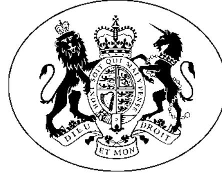
Case Number: 2206110/2018



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Celeste Barker		Catherine Freestone t/a Smile Hub

Heard at: London Central **On**: 3 and 4 March 2020

Before: Employment Judge Stout
Mr R Pell
Ms L Simms

Representations
For the claimant: Mr N Clarke (counsel)
For the respondent: Mr A Williams (solicitor)

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The Claimant's claim that the Respondent failed to make reasonable adjustments in contravention of ss 20 and 39(2)(a)/(d) of the Equality Act 2010 (EA 2010) is dismissed.
2. The Claimant's claim that the Respondent discriminated against her because of something arising in consequence of her disability in contravention of ss 15 and 39(2)(a)/(d) of the EA 2010 is dismissed.
3. The Claimant's claim that the Respondent victimised the Claimant in contravention of ss 27 and 39(2)(a)/(d) of the EA 2010 is dismissed.
4. The Claimant's claim that she was unfairly constructively dismissed contrary to ss 94-98 of the Employment Rights Act 1996 (ERA 1996) is not well-founded and is dismissed.
5. The Claimant's claim for unlawful deduction from wages under ss 13-27 of the ERA 1996 is dismissed upon withdrawal.

REASONS

Introduction

1. The Claimant Ms Barker was employed by the Respondent Ms Freestone from 26 August 2014 to 21 September 2018, latterly as Practice Manager. The Respondent owns and operates a group of dental practices in London which trades as Smile Hub.

2. By a claim form received on 19 September 2018 she brought claims for disability discrimination (failure to make reasonable adjustments and discrimination arising from disability), victimisation, constructive unfair dismissal and unlawful deduction from wages.

The issues

3. The issues to be determined had been agreed between the parties at a Preliminary Hearing before Employment Judge Norris on 13 March 2019. The only changes to that list that were agreed at this hearing were that the Claimant's claim for unlawful deduction from wages was withdrawn, and the Respondent conceded that it had the requisite knowledge required for the purpose of the claim under s 15 of the EA 2010, both as to the fact of the Claimant's disability and the disadvantage that she suffered.

The Evidence and Hearing

4. We were provided by the parties with a bundle of documents and statements for the two witnesses. We read these and heard oral evidence from both the Claimant and the Respondent, both of whom were cross-examined. The Tribunal also asked additional questions of both witnesses.

5. The hearing was listed for four days, but in the event concluded in two days. There were only two witnesses, the Claimant and the Respondent. The Respondent's representative, in particular, asked very few questions in cross-examination of the Claimant and made very short closing submissions. The Tribunal was able to deliberate and give judgment orally at the end of Day 2. Written reasons were requested by the Claimant at the hearing and are accordingly provided herein.

6. We explained when delivering judgment orally that we would not in oral reasons set out the law otherwise insofar as it was necessary to explain our decision on particular issues. We made clear that we had, however, had regard to the relevant legal principles, which were also set out in Mr Clarke's closing submissions and not disputed by the Respondent. In these written reasons, however, we do set out the legal principles to which we had regard when reaching our conclusions.

Adjustments

7. We made clear to both parties, but especially the Claimant, that if breaks were required at any point they need only ask. We asked the parties if any further adjustments were sought. They said not.

The facts

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

Background

9. The Claimant Ms Barker was employed by the Respondent Ms Freestone from 26 August 2014 to 21 September 2018. The Respondent owns and operates a group of dental practices in London which trades as Smile Hub.

10. The Claimant is by training a Dental Nurse. When she started employment with the Respondent it was as Dental Nurse/Receptionist. In August 2015 she was promoted to Practice Manager when the person then in that role (who we will refer to as V) went on maternity leave. On V's return, she did not wish to work full time and the Claimant did not wish to job share. The Claimant therefore continued in the full-time role as Practice Manager and V returned 1 day per week to a Practice Administrator role. V had a number of administrative tasks of her own to do, quite separate to those for which the Claimant was responsible. However, part of her role was to provide cover for the Claimant when she was sick or on annual leave or sitting as a member of the General Dental Council Fitness to Practice Panel (GDC FtP Panel) (which she did for 1 month per year). Cover was also required for other staff annual leave. It soon became apparent that more cover from V was required and so it was agreed between all three that V would work 2 days per week, Wednesday and Thursday.

11. At the relevant time the Respondent operated from three sites in the City of London near Liverpool Street, Moorgate and Barbican stations. The sites are within business offices of Linklaters, Freshfields and UBS Bank and the Respondent is contracted to those organisations to provide dental services between 9am and 5pm daily. The Respondent has very recently added a fourth site to its business, but this is well after the events with which we are concerned in these proceedings.

The nature of the Claimant's job

12. As Practice Manager, the Claimant's role involved overall operational management for all three sites daily, including personnel line management, managing any staffing issues such as absences and holiday requests, financial and general administration, patient queries that the clinical team members were unable to deal with, clinical compliance, the maintenance of practice equipment, and handling any issues with equipment or stock levels at the three sites. She was also the individual responsible for ensuring the organisation's compliance with GDPR.

