EMPLOYMENT TRIBUNALS

Claimant: Miss J Gunning

Respondent: BUPA Care Homes (CFH Care) Limited

Heard at: Manchester **On:** 23 and 24 May 2018

Before: Employment Judge Franey
Mr Q Colborn
Ms S Khan

REPRESENTATION:

Claimant: In person
Respondent: Mrs S Ashberry, Solicitor

WRITTEN REASONS

These are the written reasons for the judgment delivered orally with oral reasons at the conclusion of the hearing on 24 May 2018 and sent to the parties in writing on 15 June 2018.

Introduction

1. By a claim form presented on 9 February 2017 the claimant brought complaints of unfair dismissal and disability discrimination arising out of her employment at Bedford Care Home which ended when she resigned in January 2017. The details attached to the claim form made clear that the claimant suffered from severe anxiety and that she had been transferred between different units within the care home. The handwritten details of the claim on the claim form were incomplete, but the claimant later provided a typed version.

2. By its response form of 2 May 2017 the respondent defended the claims. It denied that the claimant's resignation could be construed as a dismissal, did not admit that the claimant was a disabled person but in any event denied any breach of the Equality Act 2010. The response form pointed out that the claimant had been off sick from June 2016 and had resigned following the rejection of her appeal against the outcome of a grievance lodged in August 2016.

3. There were four preliminary hearings. On 25 May 2017 Employment Judge Sherratt ordered the claimant to provide further particulars of her Equality Act allegations. Those particulars were provided in June 2017.

4. On 26 July 2017 the respondent conceded that the claimant was a disabled person.

5. On 21 August 2017 Regional Employment Judge Parkin struck out the "ordinary" unfair dismissal complaint because the claimant did not have two years of continuous employment at the time her employment ended. He granted permission to amend in relation to two matters. The first was an allegation that dismissal was automatically unfair for health and safety reasons, but he also ordered a deposit to be paid if this were to be pursued. The deposit was not paid and that claim was struck out. The second amendment was in respect of a breach of the duty to make reasonable adjustments.

6. On 25 October 2017 Regional Employment Judge Parkin ordered deposits in relation to the complaints of discrimination arising from disability and of harassment related to disability. The claimant did not pay these deposits and those claims were subsequently struck out. On 12 December 2017 Regional Employment Judge Parkin refused an application for reconsideration of those deposit orders.

7. The effect of this case management process was that the sole remaining complaint was of a breach of the duty to make reasonable adjustments. That complaint was to be found in the further particulars provided by the claimant in June and September 2017, and in the records of the case management hearings on 25 October and 12 December 2017. It centred upon a decision to move the claimant from Kenyon unit to Beech unit in May 2016, some three weeks before she went off sick, never to return.

The Issues

8. The parties had been directed to agree a draft List of Issues prior to the hearing. We made some amendments to the List of Issues at the outset of the hearing. The List of Issues to be determined was as follows:

Duty to Make Reasonable Adjustments

1. **Did the respondent apply a provision, criterion or practice ("PCP") to the claimant on 13 May 2016 by requiring her to move from the Kenyon Unit to the Beech unit?**

2. **If so, did that PCP place the claimant at a substantial disadvantage compared to a person without her disability (mental impairment in the form of anxiety)?**

3. **If so, can the respondent show that it did not know and could not reasonably have been expected to have known that the claimant was a disabled person and likely to be placed at that disadvantage?**

4. **If not, did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to have avoided that disadvantage? The adjustment for which the claimant contends is to have allowed her to remain at the Kenyon unit.**

Time Limits

5. From what date does time start to run?

6. If time started to run more than three months before presentation of the claim (by way of an application to amend on 21 August 2017), can the claimant establish that it would be just and equitable to allow a longer time period for bringing a claim?

Evidence

9. The Tribunal heard evidence from three witnesses, each of whom had prepared a written witness statement. The claimant was the only witness on her side; the respondent called Joanne Goodwin, the Home Manager, and Sharon Dickinson, the Head of Housekeeping.

10. The parties had agreed a bundle of documents running to 450 pages, and any reference in these reasons is a reference to that bundle of documents unless otherwise indicated.

Relevant Legal Principles

11. The legal principles which the Tribunal had to apply can be summarised as follows.

Jurisdiction

12. The complaint of disability discrimination was brought under the Equality Act 2010. Section 39(5) applies to an employer the duty to make reasonable adjustments. By section 109(1) an employer is liable for the actions of its employees in the course of employment.

