EMPLOYMENT TRIBUNALS

Claimant: Ms L Edington

Respondent: North West Boroughs Partnership NHS Foundation Trust

HELD AT: Liverpool **ON:** 4, 5 and 6 September 2017

BEFORE: Employment Judge Robinson
Ms F Crane
Mr P Gates

REPRESENTATION:

Claimant: In person
Respondent: Mr P Gorasia of Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim for breach of the duty to make reasonable adjustments succeeds and the matter will move to a remedy hearing on a date to be notified to the parties in due course.

2. All the other claims initially made by the claimant have been withdrawn by her and are dismissed.

REASONS

1. The only claim before us was a narrow claim that the respondent had breached their duty to make reasonable adjustments. The provision, criterion or practice ("PCP") that placed the claimant at a disadvantage was the requirement to have members of their staff, when in the office, to work at a workstation for 4-6 hours a day.

2. That workstation that the claimant worked at when she was in the office caused her that disadvantage. It was a substantial one in that it aggravated her disability.

3. The respondent accepts that the claimant is disabled within the meaning of section 6 of the Equality Act 2010. Her condition is piriformis syndrome. That condition causes an ache in the buttock, pain down the leg (similar to sciatica) and pain when walking upstairs. The claimant also had increased pain when she sat for more than 20 minutes. After 20 minutes the claimant usually has to stand in order to get herself comfortable.

4. The claimant pleads that her comparator is a hypothetical one who is an office based worker expected to undertake desk duties for up to six hours per day with occasional overtime, working on the first floor of a building. That comparator is not disabled.

The Facts

5. The reasonable adjustments which the respondent agreed ultimately that it had to put in place are contained in a Capita report at page 353G and H of the bundle. That report was signed up to by the claimant and the recommendation was that the respondent should supply the claimant with both a bespoke RH Logic 400 chair costing £879.60 and an electric height adjustable desk costing £444.

6. The details of those items were set out clearly in the report.

7. Liz Jackson, the claimant's line manager, knew or should have known that those are the exact reasonable adjustments that needed to be put in place in order to take away the disadvantage. The report is very specific as to what is required. The funding was in place for the respondent to provide that equipment. We recognise that this is a Foundation Trust which has large resources both in relation to finances and also in relation to any advice that is needed from its Occupational Health providers, its Human Resources department and, if necessary, from its own expert employment solicitors.

8. The only reason the equipment was not supplied in April or May 2015 when the claimant needed it was because Ms Jackson did not input the code into her computer in order to order the chair and the desk. That simple step which needed to have been taken was not taken.

9. The claimant's medical history sets out that she has serious difficulties with her back. In September 2014 the claimant underwent a procedure in hospital to ease the pain. That operation did not go as well as the claimant hoped it would. The recommendation of Capita was that not only should the claimant have a chair but also the height adjustable desk so that she can sit, and then when discomforted, stand at her workstation to relieve her pain. The provision of both the chair and the desk is the reasonable adjustment that is required in order for the respondent to satisfy the duty placed upon it.

10. There was a dispute between Ms Jackson and the claimant on 20 May 2015. We have seen a note from Ms Jackson which purports to suggest that the claimant did not want the chair. The note suggests that the claimant informed Ms Jackson using unrestrained language that that was the case.

11. Ms Jackson explained to us that the claimant had an "outburst" at that meeting on 20 May 2015. The claimant suggested that she did not say that she did not want the chair.

12. It is noteworthy that that memo did not say anything about the claimant not wanting a desk. It simply says that "Lindsey reports she does not want the ******* chair". The expletive has been deleted in the note.

13. We do not know when that note was written. We are not convinced that it is an accurate note of what was said at the time.

14. If it is, why did Ms Jackson continue to try to input the code after that meeting to get both items needed by the claimant including the chair. She also continued to seek help from her managers on that point during that summer.

15. Secondly why, if it was an outburst, did Ms Jackson not go back to the claimant when she had calmed down to discuss the issue? The requirement to provide the desk and chair had not gone away.

16. Ms Jackson was still seeking to order the desk and chair right through mid 2015 and actually sought help to do so from Vicky Jolley and Marie Hughes.

17. Consequently we find that the claimant did still want at her workstation both the desk and the chair as a reasonable adjustment throughout 2015.

18. We accept that the claimant did not pester her managers for that reasonable adjustment. However the claimant was still in discomfort at her work station in early 2016 and Mr Postlethwaite, to his credit, noted at a meeting that the claimant was uncomfortable in her chair. By 7 January 2016 the respondent knew once more (if they did not know before) that the claimant wanted the correct chair at her workstation.