13. As part of her role the Claimant had to travel between all three sites. It was about 10 minutes walk between Liverpool Street and Moorgate, but 20 or 30 minutes by tube from Liverpool Street/Moorgate to the Barbican site. Alternatively, a taxi ride might take 10 to 15 minutes.

14. Staff would contact her by email or telephone as needed. If an issue arose with a patient, the Claimant would need to attend site, although in practice if she was not already on the site, then she had sometimes offered to meet and speak with the patient on another occasion. The Respondent accepted it was rare that the Claimant's actual physical presence on site was required urgently. She said that on such occasions when needing to get between sites staff would jump in her cab. We find that occasions when physical presence was required on site on a less urgent basis were much more frequent. The Claimant's own evidence in her witness statement was that she would *"often travel between all three sites in one day and run things from site to site as needed"*. This suggests that her physical presence was normally required on site every day, sometimes more than once.

15. The Claimant's normal hours of work as set out in her contract were 8.30am-5.30pm Monday to Friday, but it had been agreed that on Thursdays she would work a late shift 1.30pm to 8 or 9pm.

16. In terms of the proportion of the Claimant's job that was administrative, as opposed to practical dealings with staff and patients, the Claimant's evidence was that this was about 60%. She had in fact during 2018 started working in cafes on, we find, a fairly frequent basis because she found it easier to concentrate than working at the sites. She had not discussed this with the Respondent who was, we find, unaware until it had been going on for some time. When it did come to the Respondent's attention, she did not initially stop the Claimant doing this, although it was evident that she was not happy with the arrangement. She gave evidence of one occasion when staff had been looking for the Claimant and she had asked her to return to UBS to work.

17. The Respondent's evidence was that the Claimant's main purpose was to be the person on-site keeping the business operating to a high standard, with face-to-face management of staff, patient issues and being available to deal with such matters as possible inspections by the General Dental Council. She gave evidence, which we accept as it is plausible, that the Claimant's absences from the office and erratic timekeeping had an impact on her and

other staff. It was demotivating for the team. The Respondent acknowledged that the fact that the Respondent operates from three sites inevitably meant that the Claimant would not necessarily be on site to deal with problems, but the Respondent considered that the delay in travel between sites was acceptable. The Respondent considered that any longer delay (eg the 45 minutes that the Claimant later said it would take her to get there from home) was not reasonable.

The Claimant's mental health

18. The Occupational Health (OH) Report of 12 June 2018 indicates that the Claimant has had a history of depression and anxiety. She was diagnosed with generalised anxiety disorder in her early twenties. Her mental health has over the years been episodic in nature with bad episodes every three months or so lasting for up to a week at a time. More recently (since the events of these proceedings), she has been diagnosed with bipolar affective disorder.

19. The Claimant in her witness statement for these proceedings described (and we accept) how at times when she was working for the Respondent her condition would cause severe anxiety and panic symptoms in the mornings. She would take a lot of time to get out of bed and the process of getting ready for work often caused high anxiety and she would take longer than most people. This meant that having to get to work for an 8.30am start was very difficult on some days. She would try to get to work on time, but it became very challenging when her condition was at its worst. She would also develop an aversion to loud noises and crowds so that being on the underground would be very uncomfortable and on occasion would trigger a panic attack.

Relevant events during the Claimant's employment

20. In September 2016 the Claimant returned to work after 4.5 days absence for anxiety and depression. She met with the Respondent and a Return to Work (RTW) form was completed (p 154). This notes that the absence was partly work-related because the Claimant felt under pressure. The Respondent is noted as saying that she wished the Claimant had told her sooner so she could have helped her.

21. On 15 March 2017 the Claimant made a formal flexible working request to compress her hours so that she was doing 5 days work over 4 days (p 184). She explained that her reasons for doing so were *"related to [her] need to make a change to [her] current work/life balance, whilst still wanting to continue with my responsibilities at Smile Hub … without it causing 'burnout' or detrimental mental health in the future"*.

22. The Respondent refused that request on Friday, 7 April 2017, stating that the reason for refusal was because of the needs of business in terms of patient care and service (p 188). This was a short email and no right of appeal was

offered. The Claimant accepted that decision and did not press for it to be changed.

23. The Claimant was not at work the following Monday and Tuesday (10 and 11 April 2017). The RTW form (p 156) records the reason for this as gastritis. It was not said itself to be mental health-related although the previous absence was. The Claimant said it was not connected with work.

24. In October 2017 the Claimant had 15 days off sick with anxiety and depression. The RTW form (p 158) indicates the Claimant requested flexibility with start time and a need to manage stress levels at work. Action to be taken is recorded as *"flexibility to start later 9.30am to 5.30pm or 6pm"* and *"may do 4 day weeks"*. There is no record beyond this RTW form of any formal agreement to flexibility in start times, but we note from the attendance record at p 141 that in practice the Claimant was late on a number of occasions after this.