Burden of Proof

13. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides as follows:

"(2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

The section goes on to make it clear that a reference to the Court includes an Employment Tribunal.

14. Consequently it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

Time limits

15. The time limit for Equality Act claims appears in section 123 as follows:

> **"(1) Proceedings on a complaint within section 120 may not be brought after the end of –**
>
> **(a) the period of three months starting with the date of the act to which the complaint relates, or**
>
> **(b) such other period as the Employment Tribunal thinks just and equitable …**
>
> **(2) …**
>
> **(3) For the purposes of this section –**
>
> **(a) conduct extending over a period is to be treated as done at the end of the period;**
>
> **(b) failure to do something is to be treated as occurring when the person in question decided on it".**

16. How that provision applies to a breach of the duty to make reasonable adjustments, and the principles by which the discretion to extend time because it is just and equitable may be exercised were recently considered by the Court of Appeal in **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640.**

Reasonable Adjustments

17. The relevant duty appears in Section 20. This case turned on the first requirement in Section 20(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".**

18. As to whether a "provision, criterion or practice" ("PCP") can be identified, the Equality and Human Rights Commission Code of Practice on Employment ("the Code") paragraph 6.10 says the phrase is not defined by the Act but "should be construed widely so as to include for example any formal or informal policy, rules, practices, arrangements or qualifications including one off decisions and actions".

19. As to whether a disadvantage resulting from a provision, criterion or practice is substantial, Section 212(1) defines substantial as being "more than minor or trivial".

20. Even where a PCP gives rise to a substantial disadvantage, however, the duty does not arise if the employer did not know, and could not reasonably be expected to know that the employee had a disability and was likely to be placed at the disadvantage in question by the PCP (Schedule 8 paragraph 20). This is considered by the Code in paragraphs 5.13 – 5.19 and 6.19 - 6.22.

Relevant Findings of Fact

21. This section of our reasons sets out the broad sequence of events necessary to put our decision into context. There was one significant dispute of primary fact which we will address in our discussion and conclusions.

Background

22. In January 2015 the claimant applied for a role as activity coordinator working for the respondent at its Bedford Care Home in Leigh. Bedford Care Home has a number of different units on site and approximately 200 people work there. The claimant completed a medical questionnaire (pages 248-249) which asked her, amongst other things, whether she had seen a doctor in the last five years, whether she had been prescribed any medical treatment or medication in the last years, and whether she was currently taking any medical to a strict timetable. She answered "no" to all those questions. The form indicated only that she had had one period of absence in the last eight weeks of her previous employment because of stress related to family reasons. She signed her declaration to say that her answers were true and correct.

23. In fact her answers were not accurate. Her GP records (page 193) showed that the claimant been prescribed an antidepressant in October 2014 with the medication being increased in November 2014. She also suffered from a lifelong vitamin B12 deficiency which she did not mention on her form. There was no indication to the respondent from the application documentation that the claimant had long-term health issues.

24. After starting employment on 16 February 2015 the claimant signed a written statement of the main terms of her employment (pages 254-255). The job location was specified as Bedford Care Home. She could be required to work at other BUPA locations.

Problems at Pennington Unit

25. The claimant was not successful in her application for a post as an activity coordinator but instead was employed as a care assistant. She began on Pennington unit. Whilst there she experienced some difficulties with her colleagues. Rumours began that she was taking drugs. She regarded a particular colleague, "JA", as behind these rumours. The claimant believed that they were a consequence of the fact that from time to time she would speak quickly and became excitable. She later came to realise that this was a symptom of her anxiety.

26. In April 2015 two visitors came who had known the claimant when she worked at a different Care Home. They spoke to staff about her in derogatory terms and she was upset by this. She felt she had just become accepted by the staff at Pennington unit. Seeing that she was upset the manager, Cathy Bullor, arranged for the claimant to move to Lilford unit with effect from 17 April 2015. Her manager there was Chris Millington.

27. On 6 July 2015 the claimant expressed an interest in the role of activities coordinator on the Beech unit (page 260) but it turned out there was no vacancy.

