EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**V**	**RESPONDENT**
Ms S Burnett		**British Telecommunications Plc**

Heard at: London South Employment Tribunal
On: 27, 28 & 29 August 2019
In chambers on 30 September 2019

Before: Employment Judge Hyams-Parish
Members: Ms A Donaldson and Mr M Sparham

Representation:
For the Claimant: Mr T Emslie-Smith (Counsel)
For the Respondent: Miss V Brown (Counsel)

RESERVED JUDGMENT

The claim of unfair dismissal (s.98 Employment Rights Act 1996) fails and is dismissed.

The claim of discrimination arising from disability (s.15 Equality Act 2010) fails and is dismissed.

The claim of failing to comply with a duty to make reasonable adjustments (s.21 Equality Act 2010) fails and is dismissed.

REASONS

Claims

1. By a claim form presented to the Tribunal on 2 July 2018, the Claimant brings claims of unfair dismissal pursuant to s.98 Employment Rights Act

1996 ("ERA") and disability discrimination pursuant to the Equality Act 2010 ("EQA").

Questions to be determined by the Tribunal

2. The Parties agreed that the issues to be determined by the Tribunal were those set out in the case management order dated 27 November 2018, save for the claim of indirect discrimination, which was not being pursued. The agreed issues are:

(a) Unfair dismissal

What was the principal reason for dismissal and was it a potentially fair one in accordance with s.98 of the ERA? The Respondent asserts that it was a reason relating to the Claimant's capability.

If so, was the dismissal fair or unfair in accordance with s.98(4) ERA and, in particular, did the Respondent in all respects act within the so-called 'band of reasonable responses'?

If the Claimant was unfairly dismissed and the remedy is compensation:

(i) If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed (***Polkey v AE Dayton Services Ltd [1987] UKHL 8***);

(ii) Would it be just and equitable to reduce the amount of the Claimant's basic award because of any blameworthy or culpable conduct before dismissal pursuant to s.122(2) ERA and, if so, to what extent?

(iii) Did the Claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to s.123(3) ERA?

(b) Unfavourable treatment in consequence of disability (s.15 EQA)

Did the following things arise in consequence of the Claimant's disability:

(i) Difficulties in carrying out the Claimant's contractual duties, in particular:

a. Difficulties with typing and IT work required on phone duties;

b. Failure to comply with targets; and

c. Difficulty in working to the Respondent's standard timetable of

tasks.

It is agreed that the Respondent treated the Claimant unfavourably by dismissing her.

Did the Respondent dismiss the Claimant because of any of those things?

If so, has the Respondent shown that the dismissal was a proportionate means of achieving a legitimate aim? The Respondent relies on business needs as the legitimate aim.

Alternatively, has the Respondent shown that it did not know, and could not reasonably have been expected to know, that the Claimant had the disability?

(c) Failing to make reasonable adjustments (s.20 & s.21 EQA 2010)

Did the Respondent know and could it reasonably have been expected to know that the Claimant was a disabled person in respect of tennis elbow and carpal tunnel syndrome only?

A PCP is a provision, criterion or practice. Did the Respondent have the following PCPs:

(i) The Claimant's duties included typing;

(ii) The Claimant's duties included working on the telephone;

(iii) Providing support and training on Dragon as set out at paragraph 10 of the Response;

(iv) The Claimant was required to comply with the targets as to work performance;

(v) A failure to provide a private workspace for exercises;

(vi) The Claimant had to work to the Respondent's standard timetable of tasks;

(vii) Requiring the Claimant to continue in her existing role; and

(viii) Dismissing the Claimant.

Did any such PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time?

If so, did the Respondent know or could it have reasonably been expected to know that the Claimant was likely to be placed at any such disadvantage?

If so, were there steps that were not taken that could have been taken by the Respondent to avoid any such disadvantage? These steps were set out in the Case Management order but refined during the hearing as follows:

(i) Further training and support on Dragon;

(ii) Provision of, so called, soft keys/keyboard shortcuts – or implementing scripting for use with Dragon;

(iii) Amendment to the Respondent's CSS main database to make Dragon compatible and enable the Claimant to work on it;

(iv) Providing a private environment for daily exercises and doing more to assist the Claimant find a suitable space to exercise;

(v) Allowing the Claimant to work offline on a permanent basis.

If so, would it have been reasonable for the Respondent to have taken those steps at any relevant time?

(d) Time Limits

Were the discrimination claims presented within the time limit set out in s.123 of EQA?

The Respondent avers that any complaint about something that happened before 13th of March 2018 is potentially out of time so that the Tribunal may not have jurisdiction to deal with it.