25. On 27 January 2018 the Claimant and Respondent had an *"informal discussion"*, the outcome of which was recorded in a letter from the Respondent to the Claimant of 1 February 2018 (p 64). This indicates the Respondent's *"concerns regarding your conduct"* and raises the Claimant's high level of sickness absence, totalling 7 days in the last year. The letter does not explicitly state that the 15 days' absence for anxiety and depression has not been counted in this, but evidently it was not. We find that this was therefore an adjustment which the Respondent made for the Claimant at this point, by not counting as unacceptable absence that was attributable to the condition that the Claimant now relies on as a 'disability' in these proceedings.

26. Following this discussion, the Respondent started keeping a note of the Claimant's leave. From those notes (p 65) it is apparent that the Claimant's attendance and time-keeping deteriorated towards the end of May 2018. Various reasons were given by the Claimant for this including not only mental health, but also transport problems, visit from mother, and other sickness such as a stomach problem.

27. On 25 May 2018 the Claimant had a panic attack at work and went home at 11am. The RTW form completed on 29 May 2018 (p 160) indicated that the Claimant was again asking for flexibility with hours and that she was feeling under pressure at work and felt her work load had increased. The Respondent was not sure what to do about the situation. The Claimant suggested a referral to OH and the Respondent agreed.

28. On 12 June 2018, the Claimant had a conversation on the phone with OH, who subsequently provided a report (p 66). The report confirmed that the Claimant was likely to be disabled within the meaning of the EA 2010. It said that she was *"fit to work with some adjustments"*. It said that there was an underlying condition affecting her ability to work and that *"In a work context, during a recurrence of depressive symptoms, she can struggle to get to work on time as she finds it difficult getting going first thing in the mornings and her*

attendance can also be affected". It recommended recording disability-related absences separately to other absences and adjusting absence trigger points if that could be accommodated. It also stated *"It is recommended that you explore any opportunities for possible flexible working arrangements such as flexibility with start times and working from home as this may result in improved attendance and productivity rather than sickness absence from work as she may be able to start later or be able to function as lower level such as completing administrative duties for that day"*.

29. After receipt of this report it is apparent from the Respondent's contemporaneous notes (p 145) that the parties discussed and agreed a change in start time from 8.30am to 9am, but that the Claimant continued to come in later than that on a number of occasions.

30. By letter dated 12 July 2018 (p 70) the Respondent invited the Claimant to what was called a *"medical capability meeting"* the purpose of which was stated to be to discuss: the Claimant's attendance; the OH report; whether there were any reasonable adjustments that could be made to the Claimant's job or the workplace; and whether there was any alternative employment available that would be suitable for her. It stated that the Claimant had the right to be accompanied to that meeting.

31. The Claimant had suggested that in advance of this meeting she had made a specific request for reasonable adjustments, but there is no documentary evidence to support this and we are not satisfied that a specific request (beyond the matters set out above) was made.

32. The meeting took place on 13 July 2018. It was conducted by Graham Hall, an external consultant appointed by Peninsula (the HR advisors which the Respondent has on a retainer to provide such services). The Respondent herself attended the meeting, but as a scribe, and was told by Mr Hall not to talk. After the meeting with the Claimant, Mr Hall spoke separately to the Respondent. Since it has been a matter about which the Claimant has complained, we record here that in our judgment there is nothing untoward in this. To the extent that this was a quasi grievance process, we would expect the investigator to speak to both parties separately. What was odd was that the Respondent was a scribe in the Claimant's meeting, but that is a consequence of the size and administrative resources of the organisation and was an arrangement agreed between the parties. In any event, there was no substantive unfairness arising from the process adopted because the Claimant was familiar with the nature of the business and was well placed at the meeting with Mr Hall to argue her case without input from the Respondent. She also had an opportunity to challenge what the Respondent said to Mr Hall afterwards at the appeal stage.

33. Having reviewed the minutes of the meeting, we find that the Claimant was asking generally for adjustments to include flexibility in start times and working from home. She was not specific as to how frequently she wished to work from home, or as to specific hours she wished to work. The notes (which are not disputed) show that she said that she felt the slightly later start already

agreed helped her anxiety and that she was working on getting to work on time as she was aware it was a problem. She said that she would like to work from home and that she believed this was doable and reasonable. She said that it would allow her to *"decompress"* if it was a day that V was available.

34. Mr Hall produced a report following the meeting (p 77). In his report he made a number of recommendations for consideration by the Respondent. In particular:

    a. At paragraph 27, he said *"As [the Claimant] has confirmed that a slightly later start time has helped her anxiety, it is recommended that this arrangement should continue on a permanent basis. [The Claimant] currently takes half an hour for lunch to make up the time. It is imperative that [the Claimant] arrives at or before 9am each day to ensure that the staff are aware that [the Claimant] will be in work at a particular time. If [the Claimant] feels unable to attend work at or by 9am because she feels unwell, it will be necessary for her to take sick leave."*

    b. At paragraph 28: *"A notice of improvement should be provided to [the Claimant] regarding her lateness and sickness levels."*

    c. At paragraph 30: *"The practice does not have a policy of home working, particularly for the Practice Manager where it is considered that the presence of the Practice Manager is necessary to cover 3 locations and manage staff and processes effectively. However [the Respondent] is prepared in this instance to assist [the Claimant] and consider a trial period whereby [the Claimant] can work from home every second Wednesday. This can only be accommodated if there is support available at the practice of a suitably qualified and experienced member of staff on that particular day. It can only be agreed on the basis that if it is necessary for [the Claimant] to attend meetings or for [the Claimant] to attend the practice personally, that she will do so. [The Claimant] confirmed that it would take her 45 minutes to attend the practice and she would be prepared to attend if required. This adjustment will be reviewed following a period of 3 months to determine if it is effective and whether this adjustment should continue or be varied"*.