Breakdown at Work July 2015

28. On 14 July 2015 the claimant had a breakdown at work. There had been an incident in the laundry which upset her and she wanted to leave, but Chris Millington would not let her go because he did not understand how bad she was feeling. This resulted in a severe breakdown and she was off work for three weeks. Her antidepressant prescription was renewed and she began counselling.

August – December 2015 – Kenyon Unit

29. The claimant returned to work in early August 2015, and the opportunity arose for her to move from a care assistant role to a hostess role on Kenyon unit because one of the other hostesses was going on maternity leave. The primary role of the hostess was to provide the residents with their meals and drinks.

30. There was another incident on 24 September 2015 which led to the claimant going off with stress and anxiety. She was initially given a fit note for three weeks by her GP (page 195) but this was extended and she was not fit to return to work until early January 2016.

31. The claimant had a return to work meeting in December 2015 with Chris Millington. In her oral evidence she said she told him that she was suffering from chronic anxiety.

January – March 2016

32. In January 2016 the claimant returned to work in her hostess role on Kenyon unit.

33. Mrs Goodwin came in as the Home Manager at the end of February 2016. It was a busy time for the Home because the Care Quality Commission ("CQC") had issued warning notices in February which had to be actioned by mid-March.

34. At some point in March the claimant and Mrs Dickinson discussed the possibility of the claimant moving yet again. As part of her statement for the grievance prepared in September 2016 the claimant said that she pleaded with Mrs Dickinson not to move her again because it would make her stress worse, especially because she had worked hard to keep up with all the resident changes. In her oral evidence Mrs Dickinson recalled having said that the claimant could stay on Kenyon, although she pointed out that the residents on each unit change all the time. There had been a discussion about the claimant moving to Pennington but she had made clear that she did not want to go back there.

April – May 2016

35. On 20 April 2016 the claimant lost her driving licence following a prosecution when traces of amphetamine had been found in her blood. She pleaded not guilty to the charge, believing that the reading was a consequence of the daily injections she took for her vitamin B12 deficiency. Her managers were aware that she had lost her licence but her job did not involve any driving.

36. On 9 May 2016 a colleague found some drugs in the stockroom when a pile of coats was knocked off the coat rack. Management were not able to identify who had left them there.

13 May 2016 – Move to Beech Unit

37. On 13 May 2016 the claimant was called in for a meeting with Mrs Goodwin and Mrs Dickinson. No notes were kept of that meeting. It was triggered by the fact the claimant had been seen driving her car into work when it was known that her licence had been revoked.

38. Mrs Goodwin pointed out that the B12 deficiency had not been mentioned on the medical questionnaire when the claimant applied for the job. The claimant disclosed that she also suffered from pernicious anaemia.

39. The meeting ended with the claimant moving to Beech unit with effect from the following week. There was a dispute of primary fact about how this came about. The evidence of Mrs Goodwin and Mrs Dickinson was that the claimant expressed some concerns about Kenyon unit and asked to be moved. They said she was very eager to move the activities coordinator role on Beech unit. The claimant's case was that the move was suggested by management and that although she was eager to take up an activities coordinator role, for which she had originally applied, she did not want to move to Beech unit but was pressured into doing so. In her account of this meeting prepared in early September 2016 for the grievance she said the following:

> **"I was told I was moving units, even though I'd begged previously not to move again, but suddenly realised by comments about me being near food and not taking risks [**made**] with no proof just assumptions that the drugs found belonged to me, which I would swear on oath they were nothing to do with me, and they [**were**] listening to gossip. I was totally drained by this point. The better I was at my job the more I was victimised. I said ok."**

40. We will return to that dispute in our conclusions.

41. Immediately after the meeting the claimant and Mrs Dickinson went over to the Beech unit so that the claimant could meet her colleagues for the following week.

17 May – 3 June 2016

42. The claimant started in Beech unit on Tuesday 17 May. Coincidentally that was the day of an unannounced inspection by the CQC. The inspector spoke to the claimant and in their subsequent report (page 298) they were very complimentary about the claimant.

43. At the end of that first week there was a sports day on Friday 20 May. The claimant participated and enjoyed it.

44. At some point in the next week or so JA, with whom the claimant had worked on Pennington unit, moved to Beech unit. On Friday 3 June the claimant encountered JA in the garden at the unit and they had a brief amicable exchange.