Law

(a) Unfair dismissal

3. Section 94 of the ERA provides a statutory right not to be unfairly dismissed. Generally, this is subject to a requirement that an employee has two years' service. Section 98 of the ERA provides: -

> ***(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—***
>
> ***(a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.***
>
> ***(2) A reason falls within this subsection if it:***
>
> ***(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,***

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

4. Section 98(4) ERA provides:

Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

(b) Unfavourable treatment in consequence of disability

5. Section 15 of EQA states as follows:

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

(c) Failing to make reasonable adjustments

6. A claim for failure to make reasonable adjustments is to be considered in two parts. First the Tribunal must be satisfied that there is a duty and only then must the Tribunal consider whether that duty has been breached. Section 20 of EQA deals with when a duty arises and states as follows:

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(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.

7. Section 21 of the EQA states as follows:

> ***(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.***
>
> ***(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.***

(d) Time limits

8. Section 123 of EQA deals with time limits for bringing discrimination claims in the Employment Tribunal and says as follows:

> ***(1) [Subject to [sections 140A and 140B] on a complaint within section 120 may not be brought after the end of—***
>
> ***(a) the period of 3 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) Proceedings may not be brought in reliance on section 121(1) after the end of—***
>
> ***(a) the period of 6 months starting with the date of the act to which the proceedings relate, or***
>
> ***(b) such other period as the employment tribunal thinks just and equitable.***
>
> ***(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.***

9. An “act” under the EQA includes an “omission” (section 212(2)). Section 212(3) goes on to say that reference to an omission includes a reference to:

   a. A “deliberate omission” to do something.

   b. A refusal to do it.

   c. A failure to do it.

10. Where a claim arises out of an omission:

   a. The employer’s failure to do something is to be treated as occurring when the employer decided not to do it (section 123(3)(b)).

b. In the absence of evidence to the contrary, the employer is to be taken as deciding not to do something when it does an act inconsistent with doing it (or, if there is no inconsistent act, at the expiry of the period in which the employer might reasonably have been expected to do it) (section 123(4)).

11. So, for example, the three-month time period for bringing a claim based on failure to promote might start when the employer performs the inconsistent act of promoting someone else to the vacant position.

12. Where an employer fails to make reasonable adjustments for a disabled employee simply because it fails to consider doing so, time runs at the end of the period in which the employer might reasonably have been expected to comply with its duty.

13. Even if a claim is brought out of time a tribunal can extend time by such period as it thinks just and equitable (section 123(1)(b), EQA 2010). This is a lower hurdle than the "*reasonably practicable*" test used in unfair dismissal cases.

14. Nevertheless, the Tribunal is mindful that the exercise of discretion should be the exception, not the rule. The EAT in **British Coal Corporation v Keeble [1997] IRLR 336 and DPP v Marshall [1998] IRLR 494**, held that the tribunal's discretion in these circumstances is as wide as that of the civil courts under s.33 of the Limitation Act 1980. This requires courts to consider factors relevant to the prejudice that each party would suffer if an extension were refused. These include:

    a. The length of, and reasons for, the delay;

    b. The extent to which the cogency of the evidence is likely to be affected by the delay;

    c. The extent to which the party sued had co-operated with any requests for information;

    d. The promptness with which the claimant acted once they knew of the possibility of taking action;

    e. The steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

15. While this may serve as a useful checklist, there is no legal obligation on the tribunal to go through the list, providing that no significant factor is left out (***London Borough of Southwark v Afolabi [2003] IRLR 220 (CA)***). The emphasis should be on whether the delay has affected the ability of the tribunal to conduct a fair hearing.

Practical and/or preliminary matters

16. This was a relatively document heavy case, with a Tribunal bundle extending to 1134 pages, in three lever arch folders.

17. Witness evidence was provided by the Claimant and, on behalf of the Respondent, Mr Allan Sammy, Mr Mark Wilson and Mr Oliver Galea.

Findings of fact

18. The following findings of fact were reached by the Tribunal, on the balance of probabilities, having considered all of the evidence given by witnesses during the hearing, including the documents referred to by them. Where the Tribunal's findings of fact reflect those represented by one party, in circumstances where those facts are in dispute, it means that the Tribunal preferred the evidence of that party.

19. Only findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary to determine each and every fact in dispute where it is not relevant to the issues between the parties.

20. The Claimant started working for the Respondent in September 1986. Throughout her employment she worked in various teams and was promoted a number of times.