35. Following receipt of these recommendations, the Respondent sent the Claimant a letter on 23 July 2018 (p 89) which enclosed a copy of Mr Hall's report and included the following:

    "Taking into consideration everything we discussed in the meeting, I would like to confirm that the following adjustments are made:

    - *Your start time is permanently changed to 9am.*
    - *That we trial a work from home day on a Wednesday twice a month provided we have appropriate cover available as suggested in the report.*

The change to home working will represent a temporary variation to your role and I will review the arrangement with you in 3 months time on the 20th of October to assess if this has been of benefit.

I would, however, emphasise that if you are struggling with the arrangements at any time you must inform me immediately and not wait until the review meeting.

In addition, the Company cannot continue to support the level of lateness and absences. We therefore require you to improve your attendance by being absent no more than 3 instances in total (other than for permitted reasons) over the next 3 of months [sic], as well as no lateness given the reasonable adjustments stated above.

The reasonable adjustments will be provided to help you to achieve and sustain the required improvement in your attendance.

If you do not meet the required improvement in attendance set out above, this may lead to a written warning."

36. The letter offered the Claimant a right of appeal.

37. On 24 July 2018 the Claimant posted on her Facebook account (p 92) asking for assistance with 'an employment law issue'. In a series of posts, she criticised her employer (which she does not identify in the material we have seen, although it may have been known to her friends) for the handling of the flexible working request and for its approach to dealing with mental health issues.

38. By a (misdated) letter sent on 30 July 2018 (p 101) the Claimant indicated that she was content the medical capability hearing had been held in a professional and impartial manner, but that she wished to appeal. She identified her grounds of appeal as being (in substance): (1) that she was being required to be in by 9am or take sick leave; and (2) that she should have been permitted to work from home one day each week not twice a month. She also sought reassurance that lateness or absence as a direct result of her mental health would be recorded separately to other leave reasons and that disciplinary procedures would not be pursued in relation to any absences or lateness as a result of her mental health.

39. By letter of 3 August 2018 (p 106) the Respondent invited the Claimant to an appeal which was to be held by another Peninsula-appointed consultant.

40. 7 August 2018 was the last day that the Claimant actually attended work. Thereafter, she was on sick leave.

41. The appeal meeting took place on 10 August 2018, chaired by Paul Baker (Peninsula-appointed consultant). The notes of this (p 110) record that: *"Difference between capability and disciplinary was clarified. Record it separately and use the capability not the disciplinary"*.

42. Mr Baker produced a report on 15 August 2018 (p 113). This recommended no change to the original outcome and that the appeal should be dismissed. Mr Baker clarified that it had been agreed that all lateness should be recorded, with lateness due to mental health being recorded separately (paras 84-85). So far as the request to work from home one day every week was concerned, Mr Baker observed (para 50) that *"on consideration of [the Claimant's] role and on consideration there are only sixteen employees in the organisation, inclusive of [the Respondent]. On the balance this will have impacts on [the Respondent's] workload, patient service, and employee's ability to obtain face to face support where required. Therefore, it would have been reasonable to consider 'any' time spent away from the premises to be unreasonable".* He further noted that as working from home had not yet been tried there was no evidence to show that this would benefit the Claimant and her mental health. He recommended that it should be tried.

43. Mr Baker's report also included the following, about which the Claimant complains in these proceedings:

> *"45. [The Respondent] explained on occasion V has supported supported [the Respondent] in covering [the Claimant's] role, however, it was explained that V does not wish to do this role as she works reduced hours due to childcare commitments and does not wish to have any stress. …. [The Respondent] stated there is a legitimate risk of V resigning if she was 'forced' to conduct [the Claimant's] role once every week as well as any other required times, such as annual leave or when [the Claimant] is sat on the GDC.*
>
> *46. [The Respondent] explained in [the Claimant's] absence she personally has to pick up aspects of [the Claimant's] role, dealing with patients, and any ad-hoc operational issues that arise. [The Respondent] also conducts two days of clinical work a week and the other three days are used for operating the business, administrative duties, strategic work and all other aspects of running a business.*
>
> *47. [The Respondent] stated she has previously been interrupted in clinical sessions due to the absence of [the Claimant] …*
>
> *48. [The Respondent] explained although she will have a greater workload, she would like to support [the Claimant] and will speak to V to provide greater support…."*

44. We find that the points included in the report about V here reflect the evidence that the Respondent has repeated in these proceedings, and which in broad terms we accept, about the likely impact on both V and herself of the Claimant working from home. We accept that the Respondent was in a good position given past conversations with V to make a judgment about likely impact on V and did not need to discuss this request with her specifically. We find that it is inevitable that the Claimant working from home would have had an impact in particular on V and the Respondent. It is going too far to suggest that V

would have been 'forced' to conduct the Claimant's whole role if the Claimant was working from home, but in practice if the Claimant was not in the offices, V would have become the first port of call in the event of issues arising. It was (the Respondent accepted) part of V's job description to deputise for the Claimant, so in that sense, she would have been 'forced' and we consider that the Respondent's reference to and reliance on this as part of the reasons for refusing the Claimant's request to work at home every day of the week was reasonable. Likewise, the Respondent could reasonably infer from her knowledge of V that there may be a risk of her resigning. The fact that it was part of V's job description makes no difference to that assessment. The possibility of V resigning was in our judgment a relevant consideration.