Breakdown 6 June 2016

45. On Monday 6 June 2016 the claimant was in work but after about an hour she broke down and could not continue. She told our hearing that on that day she felt "outside looking in" as though she had been displaced. She did not know what she had been asked to do. She was sent home and attended the mental health unit. She was certified unfit by her GP due to anxiety and stress with effect from 13 June (page 303) and her fit notes were subsequently extended so that she never returned to work. Through counselling she came to gain a greater understanding of her medical position, realising that she had suffered from lifelong anxiety, and that the attack of anxiety on 6 June was as if she had been exposed to a traumatic event.

Grievance 23 August 2016

46. In mid-August the claimant telephoned the respondent's "speak up" service to make a complaint about how she had been treated, and this was treated as a grievance. She provided more information by email of 23 August 2016 at pages 313-314. She referred to the fact that she had been in touch with her trade union who were sending her a stress form. She made clear that she had been moved between units a number of times and about the events in June she said the following [spelling revised]:

> **"Even though I was praised doing activities on [**the**] new unit I think it's been one step too much and I had an attack for no reason but think it's because I can see units and staff who had made me ill – that's why we're sure it's triggered some kind of PTSD."**

47. As the grievance progressed the claimant had advice and support from her union. They made her aware of the three year time limit for bringing a personal injury claim. She neither sought nor was given any advice about employment law time limits. She did not carry out any researches herself to find out whether she could bring a claim to an Employment Tribunal.

48. The grievance was heard by Lynn Kaye, a Home Manager from a different Home. There was a meeting on 27 September 2016 (pages 344-353). Prior to the meeting the claimant prepared a grievance statement (pages 317-333) and a personal statement (pages 340-343).

49. The outcome to the grievance was conveyed by a letter in October 2016 at pages 358-360. The letter said that there had been a lot of concern about the claimant's behaviour, and that these concerns had contributed to her move between different roles and units. The grievance was rejected: no bullying or harassment was found. The claimant was offered support to get back to work, and the right of appeal.

Grievance Appeal

50. The claimant appealed by a letter of 1 November 2016 at page 361. She felt there was information not taken into account.

51. Her appeal was heard on 29 November by Karl Dawson, the Regional Director. The claimant was accompanied by her union representative. The notes appeared at pages 376-382.

52. After the appeal meeting Mr Dawson carried out some further enquiries. There were statements from Chris Millington (pages 397-399), Joanne Goodwin (page 400) and Kath Barker (page 401). Mrs Goodwin's statement confirmed that the claimant had been "extremely eager" to move to Beech unit in May 2016. Ms Barker's statement confirmed that the claimant had been very eager to start on Activities.

53. On 30 November 2016 the claimant contacted ACAS to start early conciliation. She had been told by her union that she had to do this before bringing an Employment Tribunal complaint.

54. The appeal outcome letter was issued on 6 January 2017 (pages 403-404). Mr Dawson explained the further enquiries he had made. He upheld the decision of Lynn Kaye at the first stage of the grievance.

55. A second version of the letter was issued on 13 January (pages 407-408) which had an additional final paragraph. That paragraph recorded that the claimant said she did not want to return to work at Bedford Care Home. There was an opportunity to work at a Care Home in Liverpool which the claimant declined. She was invited to telephone Mr Dawson to discuss returning to work. The claimant did not take him up on that offer.

56. That same day ACAS issued the certificate confirming the end of the early conciliation period.

Resignation 27 January 2017

57. The claimant resigned by a letter of 27 January 2017 at pages 410-411. The letter was received by the respondent on 30 January 2017. The letter referred to incidents going back to the start of employment as follows:

> **"I had put previous events aside and felt settled in my role on Kenyon as it wasn't near events previously. I was then moved despite the fear and anxiety about this. Even though I applied for this post at the interview but did care, I felt it would be overwhelming at that stage. With no risk assessment and regardless to this 3-4 weeks later without any warning my fight or flight signal inappropriately activated without any danger. Through this it triggered panic disorder and it had built up from previous units."**

58. The letter ended by saying that the claimant was unhappy with the way the grievance had been dealt with and felt there had been a fundamental breach of contract.

59. Following receipt of the resignation Mrs Goodwin asked the claimant to reconsider but the claimant declined to do so.

60. She presented her Employment Tribunal complaint on 9 February 2017.

61. The amendment introducing a complaint of the breach of the duty to make reasonable adjustments was first made on paper in early June 2017, and was identified as an application for permission to amend by Regional Employment Judge Parkin at the preliminary hearing on 21 August 2017, when permission to amend was granted.