21. It is accepted by the Respondent that at all material times the Claimant was disabled within the meaning of the EQA. Her disabilities are:

    a. Epilepsy
    b. Tenosynovitis
    c. Arthritis in her leg
    d. Bi-polar disorder
    e. Carpal tunnel syndrome
    f. Tennis elbow

22. At the time of her dismissal the Claimant was employed as a Customer Services Adviser working in the Customer Service Centre ("CSC") team dealing with ISDN repairs. She joined that team in December 2014 reporting to Allan Sammy (Repair Manager) until May 2017; thereafter to Victoria Biscomb until her dismissal. Whilst the focus of the hearing was on the Claimant's performance from December 2014 it was clear from documents in the bundle that the Respondent had had issues with the Claimant's performance extending back as far as 2011. It is also clear that, as far back as 2011, the Respondent was aware of some of the Claimant's disabilities; they were providing support and making adjustments to enable her to better perform her job.

23. The Claimant's role in the CSC involved liaising with communication providers (including BT retail, Cable and Wireless, Telefonica, O2 and Vodafone), and occasionally the end customer, to provide updates on repairs. She was required to answer incoming calls, locate information on the computer system and occasionally make outbound calls to an engineer to obtain information. Whilst the department worked on both ISDN2 and ISDN30 repairs, the Claimant only worked on ISDN30. She was appointed to work on both but never got to the stage where she was *able* to work on both.

24. When the Claimant joined the CSC team refresher training needed to be arranged. It was termed "refresher training" because the Claimant had worked in a similar role previously and it was thought that the training would simply be a reminder of what she had done before. She was provided with two weeks' in-house training, followed by two weeks' consolidation and weekly coaching sessions (along with other new starters). Questions could also be asked of the Subject Matter Expert (SME), a person known as Mark Weston, who was on hand to provide additional training where required. The Claimant was given one additional month compared to the rest of the staff in her training cohort to reach the required standard. Employees who had never done the role before picked it up more quickly and did not need the support that the Claimant did, despite her previous experience.

25. The performance of employees doing the same job as the Claimant was measured in a number of ways including:

    a. **Effectiveness**: the time that someone spends on a task compared to what a target time suggests.

    b. **Actual Working Time**: as the title suggests, how long someone spends working.

    c. **Adherence**: the extent to which someone sticks or 'adheres' to a schedule.

    g. **PCA**: percentage of calls answered within 30 seconds.

26. It became apparent to Mr Sammy, quite early on in their working relationship, that there was an issue with the quality of the Claimant's work and with the standard of her performance generally. She was not giving the correct updates (i.e. not giving the correct information and not ensuring that the correct notes were being recorded on the system). As a result, an informal performance management process was commenced in March 2015. Coaching was provided to all staff twice a week in a session lasting 30 minutes, but coaching was increased for those undergoing informal performance management. The Tribunal accepts that reviews and feedback during this process were constructive and supportive and aimed at improving the quality of performance.

27. As improvements were not being made by May 2015, it was decided that the Claimant would be better supported by using the formal performance management process and as part of this a coaching development plan was devised for her. The plan was supposed to be for a period of six weeks but for the Claimant this was extended to nine weeks (albeit for one of those weeks the Claimant was on annual leave). However, at the end of the nine weeks the Claimant's performance was considered to be below acceptable standards. During this period the Claimant was asked whether adjustments were needed due to her disability and she asked for arm rests and for certain injuries to be taken into account as a result of a fall at home whereby she shattered a bone and tore some muscle in her right leg.

28. A report by Occupational Health ("OH") was requested and this was received by a letter dated 23 September 2015. An extract of this report said the following:

> ***Does she need exercise time during the day and if so how often and what are the durations? Does the exercise time include time to travel to a specific location?***
>
> ***She still needs to exercise her arm. She tells me that since she had a fall last year the symptoms of the arm problem have got worse. There are no specified times or duration for exercising the arm. The frequency of exercising depends on the discomfort.***
>
> ***If she does need exercise time, can these be done at her desk as there is low availability of empty rooms that can be used in Colombo house?***
>
> ***There is no medical reason why she cannot do it from the desk site but this depends on space around her desk and whether this will disturb her colleagues.***
>
> ***Does her health condition restrict her from meeting the team targets for her current role and if so, what percentage reduction should be applied to the call centre measures?***
>
> ***She is currently struggling to meet 90% of the required target. She has however been able to manage 80-82% of the required targets. She tells me that the role requires typing and she is right-handed. Since the right arm has a problem she tends to use the left hand more which makes her slower than her colleagues. She also tells me that her current mouse is not as comfortable and as a consequence it causes pain in the right arm. This slows her further. You may consider reducing her targets between 80%-85% depending on business needs and management decision.***
>
> ***Is she able to do her current role?***
>
> ***She is able to do her current role with some adjustments. The adjustments currently in place are likely to remain for the foreseeable future. Her ability to return to normal duties will depend on treatment options and her response to treatment.***
>
> ***Is there any medical reason why she cannot take voice calls from our customers?***
>
> ***She did have a voice problem 2012-2013 but my understanding is that***