45. By letter of 18 August 2018 (p 130) the Respondent sent the Claimant a copy of Mr Baker's report and confirmed the original decision would stand.

46. By letter of 22 August 2018 (p 131) the Claimant resigned. She referred to the refusal of her request to work 1 day from home per week for which she considered that insufficiently cogent reasons had been given. She complained about the Medical Capability Procedure that had been adopted which she said had led to a deterioration in her mental health condition. She gave 1 month's notice.

47. During the notice period the Claimant did not attend work as she was certified sick. She was paid sick pay, although the Respondent subsequently accepted this should have been full pay and paid it.

48. In early September 2018 the Respondent received an electronic notice that a device she was not familiar with had tried to access the Respondent's google drive. She did not know (and still does not know) whether this was the Claimant, but at the time we find that she suspected it was as she messaged the Claimant about it and, on advice from IT support, she changed the password on 7 September 2018 (a date we get from the email at p 191).

49. On 10 September 2018 the Claimant contacted the Respondent to complain that she was no longer able to access the Googledrive and she wanted to look at her holiday sheet. The Respondent did not restore the Claimant's access because that would have involved giving her access to all the Respondent's confidential client and business records, but she did send her the holiday sheet and offered to send her anything else she needed. The Claimant asked why she was not being given access to the full drive and the Respondent replied to the effect that she did not need it any more. In her witness statement she said that did not allow the Claimant access to the systems due to the manner of her departure.

50. On 20 September 2018 the Claimant was sent her personnel file by the Respondent (p 134).

51. Her employment terminated on 21 September 2018.

Conclusions

<u>Reasonable adjustments</u>

The law

52. Under s 20 of the Equality Act 2010 (EA 2010), read with Schedule 8, an employer who applies a provision, criterion or practice ('PCP') to a disabled person which puts that disabled person at a substantial disadvantage in comparison with persons who are not disabled, is under a duty to take such steps as are reasonable to avoid that disadvantage. Section 21 provides that a failure to comply with a duty to make reasonable adjustments in respect of a disabled person is discrimination against that disabled person. By section 212(1), 'substantial' means 'more than minor or trivial'.

53. The Respondent had conceded in advance of the hearing that the Claimant is disabled within the definition in s 6 of the EA 2010. At the hearing the Rs further conceded that at the relevant time it had both knowledge of the Claimant's disability and the substantial disadvantage to which she claims it put her (as required by para 20 of Sch 8).

54. In considering a reasonable adjustments claim, a Tribunal must identify: (a) the provision, criterion or practice applied by or on behalf of an employer, or (b) the physical feature of premises occupied by the employer, (c) the identity of non-disabled comparators (where appropriate) and (d) the nature and extent of the substantial disadvantage suffered by the claimant: *Environment Agency v Rowan* [2008] ICR 218, EAT at para 27 *per* Judge Serota QC. The Tribunal must also identify how the adjustment sought would alleviate that disadvantage: *ibid,* at paras 55-56.

55. The concept of a PCP does not apply to every act of unfair treatment of a particular employee. A one-off decision can be a practice, but it is not necessarily one; all three words connote a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again: *Ishola v Transport for London* [2020] EWCA Civ 112 at para 38 *per* Simler J.

56. The duty to make reasonable adjustments may (indeed, frequently does) involve treating disabled people more favourably than those who are not disabled: cf *Redcar and Cleveland Primary Care Trust v Lonsdale* [2013] EqLR 791.

57. What is reasonable is a matter for the objective assessment of the Tribunal: cf *Smith v Churchills Stairlifts plc* [2006] ICR 524, CA. The Tribunal is not concerned with the processes by which the employer reached its decision to make or not make particular adjustments, nor with the employer's reasoning: *Royal Bank of Scotland v Ashton* [2011] ICR 632, EAT.

58. Carrying out an assessment or consulting an employee as to what adjustments might be required is not of itself a reasonable adjustment: *Rider v Leeds City Council* [2013] Eq LR 98, EAT, *Tarbuck v Sainsbury's Supermarkets Ltd* [2006] IRLR 664, EAT.