19. Because of miscommunication Mr Postlethwaite then had the claimant seen by an Occupational Health officer rather than simply going back to the ATM report and checking what was needed. He did not have knowledge of that ATM report. That report and the contents thereof should have been brought to his attention by Ms Jackson. Because Ms Jackson did not do that the wrong chair was ordered. That was too much for the claimant. After the supervision meeting with Ms Jackson on 2 March 2016 she left work ill. She made it clear in a phone call to a work colleague shortly thereafter it was reported to Ms Jackson that "she could not face sitting in that chair for six hours". She was referring to the chair that had been wrongly ordered.

20. Once the claimant went off work 3 March 2016 she never returned and was ultimately dismissed for different reasons, namely redundancy, on 17 October 2016.

21. The date of receipt by ACAS of the early conciliation notification was 5 October 2016 and the date of issue of the certificate was 1 November 2016, and the proceedings were issued by the claimant on 9 January 2017.

22. We find that the duty to make reasonable adjustments continued even though the claimant was being made redundant. That duty continued throughout the period

she was employed and those adjustments would have been required to be put in place if she had been redeployed by this respondent.

23. During that period, however, from March 2016 to her dismissal the claimant remained off work through stress. To compound the claimant's difficulties she knew that her role was being decommissioned as early as 14 June 2016, that she was subject to redeployment and her employment would end in 2016 unless another role was found for her. At the end of April 2016 the claimant raised a grievance which included a complaint that, despite the Capita ATM report recommending that both a chair and a desk should be provided as a reasonable adjustment, they were not. In other words the two items were inextricably linked as adjustments in order to improve her workstation when she returned to work.

24. When responding to the grievance, despite noting that the claimant was complaining about “equipment” not being provided, Mr Postlethwaite only dealt with the chair in his response. He mentions Liz Jackson’s note of 20 May 2016 which said, as mentioned above, that the claimant did not want the chair. There is no mention by Mr Postlethwaite of the desk. That must have been frustrating to the claimant. Mr Postlethwaite’s letter confirms that at the grievance meeting the claimant was so distressed that the meeting could not be continued. The claimant did not appeal the outcome of the grievance.

25. The medical evidence confirms that that distress continued and became worse. The notes of the welfare meeting on 19 September 2016 record that the claimant's health was deteriorating and that the claimant had “high levels of anxiety”.

26. From 14 June 2016 the claimant had to deal with the further upset of potentially losing her job, that her stress was continuing and increasing, she was absent from work, her back condition was not improving and the stress was heightened by having to consider new posts each time those were put to her by the respondent’s HR officers.

27. The last Occupational Health report at the end of September 2016 confirmed the claimant was “too ill” to return to work before her redundancy which then actually took place on 17 October 2016.

28. The claimant’s perception was that the redundancy was linked to her grievance and by October 2016 her mental health was so fragile that her partner asked permission to write to the respondent on her behalf. Mr Postlethwaite agreed. The claimant did have trade union support over much of the relevant period, although the claimant was not impressed by the quality of the support being given to her.

The Law

29. The duty to make reasonable adjustments is contained in sections 20 and 21 of the Equality Act 2010. It is the first requirement under section 20 that is at issue here. That is a requirement that where a provision, criterion or practice of the employer puts the disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled the employer should take such steps as it is reasonable to have to take to avoid the disadvantage.

30. The claimant has to establish the detrimental action relied upon, which here was not putting into place the workstation which was appropriate for the claimant.

31. If the employer does not know or could not reasonably be expected to know that reasonable adjustments are needed then the claim would fail, but here we found that the respondent was very well aware that reasonable adjustments needed to be made. Liz Jackson was the appropriate officer who should have put the reasonable adjustments in place.

32. Section 123 of the Equality Act 2010 confirms that where there is a complaint under the Act relating to, for example, the breach of the duty to make a reasonable adjustment, the period of three months in which a claimant should issue proceedings starts with the date of the act to which the complaint relates, or "such other period as the Employment Tribunal thinks just and equitable".

33. With regard to a failure to make reasonable adjustments the question has always been whether the failure to make adjustments is a continuing act or is one of omission.

34. Section 123(4) of the Act provides:

> "In the absence of evidence to the contrary, a person is to be taken to decide on failure to do something:-
>
> (a) when that person does an act inconsistent with doing it; or
>
> (b) if that person does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

35. It was difficult to decide when the omission in this case was decided upon.

36. Both Ms Jackson and Mr Postlethwaite continually got it wrong as far as the chair and the desk were concerned.

37. As was said by the Court of Appeal, however, in the case of **Hull City Council v Matuszowicz [2009] ICR 1170**, both Lord Justice Lloyd and Lord Justice Sedley acknowledged that imposing artificial dates from which time starts to run is not satisfactory. One way of proceeding would be to see whether it would be just and equitable to extend time and we have dealt with that issue below.