> ***this has fully recovered. There is no medical reason why she cannot take voice calls.***
>
> ***Is there any reason why she should not be able to stick to the 15 minute DSE breaks and her 30 minute lunch break durations?***
>
> ***She reports that the symptoms in the right arm have worsened over time especially following the fall last year. She has been assessed by an orthopaedic surgeon privately but she is waiting for an appointment preferably through NHS for surgical intervention. Currently the pain is likely to persist and she will still require intermediate breaks but I am unable to specify the number of breaks that will be required. This will depend on the type of activities she would be doing and the discomfort she is likely to be in.***
>
> ***Is there any more support that we can provide to help her in her role?***
>
> ***She feels that she has been unsupported and she is now conscious when she takes breaks. You may wish to meet with her to discuss her concerns. She will benefit from general support and understanding. To reduce repetitive use of her arms you might consider work rotation to avoid the same activities, depending on business needs. She says the current mouse is not as good and it is increasing her discomfort. She feels further reassessment by ENABLE of her workstation would be helpful. I understand she has already requested this.***

29. In October 2013 the Claimant was invited to a meeting to decide whether a formal warning on the grounds of unsatisfactory performance should be issued. An initial formal warning was issued as a result of that meeting, accompanied by guidance for improvement. The Respondent agreed to review whether any further adjustments were needed so that these could be implemented before the plan started. The Claimant appealed against this decision, but the appeal was not upheld.

30. The Respondent put in place a formal improvement plan which commenced in November 2015. As part of this plan the effectiveness measure was reduced to 82%, increasing to 85% over time. Support continued to be available to the Claimant through training, assistance from peers, or work shadowing, but ultimately the Respondent felt that the Claimant also had to be proactive in sourcing the support that she needed to enable her to perform her job to a satisfactory standard.

31. At the end of the four week plan it was considered that the Claimant was still failing to reach the required standards of work and she was therefore invited to attend a meeting to decide whether a final formal warning should be issued. This meeting eventually took place on 14 March 2016 having been delayed for a number of reasons. At the meeting, the Claimant complained that the Respondent had not made adjustments for her before September 2015 and had not left enough time to allow her to improve, with the adjustments in place. The Tribunal finds that adjustments requested by the Claimant were in place from November 2015 and a period of approximately four months had passed since then and the meeting to decide whether a final warning should be given. The Respondent

considered that it was appropriate to issue a formal final warning which it did by letter dated 7 April 2016.

32. By this stage the Claimant had an effectiveness target of 85%; this measured the effectiveness of calls handled and not the number of calls handled. The emphasis was therefore very much focused on the quality of the work she did, rather than how much work she did. The Claimant was also not measured on 'adherence' (i.e. the percentage of time the Claimant adhered to her schedule) unlike other colleagues. The breaks which the Claimant took, therefore, had no impact on how her performance was measured. The time it took the Claimant to deal with a call was measured but since this was reduced for the Claimant, she had longer to deal with the call and deal with any offline work.

33. Mr Sammy had a 1:1 with the Claimant on 11 April 2016 to discuss her health and the next steps in relation to starting her Final Formal Performance Plan which was due to start in the week commencing 11 April 2016. The Claimant was given clear objectives to help improve her performance and she was given constructive feedback at weekly reviews provided by the SME.

34. An up to date OH report was obtained and provided by letter dated 23 April 2016. It commented on the fact that the Claimant had been diagnosed with acute laryngitis in January 2016 and that the Claimant was getting a lot of right wrist pain and left sided elbow pain aggravated by repeated use of the keyboard and mouse following a recommendation by the Claimant's GP to be given more offline duties. The report included the following recommendations:

    a. rotate the Claimant's tasks and provide frequent rest breaks;

    b. carry out a workplace assessment;

    c. further reduction of the effectiveness target to 80%;

    d. establish a better working relationship with Mr Sammy;

    e. walking away from her desk to carry out exercises, particularly voice exercises.

35. Mr Sammy considered the request to reduce effectiveness target to 80% and concluded that it was an unreasonably low target given the level of service the Respondent needed to provide to customers and the potential impact this would have on the quality of service provided.

36. The availability of rooms and space for the Claimant to perform her exercises was explored during the questioning of witnesses. The Tribunal finds that capacity on the first floor, where the Claimant worked, was tight and there was very high occupancy. Available rooms were therefore at a

premium and were very often booked up. It was possible for the Claimant to book available rooms using the Respondent's room booking system, but the difficulty was that the Claimant would need them for a short period of time at frequent intervals. She was therefore encouraged to use available communal areas which no one was using, such as hallways, the canteen, medical room etc. Indeed, in practice the Claimant found space to perform her exercises, including the stairwell. The Tribunal also finds that there was more capacity on the 11th floor of the same office which was also occupied by the Respondent and could also have been utilized by the Claimant albeit she would need to have taken the lift to this floor.