Submissions

62. At the conclusion of the evidence each side made a submission to the Tribunal.

Respondent's Submission

63. Mrs Ashberry had been able to prepare a written submission which we read before hearing oral submissions. She invited the Tribunal to conclude that there had been no application of any PCP because the claimant had willingly agreed to move to the Beech unit. Even if that were not the case, she argued that this was not a PCP but simply a one-off decision in particular circumstances.

64. Nor could it be said there was any substantial disadvantage. The claimant was likely to encounter colleagues with whom she had had difficulties in any role on site. The unfortunate deterioration in her health on 6 June 2016 could not have been predicted.

65. In any event the respondent neither knew nor could reasonably have known that the claimant was a disabled person. She had never told them that. Nor was there knowledge, actual or constructive, of any substantial disadvantage.

66. In any event leaving the claimant on Kenyon unit would not have removed that disadvantage. The breakdown could have happened wherever the claimant was working.

67. Finally, Mrs Ashberry submitted that the claim was out of time: time started to run from 13 May 2016 when the decision to move the claimant was made, and no good reason for extending time had been identified.

Claimant's Submission

68. The claimant began her oral submission by providing an overview of how she had been treated. She emphasised the number of moves between units and how she had been treated by colleagues. She had only realised with hindsight that concerns about her behaviour were because of the effect on her of the chronic anxiety.

69. Dealing with the issues for the Tribunal to decide, she said there was a practice in the company of moving people between units and that this created a substantial disadvantage because she had to start all over again in a new unit, and would be moving to the area where she had her original breakdown in July 2015. There was also the risk of seeing JA again. She had told the respondent about her anxiety and it would have been reasonable to have left her on the Kenyon unit.

70. On time limits she emphasised that the union had been advising her about a personal injury claim not about employment law matters, and that she had acted in accordance with what ACAS told her. She had done everything possible and relied on what the union told her. She said that the Tribunal should extend time.

Discussion and Conclusions

71. Before addressing the list of issues the Tribunal had to make a finding of fact about the circumstances of the move to Beech unit on 13 May 2016.

Factual Finding – Move to Beech Unit

72. There were no notes kept of the meeting between the claimant, Mrs Goodwin and Mrs Dickinson on 13 May 2016. The first time anything was committed to paper about that meeting was almost four months later in the claimant's grievance statement of 5 September 2016 at page 329. In that account the claimant said that by the end of the meeting she felt drained and that she was being victimised so she "said ok". The thrust of that document was that she had been pressured into agreeing.

73. The claimant gave a different account in her further particulars a year later in September 2017 (page 135). There she said that she told the managers that she did not want to move but they said, "you've no choice". On that account it was overtly a move forced upon her.

74. We thought the earlier account was more likely to be accurate. It was made only four months after the meeting. The latter account was made 16 months after the meeting and at a time when the litigation was well advanced.

75. There was no account recorded from the respondent's witnesses save for the notes Mrs Goodwin provided to the grievance appeal investigation in December 2017 at page 400. There she recorded that the claimant had said she was struggling at Kenyon unit and that the claimant was eager to move.

76. Putting these matters together we found that the claimant felt under pressure because of the loss of her driving licence, the fact that managers now knew she had a vitamin B12 deficiency and was on daily injections, and the concerns managers were expressing about whether she could continue to serve food and drink to residents. The discovery of drugs in the stockroom a few days earlier was also a concern because she felt there was suspicion directed at her. These were all good reasons to want to move. We concluded that she was eager to move to a role as activities coordinator.

77. We accepted that the claimant did not want to move to Beech unit because it was near to the units where she had had problems in the previous year (Pennington and Lilford). Even so, we found as a fact that the claimant agreed in that meeting to move to the Beech unit and did not voice her concerns about that to the respondent. Had she said that she did not want to move to the Beech unit the move would not have happened, just as in March she had told Mrs Dickinson she did not want to move to the Pennington unit (see paragraph 34 above).

78. Accordingly Mrs Goodwin and Mrs Dickinson were not aware that the claimant had reservations about moving to the Beech unit because the claimant did not tell them.