59. Although the EA 2010 does not set out a list of factors to be taken into account when determining whether it is reasonable for an employer to take a particular step, the factors previously set out in the Disability Discrimination Act 1995 are matters to which the Tribunal should generally have regard, including but not limited to:

    a. The extent to which taking the step would prevent the effect in relation to which the duty was imposed;
    b. The extent to which it was practicable for the employer to take the step;
    c. The financial and other costs that would be incurred by the employer in taking the step and the extent to which it would disrupt any of its activities;
    d. The extent of the employer's financial and other resources;
    e. The availability to the employer of financial or other assistance in respect of taking the step;
    f. The nature of the employer's activities and the size of its undertaking;
    g. Where the step would be taken in relation to a private household, the extent to which taking it would: (i) disrupt that household or (ii) disturb any person residing there.

60. Under s 136 EA 2010, the Claimant bears the burden of establishing a prima facie case that the duty to make reasonable adjustments has arisen and that there are facts from which it could reasonably be inferred, in the absence of an explanation, that the duty has been breached. There must be evidence of some apparently reasonable adjustment which could be made, at least in broad terms. In some cases the proposed adjustment may not be identified until after the alleged failure to implement it and this may even be as late as the tribunal hearing itself: *Project Management Institute v Latif* [2007] IRLR 579, EAT.

Conclusions

61. The Claimant has identified the PCP in this case in two different ways: first, as a requirement to work in the office rather than at home; secondly, as a requirement to work in the office for 9 days in every fortnight. We accept that these constituted PCPs. We consider the case by reference to each PCP.

62. The nature and extent of the alleged disadvantage in this case is, we find, that the Claimant when in a depressive episode had greater difficulty than a non-disabled person with getting up and travelling to work. Sometimes she was too ill to attend work at all, but generally she managed to do so, albeit with some lateness.

63. Viewing the case through the prism of the first PCP, we accept that this put the Claimant at a substantial disadvantage. It was more than minor or trival. But the Respondent took two steps toward removing that disadvantage: (1) moving the Claimant's start time from 8.30am to 9am; and, (2) proposing a trial period of three months (with an option for earlier review) of working from home twice a month, provided that the Respondent had appropriate cover available as suggested in Mr Hall's report (i.e. support available at the practice of a suitably qualified and experienced member of staff on that particular day and if it is necessary for the Claimant to attend meetings or for her to attend the practice personally, that she will do so within 45 minutes). Further, this proposal was to be subject to earlier review if the Claimant was *"struggling with the arrangements at any time"*.

64. We find that those adjustments would have alleviated the disadvantage to some extent.

65. The Claimant says that the Respondent should have taken the further step of allowing her to work from home 1 day every week. However, we find that the adjustment in start time had the most direct relationship to the disadvantage suffered because it was an adjustment to be made every day of the week. The home-working would be of assistance if that was a day on which the Claimant was having a particularly bad episode, but would not assist if a bad episode coincided with a day on which she was supposed to be in the office. We can appreciate that allowing working from home once every week rather than once every two weeks might increase the chances of the particular disadvantage being avoided, but on the other hand it might not.

66. Further, we find that given the size and administrative resources of the Respondent, the proposal to try working home for a trial period every other week was a reasonable one. This is in particular because it is apparent that the face-to-face aspects of the Claimant's role were very important. As the Claimant accepted on a normal day she would have personally to be in each office at least once, sometimes more frequently. Even if she could come in within 45 minutes, her absence from the offices would still mean that in practice the Respondent and/or V would inevitably have to provide cover for her in terms of dealing with incidents as they arose. In a small business such as this, we consider that this placed an unreasonable burden on other employees, in particular on the Respondent herself (who may have to interrupt clinical work) or on V (who we accept the Respondent reasonably judged might resign if required to provide cover more frequently).

67. It follows that, viewing the case through the prism of the first PCP, we conclude that the adjustments the Respondent were made were reasonable and it would not have been reasonable to make the further adjustment sought by the Claimant because we are not satisfied that it would have made any difference to the substantial disadvantage suffered and the possibility that it might sometimes have alleviated that substantial disadvantage was outweighed by the extent of the impact that the further adjustment would have had on the Respondent's business.

68. If we consider this claim by reference to a PCP of working at home 9 days every fortnight, then our findings above mean that we are not satisfied on the balance of probabilities that this placed the Claimant at a substantial disadvantage in relation to non-disabled persons because of the lack of clear link between the Claimant's difficulties in attending work and being able to work from home on a specific day each week. Even if we are wrong about that, we find for the reasons we have given that it would not have been reasonable to make a further adjustment to this arrangement. What was offered by the Respondent was reasonable.

69. It follows that the reasonable adjustments claim fails.

Discrimination arising from disability

The law

70. In a claim under s 15 of the EA 2010, the Tribunal must consider:
    a. Whether the claimant has been treated unfavourably;
    b. Whether the unfavourable treatment is because of something arising in consequence of the employee's disability;
    c. Whether the employer knew, or could reasonably have been expected to know, that the employee or applicant had the disability relied on.

71. There are two aspects to causation under s 15. First, the Tribunal must identify what caused the unfavourable treatment. This involves focussing on the reason in the mind of the alleged discriminator. Secondly, the Tribunal must determine whether that reason was something arising in consequence of the Claimant's disability. That is an objective question and does not involve consideration of the mental processes of the alleged discriminator: *Pnaiser v NHS England and anor* [2016] IRLR 170, EAT.