37. Mr Sammy and the Claimant met for a 1:1 on 25 April 2016 when the Claimant provided a fit note stating that she was fit for work with adjustments including avoiding using the voice or excessive typing or use of hands. At that meeting the Claimant confirmed that the coaching she received from Mr Weston was useful and a further coaching session was arranged for 27 April 2016.

38. The Claimant had by that time appealed the final formal warning and Mr Sammy provided her with a letter inviting her to an appeal hearing on 3 May 2016. As further advice was also being sought from HR the final formal performance plan was placed on hold pending the outcome of her appeal.

39. The hearing to consider the Claimant's appeal against her final formal warning was held on 11 May 2016 which was considered by a senior manager in the CSC. He informed the Claimant by letter dated 13 June 2016 that the final forming warning issued by Mr Sammy should stand.

40. A referral was made on 19 May 2016 to carry out a work-station assessment for the Claimant and this was completed by 1 July 2016 by a company called Ability Net. The recommended adjustments in that report were as follows:

    a. The provision of a vertical mouse that would avoid the forearm from twisting into a position that can add to hand, wrist and arm pain;

    b. Remaining in an off-line role so that she can avoid excessive use of her voice;

    c. Breaks to perform physical exercise

41. On 11 July 2016 a vertical mouse was approved and ordered. Dragon software was considered by Ability Net but they decided it would not be suitable for the Claimant because of the symptoms associated with her throat condition. The report included a number of exercises that could be carried out by the Claimant at her desk or walking around the office without needing to be in a private room. The only new equipment recommended by AbilityNet was a new left-handed mouse.

42. The Claimant was advised to use the "unscheduled break code" when she

needed to move from her desk to perform her exercises and also so as to ensure that her performance would not be adversely affected by the need to have frequent breaks. However, the Tribunal finds that the Claimant did not always use this code as she was advised to do.

43. The new final performance plan was implemented on 11 July 2016. Whilst Mr Sammy encouraged the Claimant to do her exercises and log them, it became clear after the first review that the Claimant had not been logging them as requested.

44. The Tribunal finds as part of the final performance plan, whilst effectiveness was monitored, it ceased to be the measure of success and it was the overall quality that was important. The Tribunal further finds that whilst there were improvements in effectiveness in certain weeks, generally the quality of work was still very much below the standard required. The Claimant continued to put incorrect notes on the system providing updates to the communication providers that were not a true reflection of the notes provided by diagnostics or notes provided by the engineers. Such mistakes would often result in providers having to call again to understand why the Respondent had still not completed the repair. Errors also delayed the repairs for customers which risked the Respondent receiving complaints.

45. The Claimant was absent due to the fact that she had to go into hospital for a knee operation and then took some annual leave. This means that she did not return until September 2016. A second formal review meeting was conducted by telephone on 7 September 2016. Adjustments necessary to assist the Claimant's return to work after her knee operation were discussed during that call and certain adjustments were agreed, such as adjusting start and finish times so that the Claimant could avoid rush hour. She was also offered the opportunity to get a taxi to and from work in the first week.

46. The Claimant subsequently needed a knee replacement as well as an operation on her right shoulder which resulted in her being signed off work until the second week of January 2017.

47. In November 2017, there was a further OH assessment which was conducted over the telephone with the Claimant. That report recommended a phased return to work for the Claimant and assistance with transportation to work. It suggested a further DSE assessment in light of her tennis elbow and recommended that her effectiveness target be reduced from 82% (although this is an error because the target at that time was 85%).

48. As the next stage in the process for dealing with the Claimant's underperformance was to consider whether her employment should be terminated, in December 2016 Mr Sammy passed the Claimant's case to Danielle Henry (Head of Service) for a review of the case by a second line manager and to consider what steps should be taken in view of the insufficient improvement in the Claimant's performance.

49. Ms Henry wrote to the Claimant by letter dated 15 December 2016 inviting the Claimant to a meeting to discuss, in light of continued underperformance, whether the Claimant should be moved to another role or whether her employment should be terminated. That meeting, after some delays due to the fact that the Claimant had refused to attend two scheduled meetings, was held on 28 February 2017. During the meeting the Claimant raised her concerns about the targets but Ms Henry reiterated, and the Tribunal accepts, that whilst effectiveness was monitored as part of the plan it was not a measure of success and that her final performance plan was based on the behaviours she demonstrated with the outcome based on quality. Ms Henry considered that in view of the Claimant's long service she should be given a further performance plan to give her the best chance possible to succeed in her role.

