that would otherwise arise. The carrying out of an assessment or the obtaining of a medical report does not of itself mitigate, prevent or shield the employee from anything. It will make the employer better informed as to what steps, if any, will have that effect, but of itself it achieves nothing.”*

- 4.11 If the duty arises it is to take such steps as is reasonable in all the circumstances of the case for the Respondent to have to take in order to prevent the PCP creating the substantial disadvantage for the Claimant. This is an objective test where the Tribunal can indeed substitute its own view of reasonableness for that of the employer. It is also possible for an employer to fulfil its duty without even realising that it is subject to it or that the steps it is taking are the application of a reasonable adjustment at all.

## **5. Conclusions**

- 5.1. The duty to make reasonable adjustments only arises once the employer knows or ought to know that the employee is disabled and that she was put at a substantial disadvantage in comparison to non-disabled employees. As at early February 2016, the Respondent knew that the Claimant had been absent due to anxiety but not of any history of anxiety or her having been unable to carry out her duties or struggling with larger groups. The Claimant's absence itself was not sufficient to impute knowledge of disability. An employee off for five months due to anxiety (without more information) would not ordinarily be thought to be likely to be disabled and the Respondent was not at this point on notice to make further enquiries.
- 5.2. By the 5 February text, however, the Respondent knew that the Claimant had had a form of a panic attack. The Claimant told Mrs Fieldman on 1 March that she couldn't carry out group activities and they made her anxiety worse. The Claimant then continued on a second period of extended sickness, again because of anxiety. By 31 March the Claimant was still absent and it was clear that she wanted to do an administrative role and could not undertake the group activities. That evening the Claimant notified the Respondent by email that her anxiety was a long-term condition under the Equality Act and that she was entitled to reasonable adjustments. At that point, on 31 March, sufficient pieces of the jigsaw came together for the Respondent to be clearly on notice that the Claimant might be disabled and that due to that disability she could not perform the full range of her duties. Certainly, at this point the Respondent had to take reasonable steps and make reasonable enquiries to find out what the Claimant's situation amounted to. The Respondent at this point in time, but not before had the requisite knowledge for the duty to make reasonable adjustments to potentially arise. On that basis, the Respondent anticipated in submissions that no time limit issue arose in respect of the Claimant's claim to the Tribunal submitted on 20 July 2016 after a period of ACAS Early Conciliation from 8 June to 8 July. Ironically, had the duty arisen earlier the Claimant's complaints might have been out of time (subject to the Tribunal's discretion to extend time if just and equitable to do so).
- 5.3. It has already been determined that the Claimant was at all material times a disabled person by a reason of anxiety.

- 5.4. The Respondent applied a practice of requiring an activities co-ordinator to carry out group activities as well as one to one sessions. As at 31 March the Respondent ought reasonably to have known that the Claimant was both disabled and was at a substantial disadvantage in complying with this requirement. Again, as a matter of fact, the Claimant's anxiety manifested itself in her struggling to cope in aspects of social interaction and in particular where she felt she was performing or the centre of attention. Group activities exposed her particularly to such trigger points and by 31 March the Respondent was aware that the Claimant struggled in group activity situations and felt she could no longer cope in group activities. The duty to make reasonable adjustments therefore arose.
- 5.5. The test of reasonableness in this context is an objective one and a matter for the Employment Tribunal. An employer can, however, comply with the duty even if it is unaware of its duty, including where it does not acknowledge that the employee is disabled. In some circumstances, there will be nothing an employer can reasonably do to remove or alleviate a disadvantage. The Tribunal is not limited to adjustments proposed by the employee at the time, albeit that might be a factor in concluding whether a step might have been reasonable to take. A Tribunal can come up with its own adjustments provided these have been canvassed with the parties in advance of its conclusions.
- 5.6. The Tribunal rejects the argument that the Claimant ought to have been provided with the assistance of a support worker to carry out group activities. The Claimant did not raise this with the Respondent at the time. Crucially, she did not do so as it would not have been an effective measure. It would not have alleviated the Claimant's anxiety. The Claimant already ordinarily had an element of support whilst conducting group activities due to the presence in the vicinity of care workers. With a support worker, she would still have been performing and the centre of attention and then in front of a further colleague as well as elderly residents.
- 5.7. Nor would it have been a reasonable adjustment to transfer the Claimant to an administrative role. The Respondent had been willing to do so when such role appeared likely to exist but it made a genuine business decision to conduct the home's administrative work from head office. The creation of a role that was no longer required goes beyond the scope of a reasonable adjustment.
- 5.8. Nor would it have been reasonable for the Respondent to allow the Claimant to carry out only one to one activities or small group activities in her existing 20 hours activities role. Group activities were an important aspect of stimulation for residents and involved the maximum number of residents (and were therefore of greater overall effective benefit).
- 5.9. However, one to one sessions with residents were still needed. The Claimant had always devoted 8 hours per week to those without any complaint from the Respondent and without any suggestion that she change that way of working. 8 hours of one to one sessions equated to only 20 minutes each week for each resident where residents might often have individual needs beyond ordinary care for which the Claimant would be expected to take an element of responsibility. Would it therefore have

been a reasonable adjustment to allow the Claimant to continue working 8 hours per week on one to one activities? Whilst the Claimant's preference was to keep 20 hours per week she would have accepted such a role to preserve her in employment. This proposal then depended on the ability of the Respondent to recruit someone to carry out 12 hours per week in group work activities and the suitability/practicability of activities the being provided by more than one employee.