79. Having made that finding of fact we turned to the issues for determination.

1. **Did the respondent apply a provision, criterion or practice ("PCP") to the claimant on 13 May 2016 by requiring her to move from the Kenyon Unit to the Beech Unit?**

80. Although the claimant agreed to move to the Beech unit, the move was part of a management practice of moving staff between units on the site depending on business need. That practice was applied to the claimant on this occasion. The business need was a combination of the fact that there was a vacancy for activities coordinator on the Beech unit at a time when the CQC was looking closely at the Home, and concerns about the claimant in her hostess role arising out of the loss of her licence due to traces of amphetamine having been found on a blood test. Even though she did not voice any objection that practice was still applied to her on this occasion when she was moved to Beech unit.

2. **If so, did that PCP place the claimant at a substantial disadvantage compared to a person without her disability (mental impairment in the form of anxiety)?**

81. There were three different elements to the assertion by the claimant that a PCP of moving staff between units put her at a substantial disadvantage compared to a person without her disability.

Risk of Encounter

82. The first element was that such a practice would create a greater risk that she would encounter a colleague with whom she had previously had problems, thereby giving rise to an exacerbation of her symptoms. We concluded that was not a substantial disadvantage. Any risk of that happening was a minor risk. The site had a number of different units and about 200 employees. The number of people with whom the claimant had a particular problem was very small, and the risk of problems would arise not because of a chance encounter but only if the claimant was actually working with such a person on the same unit. This apparent disadvantage was not emphasised by the claimant in the documents she prepared for the grievance.

83. Even though with hindsight, therefore, it was apparent that the contact with JA was a trigger for the breakdown on 6 June 2016, the PCP of moving staff between different units did not create a substantial disadvantage: it was a remote possibility and therefore a minor or trivial disadvantage.

Unfamiliar Environment

84. The second element was that moving to a different unit was substantially more difficult for a person with chronic anxiety because of the need to become familiar with a new working environment, new colleagues, new residents and new ways of working.

85. Even though residents would change on a ward, we concluded this was a substantial disadvantage. The additional difficulties faced by the claimant due to chronic anxiety in integrating herself into a new team of colleagues were neither minor nor trivial, even if those difficulties were not apparent to the colleagues in

question. She faced a considerably greater challenge due to chronic anxiety than a person without that disability would have faced.

Sight of Other Units

86. The third element was that the PCP of moving staff between units made it more likely that the claimant with chronic anxiety would experience a relapse if required to work within sight of the units where she had previously encountered problems.

87. This was a point which the claimant highlighted in her further particulars in June 2017 (page 53) and September 2017 (page 80). The Kenyon unit was at one end of the Bedford Home site; Beech, Pennington and Lilford units were all at the other end. The claimant made this point in her email of 23 August 2016 at page 314 where she said that she thought her breakdown was because she could see the units and staff who had made her ill. Following the greater understanding she had gained through counselling it was her view this was the most likely cause of her breakdown. According to her email it was also the joint view of the counsellor.

88. We concluded this was a substantial disadvantage. Seeing a unit where she had previously had a traumatic experience was significantly more likely to create difficulties for a person with chronic anxiety than for a person without that disability.

3. If so, can the respondent show that it did not know and could not reasonably have been expected to have known that the claimant was a disabled person and likely to be placed at that disadvantage?

89. Having concluded that the PCP did put the claimant at a substantial disadvantage in those two ways, we considered whether the respondent had made out the knowledge defence.

90. The first question was whether the respondent knew or ought reasonably to have known that the claimant was a disabled person. We reviewed the information available to the respondent. When she completed her medical questionnaire upon application the claimant ticked “no” to every box about medical interaction. She made no mention of the antidepressants which she had been taking for some time.

91. The respondent first became aware of a problem when the claimant had her breakdown in July 2015. Mr Millington saw it happen, and the GP records at page 194 confirmed that a fit note was issued although the precise description of the medical condition was not recorded. We inferred that it must have been a reference to anxiety or stress. The claimant was off work for three weeks at that period.

92. Her return was short-lived. She went off again on 24 September 2015 and was certified unfit for work continuously due to anxiety and stress (or anxiety states) until 8 January 2016. In this period she had the return to work meeting in December 2015 with Mr Millington and Mrs Dickinson where we found as a fact the claimant did mention her anxiety. It would be odd if she had not done so given that it was the cause of her absence.