50. There followed a further nine-week plan, commencing 24 April 2017 and ending 23 June 2017, during which the Claimant's performance was monitored and assessed and during which she was provided with support. As part of this plan, Dragon software was installed on the Claimant's computer and she was given training on the use of the software, the first training session taking place on 22 May 2017 and further training taking place on 5 and 14 June 2017. In addition to the training, Mr Weston demonstrated to the Claimant the documentation and training available on YouTube showing how Dragon could be used. Mr Weston's support (provided in the weeks commencing 19 and 26 June 2017) also included him sitting down with the Claimant to explore the software together. In a report prepared by training consultants in or about mid-June 2017, it was recommended that the Claimant be given a further two training sessions so that she "*can receive a comprehensive understanding of the software, especially in relation to her role, and in particular with her 'fault reporting' software*".

51. As part of the recommendations by Ms Henry following her review of the Claimant's case, it was suggested that the Claimant be re-referred to OH. The Claimant attended an appointment with OH on 9 August 2017. The OH report concluded that the Claimant's vocal problems had settled so that she was able to use the telephone again. It also recommended '*straight line thinking so that she did not need to multi-task'*. The only adjustments suggested in the report was looking into whether access to work could support her taxi journey which Mr Sammy looked into for her and subsequently implemented.

52. The above-mentioned additional Dragon software training sessions took place as suggested on 11 and 26 September 2017. In a further report provided by training consultants they concluded that the Claimant:

> ***….now has good control of dictation and basic computer navigation. However, the BT systems that are used in-house are bespoke and dragon is not naturally compatible with them. For Sheena to progress in using Dragon to control her BT systems I would recommend (if it is possible) some Dragon scripting sessions. (Scripting Dragon, using***

Dragon Script coding can make most tasks on a computer work, even quirky tasks that dragon cannot normally do.)

53. The final formal performance plan commenced for the second time on 2 October 2017, incorporating weekly review meetings. The Tribunal accepts that by this stage all adjustments that had been recommended had been implemented save for the Dragon scripting and training which the Respondent decided was not a reasonable adjustment not least because they believed it would not make any difference to the quality of the notes being provided by the Claimant. The plan lasted for 5 weeks, it being extended by one week, and in 4 out of the 5 weeks the Claimant achieved a 'fail' because her performance did not reach satisfactory standards.

54. On 7 December 2017 Mr Sammy passed the case over to HR to appoint a second line manager to conduct a final review of the Claimant's case as it was felt that she had still not reached the required standard. Her case was reviewed by Lynne Brown, Complex Case Specialist.

55. A meeting was held on 22 January 2018 with the Claimant to discuss on-going issues regarding her performance. This meeting was conducted by Mr Mark Wilson (Customer Service and Application Support). Following that meeting a decision was taken, as confirmed in a letter by Mr Wilson dated 27 February 2018, to terminate the Claimant's performance on the grounds of capability.

56. In reaching is decision Mr Wilson took into account all that had happened during the history of the Claimant's performance management and the fact that she was a long serving member of staff. He considered alternative positions and was aware that Mr Sammy had carried out an extensive search over a period of months leading up to the final decision to terminate. Nothing could be identified that would be suitable. Within the repair team the Claimant was on the lowest grade and therefore there were no lower grade jobs that she could be deployed to.

57. The Claimant's employment was terminated on notice and her employment came to an end on 22 May 2018. The Claimant did not work her notice.

58. The Claimant appealed against her dismissal and this was heard by Mr Oliver Galea (Senior Operations Manager). Following a hearing, Mr Galea decided to uphold the decision to dismiss.

Submissions by the parties

59. Counsel for both parties produced written submissions and used them as a basis for their oral submissions, which the Tribunal considered carefully prior to reaching its decision. Counsel for the Claimant also took the opportunity to refine the reasonable adjustments claim in light of the evidence heard by the Tribunal. The reasonable adjustments relied on by the end of the case were as follows:

a. Allowing additional time for dragon training;

b. Provision of soft keys scripting of the CSS system;

c. Provision of a quiet space to do her exercises; and

d. Allowing the Claimant to work offline on a permanent basis.

Analysis, conclusions and associated findings of fact

(a) Reasonable adjustments

(i) Was the Respondent under a duty to make reasonable adjustments?

60. The Tribunal reached the following conclusions in relation to each of the PCPs.

The Claimants duties included typing

61. The Tribunal finds there is adequate evidence to show from OH reports that due to her physical disabilities she was slower at typing than employees who are not disabled. This is due to her condition, Tenosynovitis, which is an inflammation of the fluid-filled sheath that surrounds a tendon. Symptoms of tenosynovitis include pain, swelling and difficulty moving the particular joint where the inflammation occurs. As this condition affected the Claimant's right arm, it resulted in her having to use her left arm which made her slower. The OH reports also refer to tennis elbow (which the Respondent accepts as one of the Claimant's disabilities) and the Tribunal therefore concludes that the Claimant was further disadvantaged by this physical condition in terms of her ability to type in addition to the fact that it is her slower hand.