- 5.10. On the evidence, the Tribunal considers a perceived difficulty in recruiting someone to be a factor in the Respondent's decision not to accept the Claimant's proposal, but not the main one. In the Respondent's formal letter rejecting the potential adjustments to hours/duties, the focus of the letter is instead on the need for consistency and one person performing the role as well as the need for someone who was flexible and reliable. This indeed was a reference to the Respondent's perception that the Claimant was inflexible which arose out of concerns arising from her absence, i.e. that she would be absent in the future. However, as regards consistency, the Respondent's arguments cannot be accepted. Residents' focus would have been on the activities not on the person delivering them. Some residents would not particularly register that anyway. The activities were straightforward in nature, easily planned and delivered without any particular specialist skills other than the ability to communicate and empathise which one would hope to see in any employee in the care sector. If necessary, the Claimant could have planned activities still, for others to deliver. Given the limited work involved in doing so, her reduced hours would not have prevented this planning.
- 5.11. The Respondent's arguments regarding recruitment difficulties is based on unevicenced recruitment problems from previous activities co-ordinator recruitment exercises, but it is undermined by the Respondent's initial intention to recruit an administrator for only 12 hours per week. The Respondent would not have considered such a recruitment if it had not had a reasonable expectation of finding a suitable individual willing to perform what was a relatively junior role.
- 5.12. The care industry classically employs staff on flexible hours sometimes from agencies or on bank arrangements and sometimes with more than one employment. The Respondent employed over 30 individuals at the home where the Claimant worked and others elsewhere. It, of course, made no attempt to recruit or offer additional hours leading residents' activities to existing employees. This is in circumstances where, during the Claimant's (planned and unplanned) absence, care staff had stepped up and delivered activities, not fully and not entirely satisfactorily, but where now there was an opportunity to put a more formal or longer term arrangement in place. For instance, this would not have been perceived as an unattractive addition to their duties for some care workers.
- 5.13. Whilst before the Tribunal Mrs Fieldman said that absences meant a shortage of care workers, that contrasted with her telling the Claimant that she already had too many in the context of there being no alternative work for the Claimant. She certainly had access to bank care workers to supplement care worker hours. In all the circumstances, it would have been a reasonable adjustment in the context of the Claimant's disability and disadvantage suffered by her to allow her to work 8 hours on one to

one sessions, with the remaining hours of group activities filled by the recruitment of another activities employee either externally or internally by re-allocating duties or increasing hours. The Tribunal on all the evidence concludes that this in all likelihood would have been achieved by the Respondent if it had been open to the possibility.

- 5.14. The Respondent failed in its duty to make reasonable adjustments therefore. The Respondent set its mind against this possibility obviously not understanding that the Claimant was disabled. There was no consideration at the time of reasonable adjustments in a context of their acceptance of the Claimant as a disabled person. The possibility was not therefore explored where circumstances were that, if it had been, a solution would on balance have been found.
- 5.15. Indeed, the Respondent's argument regarding consistency is overplayed to the extent that the activities could have been undertaken on a planned basis by more than one other member of staff. The consideration of the benefit to residents is also overstated given the periods, on the Respondent's own evidence, that they had been left without any stimulation. There would have been no extra cost for the Respondent, which incidentally is not a small employer, as the Claimant would and recognised that she would only be paid for the reduced hours worked.
- 5.16. On the Tribunal's findings, the Claimant resigned because of the Respondent's failure to make a reasonable adjustment. She did not resign because of Mrs Fieldman's method or tone of communications with her, whether by text or in the various meetings they held. Indeed, the Claimant has misrepresented the nature of these meetings in these Tribunal proceedings. The Claimant made no indication at the time that she was concerned with Mrs Fieldman's behaviour towards her.
- 5.17. Nevertheless an employer's failure to comply with the duty to make reasonable adjustments may, on its own, amount to a breach of the implied term of trust and confidence and fundamental breach of contract. Here the Tribunal concludes that it did. The Claimant was a disabled employee seeking a means of retaining her employment. This was denied her by the Respondent in breach of the duty it owed to the Claimant under the Equality Act. The nature of the disadvantage caused to the Claimant by her job role and the adjustment which ought reasonably to have made were of a material nature to the Claimant's employment and any failure could not for instance be classified as inadvertent or arising from any lack of information or co-operation on the Claimant's part. The Claimant was therefore constructively dismissed when she resigned in response to the Respondent's failure to implement a reasonable adjustment. She did not delay in so doing so as to be taken to have affirmed the contract of employment. The situation was a fluid one and the Claimant sought to explore alternatives before making a decision without any undue delay. The Respondent cannot put forward any potentially fair reason for dismissal in these circumstances such that, as well as the Claimant's complaint in respect of a failure to make reasonable adjustments, her complaint of unfair dismissal is also well founded and must succeed.

Employment Judge Maidment

Date: 21 September 2017