72. An employer has a defence to a claim under s 15 if it can show that the unfavourable treatment was a proportionate means of achieving a legitimate aim. Assessing proportionality involves an objective balancing of the discriminatory effect of the treatment and the reasonable needs of the party responsible for the treatment: *Hampson v Department of Education and Science* [1989] ICR 179, CA.

73. If there is a link between reasonable adjustments said to be required and the disadvantages or detriments being considered in the context of indirect discrimination and/or discrimination arising from disability, any failure to comply with the reasonable adjustments duty must be considered 'as part of the balancing exercise in considering questions of justification' and it is unlikely that a disadvantage that could be alleviated by a reasonable adjustment will be justified: *Dominique v Toll Global Forwarding Ltd* (UKEAT/0308/13/LA) at para 51 *per* Simler J.

74. Again, the burden of proof is on the Claimant initially under s 136(1) EqA 2010 to establish facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent has acted unlawfully. The burden then passes to the Respondent under s 136(3) to show that the treatment was not unlawful.

Conclusions

75. In this case, the alleged unfavourable treatment is:

    a. Not allowing the Claimant to work from home every week;
    b. Referring to another employee in the appeal stage, and informing the Claimant that there was a risk that the other employee could resign if the Claimant was entitled to work from home weekly;
    c. Informing the Claimant that should there not be an improvement in her attendance, further action may be taken.

76. As to the first, we do not consider that this claim works as a s 15 claim. Applying the approach in *Pnaiser*, we have first considered why the Respondent refused to allow the Claimant to work from home every week, and we find that it is because of the needs of the Respondent's business. That is not something that arises in consequence of the Claimant's disability. The fact that the Claimant made the request because of something arising in consequence of her disability is not enough to make everything that happens in response to, or in the course of dealing with that request, discrimination arising from disability. To use the statutory language, the Respondent's refusal of the request is unfavourable treatment because of something (the Claimant's request) that is done because of something (the Claimant's difficulties in getting up and getting to work) that arises in consequence of the Claimant's disability (generalised anxiety disorder). There are too many links in the causal chain.

77. The same point deals with the second s 15 claim. The Respondent's reason for referring to V's needs in the course of the appeal was something she did because of the needs of the business. That is not something that arises in consequence of the Claimant's disability.

78. The third s 15 claim is different, however. The Respondent saying in the letter of 23 July 2018 that if her attendance did not improve by "being absent no more than 3 instances in total *other than for permitted reasons* over the next 3 months as well as no lateness … may lead to a written warning" is unfavourable treatment. It is a decision taken by the Respondent because of the Claimant's poor absence record and timekeeping, which is something that arises because of her disability. The burden then shifts to the Respondent to show that it was a proportionate means of achieving a legitimate aim.

79. We accept the Respondent had a legitimate aim in imposing that requirement of securing reasonable levels of attendance and punctuality at work. We consider this was proportionate because:

    a. The threat was merely of a written warning, not anything more serious, and there had been a previous informal warning in February 2018;
    b. The requirement to improve allowed for a reasonable amount of absence (3 occasions in 3 months), as well as other absences 'for permitted reasons', which was we find clarified during the course of the appeal as meaning that absence for mental health reasons would be treated differently, as it had been by the Respondent previously;
    c. The Claimant's start time had already been adjusted so that she was only required now to be in by 9am each day (and not until 1.30pm on Thursdays);
    d. The Respondent had agreed to 1 day working from home every other week which should also have made things easier for the Claimant going forward;
    e. OH's recommendation for flexibility in start times and homeworking had, in our judgment, been sufficiently implemented through the adjustments offered by the Respondent. We do not read the OH report as indicating that it would have been a reasonable adjustment to allow the Claimant to be late by variable amounts each day; and,
    f. The Respondent had a genuine business need as we have found for its Practice Manager to be in the office during its core hours of 9am-5pm and it had already made significant adjustments to that requirement in seeking to meet the Claimant's needs.

80. It follows that the s 15 claim fails.

<u>Victimisation</u>

The law

81. Under ss 27(1) and s 39(2)(c)/(d) EA 2010 and s 39(2)(c)/(d), the Tribunal must determine whether the Respondent has treated the Claimant unfavourably by subjecting her to a detriment because she did, or the Respondent believed she had done, or may do, a protected act. A protected act includes (so far as relevant in this case) doing anything for the purposes of or in connection with the EA 2010 (s 27(2)). In deciding whether the reason for the treatment was the protected act, the Tribunal must determine *"what, consciously or unconsciously, was the reason"* for the treatment (*Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48, [2001] ICR 1065 at para 29 *per* Lord Nicholls). The protected act must be a material (i.e non-trivial) influence or factor in the reason for the treatment (*Nagarajan v London Regional Transport* [1999] ICR 877, as explained in *Villalba v Merrill Lynch & Co Inc* [2007] ICR 469 at paras 78-82).

82. A detriment is something that a reasonable worker in the Claimant's position would or might consider to be to their disadvantage in the circumstances in

which they thereafter have to work. Something may be a detriment even if there are no physical or economic consequences for the Claimant, but an unjustified sense of grievance is not a detriment: see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] ICR 337 at paras 34-35 *per* Lord Hope and at paras 104-105 *per* Lord Scott. (Lord Nicholls (para 15), Lord Hutton (para 91) and Lord Rodger (para 123) agreed with Lord Hope.)