The Claimants duties included working on the telephone

62. The Tribunal is not satisfied that the requirement to work on the telephone placed the Claimant at a substantial disadvantage on account of any of her disabilities. The Claimant submitted that the substantial disadvantage was being required to remember the requirements and procedures during the call after a long period of absence due to her knee operation. However the evidence does not support this. The Tribunal concludes that throughout the history of the case, the Claimant made mistakes.

Providing support and training on dragon

63. The Tribunal finds that this does not represent a PCP but rather a potential adjustment.

The requirement to comply with the targets as to work performance

64. The Tribunal accepts that the requirement to follow targets can be a PCP as it would place the Claimant at a substantial disadvantage compared to persons without the Claimant's disabilities. There is clear medical evidence that because of her physical disabilities the Claimant was slower at completing tasks. That said, the Tribunal finds that by the latter stage of her employment, and certainly by in the weeks and months leading up to the termination of her employment, she was not required to meet any targets.

A failure to provide a private workspace for exercise

65. As drafted, the Tribunal is not satisfied that this is a PCP. The Tribunal assumes this to be a requirement to perform her role sitting at her desk, which given the Claimant's physical disabilities would place the Claimant at a substantial disadvantage.

The Claimant had to work to the Respondents standard timetable of tasks

66. The Tribunal accepts that the requirement to work to a standard time table of tasks could be a PCP as the Tribunal finds that it would place the Claimant at a substantial disadvantage given that the Claimant's routine has to be regularly broken up because the Claimant requires regular breaks. However, the Tribunal finds as fact that the Claimant was not required by the Claimant to work to a standard timetable of tasks in any event. The Tribunal finds that the Claimant was not measured on how much work she did and neither was she penalised for taking frequent breaks. By the end the focus had become purely on the quality of what the Claimant did, however much this was in terms of quantity.

Dismissing the Claimant

67. The Tribunal finds that there is no evidence from which it is capable of concluding that this is a PCP.

Requiring the Claimant to continue in her existing role

68. The Tribunal accepts that given the difficulties the Claimant has in her role that this is capable of being a PCP.

(ii) Did the Respondent comply with its duty to make reasonable adjustments?

69. The Tribunal then went on to consider whether the Claimant had failed in their duty to make such reasonable adjustments that would avoid the substantial disadvantage created by the above PCPs.

Allowing additional time for dragon training

70. The Tribunal finds that the Claimant was provided with Dragon software by 22 May 2017 (see paragraph 50 above). She therefore had the software for a period of four months prior to her final performance plan commencing (see paragraph 53 above). Further, at the dismissal hearing, the Tribunal accepts that the Claimant confirmed that she had been given sufficient Dragon training.

71. The Tribunal accepts the Respondent's submission that the suggestion of more training on Dragon software is a "red herring". This is because the Tribunal finds, on the evidence, that the provision of Dragon software merely touched the surface in terms of having any impact on the Claimant's ability to perform to the required standard. In fact, Dragon had little benefit, as far as the Tribunal could assess, which the Tribunal assumes is why the software is not more widely used within the Respondent's business. This is of course partly because of compatibility issues between the Respondent's CSS system and Dragon, meaning that there was relatively little that Dragon could be used for.

Provision of soft keys scripting of the CSS system

72. The Tribunal heard much evidence regarding the issue of scripting from witnesses during the hearing. The Respondent's witnesses were very clear, and the Tribunal accepts as fact, that incorporating the kind of scripting that was envisaged, was problematic due to the systems operated by BT and that scripting, even if implemented, would soon become out of date and need to be updated. Whilst Dragon had been given to the Claimant, it was not widely used at BT and therefore scripting would have necessitated a large amount of work for a piece of software that was not commonly used. The Tribunal doubted the actual impact of scripting on the Claimant's performance. It certainly was not persuaded by the evidence that there was a real prospect of the provision of scripting removing disadvantage suffered by the Claimant. Scripting would have allowed the Claimant to move around the system but given that it was the quality of the Claimant's work that was the issue – and not the speed of doing it – it was doubtful that this would have anything like the positive impact on overall performance to justify the work on the CSS systems that would be needed.

Provision of a quiet space to do her exercises

73. The Tribunal finds that the Tribunal did all that was reasonable in terms of enabling the Claimant to do her exercises at intervals that were entirely within her control. Additionally she was able to go to private rooms if they were available. This is covered at paragraph 36 above.

Allowing the Claimant to work offline on a permanent basis

74. The Tribunal does not find that this would be a reasonable adjustment given that it is such a fundamental part of her job. It would leave the Claimant with a vastly different job than that which she was employed to do.