Conclusion

38. Applying the law to the facts of this case, and we have set out below further facts for the ease of presentation, we concluded as follows.

39. We find the respondent did fail to comply with the duty to make reasonable adjustments. We accept that by 24 May 2016, or shortly thereafter, the claimant knew the correct chair she needed for her workstation was in place. By that time the claimant had been off a considerable period of time. The desk was an integral part of the requirement as far as the reasonable adjustments were concerned and was never provided. Indeed Mr Postlethwaite, who was sympathetic to the claimant's needs, did not discuss the desk adjutment with Ms Edington.

40. In that sense the respondent's breach of the duty to make reasonable adjustments was continuing.

41. We found that it mattered not that the claimant was not demanding the chair and desk every week through 2015. She made it clear in January 2016 that in order to be comfortable at work she needed the chair. More importantly the claimant's line manager knew in mid 2015 exactly what the claimant needed to take away the substantial disadvantage the claimant suffered at her workstation. The respondent therefore had breached the claimant's employment rights at that point and continued to do so until her employment ended on 17 October 2016.

42. If the respondent had acted appropriately and dealt with the Capita ATM report and its recommendations (and it could not have been clearer) the claimant might have been able to, not only stay in work, but she may also have been relatively comfortable at work.

43. We then considered whether the claim was in time as mentioned above. We find that ultimately the claim was in time because by October 2016 the respondent had still not provided to the claimant the workstation needed and agreed to. There had been no decision by Mr Postlethwaite or indeed Ms Jackson at that point to specifically deny the claimant's requirements. They just simply did not consider the issue or look carefully at the ATM report. The claimant was put at a disadvantage in terms of the redeployment as well. The wrongdoing continued until the end of her employment. Her claim, when issued in early January 2017, when one adds the time her early conciliation certificate runs for, makes this claim in time.

44. Even if we are wrong we decided to extend time for the following reasons.

45. We have a discretion to do so, but only if it is just and equitable for that extension to be made. We decided to extend time in any event to 9 January 2017. The reason for that is that we find during the second half of 2016 and certainly from 24 May 2016 the claimant was attempting to cope with not only serious ill health exacerbated by the respondent's actions, she was also dealing with the blow of losing her job, with the upset of not having reasonable adjustments put in place and the upset of having the wrong chair ordered by her manager. All that led to her going off work on 3 March 2016. It was a blow upon a bruise for the claimant to see that her grievance about the reasonable adjustments was not upheld by Mr Postlethwaite.

46. One can understand the turmoil the claimant must have been in during 2016 to October.

47. In extending time we accept that time limits are put in place for a purpose and that in **Robertson v Bexley Community Centre t/a Leisurelink 2003 IRLR 434** Court of Appeal it was suggested that an extension of time was the exception rather than the rule.

48. However we considered the issues contained in section 33 of the Limitation Act 1980. We considered the prejudice that each party would suffer as a result of the decision that we reached. We had regard to all the circumstances in the case and in particular the length of and reasons for the delay in issuing the proceedings, the

extent to which the cogency of the evidence was likely to be affected by the delay, the extent to which the party sued has cooperated with any request for information and the promptness with which the claimant acted once she knew of the facts giving rise to the cause of action.

49. Applying those principles we concluded that once the claimant had lost her job and knew that redeployment was not going to take place, she acted promptly and issued the proceedings appropriately, having got her early conciliation certificate in place. There would be prejudice to the claimant if we did not allow an extension of time. The prejudice to the respondent, by allowing the claims to proceed, is not as great as the prejudice to the claimant if we disallowed her claims.. We accepted that if the claimant was to win then the respondent would have to pay compensation to the claimant.

50. We do not suggest, however, that the respondent has put in place any barriers to the claimant issuing these proceedings. All we are saying is that it is just and equitable in all the circumstances for time to be extended.

51. Once the claimant was able to concentrate on issuing proceedings, and that ironically is because she lost her job, she exercised her right as quickly as necessary.

52. In those circumstances, therefore, we accept that this claim can be pursued appropriately and we find that the respondent has been guilty of a failure to make the appropriate reasonable adjustments.

2-11-17

Employment Judge Robinson

JUDGMENT AND REASONS SENT TO THE PARTIES ON

7 November 2017

FOR THE TRIBUNAL OFFICE