83. Again, the burden of proof is on the Claimant initially under s 136(1) EqA 2010 to establish facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent has acted unlawfully. The burden then passes to the Respondent under s 136(3) to show that the treatment was not unlawful. This does not mean that there is any need for a Tribunal to apply the burden of proof provisions formulaically. In appropriate cases, where the Tribunal is in a position to make positive findings on the evidence one way or another, the Tribunal may move straight to the question of the reason for the treatment: *Hewage v Grampian Health Board* [2012] UKSC 37, [2012] ICR 1054 at para 32 *per* Lord Hope.

Conclusions

84. The issues for us are:

    a. Did the Claimant do a protected act? If so, when and how?

    b. Was she subjected to a detriment because she did so in respect of:
        i. Being threatened with disciplinary action;
        ii. Being subjected to medical capability procedure; and/or
        iii. Being denied access to the Respondent's computer systems.

85. The Claimant did a protected act within the meaning of s 27(2)(c) of the EA 2010 during July 2018 when she requested for reasonable adjustments to be made for her in according with the Respondent's duty under ss 20 and 21 of the EA 2010.

86. As to the first allegation of victimisation (being threatened with disciplinary action), the Claimant was not 'threatened with disciplinary action' (a written warning) because she had made a request for adjustments, but because of her history of poor attendance and timekeeping. That is not victimisation.

87. As to the second allegation (being subjected to medical capability procedure), in our judgment it is unfortunate that the Respondent labelled the process that it adopted in response to the Claimant's request for reasonable adjustments a 'medical capability procedure', but the fact remains that there needed to be a meeting and a decision made and in substance the process adopted was appropriate. In our judgment it is not reasonable for the Claimant to have regarded the process itself as a detriment. In any event, we do not consider that the fact that this was a request for reasonable

adjustments under the EA 2010 rather than an ‘ordinary’ flexible working request (which would not have been a protected act) made any difference to the process adopted. In other words, the reason for the treatment complained of was not the protected act.

88. As to the third allegation (denial of access to the computer systems), we are not satisfied that this was a detriment as the Claimant had no reason to have access to the Respondent’s computer systems while on sick leave during her notice period and this did not therefore affect her in the circumstances in which she was required to work. What information she asked for she was provided with. In any event, we again do not consider that the fact that this was a request for reasonable adjustments under the EA 2010 rather than an ‘ordinary’ flexible working request made any difference to the process adopted. In other words, the reason for the treatment complained of was not the ‘protected act’.

<u>Constructive unfair dismissal</u>

The law

89. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is taken to be dismissed by his employer if “the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct”.

90. It is well established that: (i) conduct giving rise to a constructive dismissal must involve a fundamental breach of contract by the employer; (ii) the breach must be an effective cause of the employee’s resignation; and (ii) the employee must not, by his or her conduct, have affirmed the contract before resigning.

91. Not every breach of contract is a fundamental breach: the conduct of the employer relied upon must be *“a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract”*: *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761. The assessment of the employer’s intention is an objective one, to be judged from the point of view of a reasonable person in the position of the claimant. The employer’s actual (subjective) motive or intention is only relevant if *“it is something or it reflects something of which the innocent party was, or a reasonable person in his or her position would have been aware and throws light on the way the alleged repudiatory act would be viewed by such a reasonable person”*: *Tullett Prebon v BGC Brokers LLP and ors* [2011] EWCA Civ 131, [2011] IRLR 420 at para 24 per Maurice Kay LJ, following Etherton LJ in *Eminence Property Development Ltd v Heaney* [2010] EWCA Civ 1168, [2011] 2 All ER (Comm) 223, at para 63.

92. In this case the complainant relies on breach of the implied term recognised in *Malik v Bank of Credit and Commerce International* [1998] AC 20 that the

employer should not, without reasonable and proper cause, conduct itself in a way that is calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence that exists between an employee and her employer. Both limbs of that test are important: conduct which destroys trust and confidence is not in breach of contract if there is reasonable and proper cause. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract because the essence of the breach of the implied term is that it is (without justification) calculated or likely to destroy or seriously damage the relationship: see, for example, per Browne-Wilkinson J in *Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666, 672A and *Morrow v Safeway Stores* [2002] IRLR 9.

Conclusions

93. In this case the Claimant contends that the Respondent's refusal to make a reasonable adjustment and threats of disciplinary action constituted a repudiatory breach of her contract of employment. However, it follows from our findings in relation to her other claims above that we do not consider the Respondent's conduct in this regard was calculated or likely seriously to destroy or damage the relationship between employer and employee, or that (if it was), there was reasonable and proper cause for that because the Respondent's actions were a reasonable and proportionate response to the situation that had arisen.

94. The Claimant's constructive unfair dismissal claim therefore also fails.

Overall conclusion

95. The unanimous judgment of the Tribunal is each of the Claimant's claims should be dismissed.

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Employment Judge Stout

20 March 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

23/3/2020

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FOR THE TRIBUNAL OFFICE