75. The Tribunal finds that where there was a duty to make reasonable adjustments, the Respondent did make such adjustments that were reasonable for it to make. In these circumstances the Claimant's claim that the Respondent failed to make reasonable adjustments must fail.

(b) Unfavourable treatment arising in consequence of disability

76. It being admitted by the Respondent that the Claimant was treated unfavourably by being dismissed, the Tribunal then had to consider whether she was dismissed because of any of the following, which have been pleaded as the "*something arising from disability*":

    a. Difficulties with typing and IT work required on phone duties;

    b. Failure to comply with targets; and

    c. Difficulty in working to the Respondent standard timetable of tasks.

77. The Tribunal finds that the Claimant was not dismissed for any of the above reasons. The Tribunal finds that the reason for the Claimant's dismissal was the quality of her work, despite an extensive range of adjustments having been made (see background findings of fact above). She was not dismissed because of difficulties with typing and IT work, or being required to take telephone calls. The Tribunal finds that by the time of her dismissal she was not measured according to targets and therefore she cannot have been, and was not, dismissed because she had failed to meet her targets. Finally there was no suggestion that the Claimant was dismissed because she had difficulty working to a standard timetable of tasks. Indeed, the Tribunal finds that the Claimant was not required to work to a standard time table of tasks. The fact that the Claimant did not have to meet targets meant that she was given more flexibility in terms of what she did and when she did it. As is said above, the Claimant was dismissed because of the Claimant's output generally which fell significantly below acceptable standards.

78. Even if the Claimant had been successful in persuading the Tribunal that she was dismissed for something arising in consequence of her disability, the Tribunal concludes dismissal was a proportionate means of maintaining a minimum standard of service to its external and internal clients. The Tribunal accepts that the failures which the Claimant continued to make in her work had the potential to have serious consequences including lost business, delays and even fines imposed under service level agreements. Given the length of time which the Respondent attempted to support the Claimant to improve her performance, as against the impact of her poor performance, the Tribunal concludes that dismissal was a proportionate means of achieving a legitimate aim.

79. For the above reasons the Tribunal concludes that the claim of unfavourable

treatment for something arising in consequence of the Claimant's disability must fail.

(c) Unfair dismissal

80. The Tribunal finds that the Respondent clearly established the reason for dismissal, that being the Claimant's capability. It was quite clear to the Tribunal that the Respondent honestly believed on reasonable grounds, for the reasons set out above, that the Claimant was not capable of performing her job to a satisfactory standard.

81. Given the Claimant's length of service it is right that the Respondent took some considerable time to support the Claimant, particularly given her disabilities, in order to give her the opportunity to improve. The Tribunal notes that the Respondent began to have concerns about the Claimant's performance in May 2015 when the Respondent implemented a coaching and development plan. It dismissed the Claimant two years nine months later during which time a number of performance improvement plans were implemented and advice was sought from occupational health and other workplace consultants. The Tribunal finds that the Respondent made almost all adjustments that were requested, the only ones which they didn't related to what was referred to as 'Dragon scripting' for reasons explained above. The Tribunal concludes that there was little more that they could do. What the Respondent did, leading up to and including dismissal, was well within the band of reasonable responses open to an employer and really cannot be criticised by the Tribunal. As one would expect from a large, well resourced, company such as the Respondent, the process was thorough and supportive and the Tribunal felt that the decision to dismiss the Claimant was very much taken as a last resort.

82. For these reasons the Tribunal concludes that the claim of unfair dismissal must fail.

(d) Time limits

83. Whilst rather an academic or superficial exercise, given the Tribunal's above conclusions, the Tribunal went on to consider the issue of time limits. The Tribunal concludes that the claim of failing to make reasonable adjustments is the only claim that is out of time. This is because by the time that the Claimant was given notice of her dismissal in February 2018, the Claimant was clear that the Respondent was not going to make any further adjustments. So any outstanding adjustments that the Claimant considers ought to be reasonably made were not going to be made after that point. The remaining two claims that are about the dismissal, being claimed as unfair and as unfavourable treatment, were in time.

84. The Tribunal then went on to consider whether it was just and equitable to extend time, and notwithstanding its conclusions on the reasonable adjustments claim above, and concluded that it was not just and equitable

to extend time. The Tribunal considered the Claimant's reasons for delay but also the merits of the case and the relative prejudice between the parties. The Tribunal considered the delay to be a relatively lengthy one and her reasons appeared to be focused on the fact that the process was not complete and she had appealed against her dismissal. The Tribunal did not consider the reasonable adjustments claim, and the evidence in support of it, to be particularly strong. Considering the balance of prejudice between the parties, the Tribunal took into account, amongst other matters, the fact that the Claimant was still left with the unfavourable treatment and unfair dismissal claims to pursue.

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Employment Judge Hyams-Parish
21 October 2019