93. However, the claimant returned to work in the Kenyon unit in early January 2016 and there was no indication of any problems in the four months or so prior to

the meeting on 13 May 2016. There was no record of any time off even though in that period the claimant had her medication increased (8 February and 25 April 2016 – page 199). This was not disclosed to the respondent and there was no reason for the respondent to think that the claimant had any medical problems affecting her day-to-day activities in this period.

94. We concluded that the respondent could not reasonably have known that the claimant was a disabled person. Such knowledge will arise only if the respondent could reasonably have known that all the elements of the definition of disability under the Equality Act 2010 were in place.

95. One of those elements is that there must be a substantial and long-term adverse effect on day-to-day activities. The respondent was at the most aware that the claimant had been suffered from stress and anxiety between July 2015 and January 2016, but there was nothing to indicate any ongoing impact on day-to-day activities after she returned to work in January 2016.

96. Nor was there any indication, medical or otherwise, that the claimant was a risk of a recurrence or that she was still taking medication.

97. In those circumstances the respondent could not reasonably have known that the claimant was a disabled person.

98. As a result the duty to make reasonable adjustments did not arise. The claim failed and was dismissed.

Remaining Issues

99. It is appropriate to indicate briefly what we would have decided in relation to the remaining issues had these been live.

Knowledge of Substantial Disadvantage

100. We would have found that the respondent ought reasonably to have known that the challenge of getting to grips with a new unit was likely to put a person disabled by chronic anxiety at a substantial disadvantage compared to a person without that disability.

101. We would not have found that the respondent ought reasonably to have known that a change of unit created any substantial disadvantage in relation to the risk of seeing another unit. A return to the same unit where a previous traumatic incident had happened might have given rise to knowledge of such risk, as indeed Mrs Dickinson recognised when she agreed in March not to move the claimant back to Pennington unit, but there was nothing from which the respondent could reasonably conclude that there was any substantial disadvantage in a move to a different unit simply within sight of the unit where the problem had occurred.

Reasonable Adjustment

102. Had the respondent known that the claimant was a disabled person, the reasonable adjustments complaint would have succeeded (subject to time limits). Knowing that a move to a new unit would be likely to put a person with chronic

anxiety at a substantial disadvantage, leaving the claimant in the Kenyon unit would have been a reasonable adjustment for the respondent to make. It would have avoided that disadvantage altogether.

Time Limits

103. However, we would have found the claim to have been brought out of time in any event. Time started to run from 13 May 2016 which was the date on which the claimant could reasonably have expected the respondent (had it known that she was a disabled person likely to be at a substantial disadvantage)) to have refrained from moving her to another unit. The primary time limit expired on 12 August 2016.

104. The application to amend to bring a claim of a breach of the duty to make reasonable adjustments at the earliest was not made until 14 June 2017. It was brought 13 months after the relevant decision. It was ten months late. In the context of employment law time limits that is a significant period.

105. Although we accepted that the claimant was suffering from anxiety throughout this period, she was able to put together a detailed grievance statement in early September 2016. There was no medical evidence suggesting that she was unable to present her Tribunal complaint about reasonable adjustments during this period.

106. We accepted the claimant had no knowledge of her legal rights and that when she contacted her union the union focussed on a personal injury claim rather than on possible Employment Tribunal proceedings. It was only through her own researches after the claim form was first lodged that she became aware of this claim.

107. Whilst recognising the difficulties which a person with chronic anxiety faces in this complex area of law, we took into account that the delay in bringing the claim did cause prejudice to the respondent. Had a legal claim about the decision on 13 May been intimated by mid-August 2016, Mrs Goodwin and Mrs Dickinson would have been able to commit to paper much earlier their recollection of that meeting and what was discussed. Instead Mrs Goodwin was not asked to do that until the very end of 2016 in the grievance appeal stage.

108. In those circumstances the Tribunal would have concluded that the claimant had not established grounds upon which it would have been just and equitable to extend time.

Postscript – Reconsideration Application

109. On 22 June the claimant applied for reconsideration of the judgment.

110. If there are any further points she wishes to make in support of that application they should be supplied to the respondent and to the Tribunal within 14 days of the date on which these reasons are sent to the parties.

111. I will then give the application preliminary consideration under rule 72.

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Employment Judge Franey

2 July 2018

WRITTEN REASONS SENT TO THE PARTIES ON

18 July 2018

FOR THE TRIBUNAL OFFICE

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