EMPLOYMENT TRIBUNALS

Claimant: Mrs K Redpath

Respondent: YMCA St Pauls Group

Heard at: London South via CVP **On: 17, 18 , 21 September 2020 and in chambers 22 and 23 September 2020**

Before: Employment Judge Khalil sitting with members
Mr Shaw
Mr Sher

Appearances

For the claimant: in person
For the respondent: Mr McDevitt, Counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is:

a) The claims for disability discrimination under S.15 and 20/21 of the Equality Act 2010 are not well founded and are dismissed.

b) The claim for constructive unfair dismissal under S.95/98 Employment Rights Act 1996 is not well founded and is dismissed.

<u>Reasons</u>

<u>Appearances, claims and documents.</u>

1. By a claim form presented on 20 March 2019, following ACAS early conciliation between 4 February 2019 and 18 March 2019, the claimant brought a complaint of constructive unfair dismissal and disability discrimination.

2. The claimant had received legal support for her claim but represented herself at the hearing. Her husband was present with her for support.

3. The respondent was represented by Mr McDevitt, Counsel.

4. The Tribunal had an agreed bundle of documents just under 500 pages. A small number of documents were added to the bundle by both parties with the permission of the Tribunal.

5. The claimant had called 2 witnesses to give evidence – Ms Sherry Lawrence and Ms Charmagne Bogle in addition to her own evidence.

6. The respondent called 3 witnesses – Mr Stuart Creed (Strategic Lead in Health & Wellbeing), Mr Richard James (Chief Executive) and Ms Marjorie James (Director of People and Services).

7. All witnesses had produced a witness statement.

8. The hearing was conducted by CVP and regular breaks were accommodated to avoid CVP fatigue. In addition, having regard to the claimant's health, the Tribunal accommodated further irregular breaks as and when required or when she became distressed. The claimant had asked for questions to be broken down or repeated where required which was accommodated by the Tribunal and applied by the respondent's counsel. The claimant also became distressed towards the latter part of her cross examination. The Tribunal had 2 breaks within an hour and offered the claimant to stop the hearing until after the weekend as it was a Friday. However, the claimant was very keen for her cross examination to be completed. With a steer on proportionality, Mr McDevitt was able to complete his questions within 15 minutes thereafter. The Tribunal also agreed, in the circumstances, to convert the hearing into a split hearing to avoid further questioning of the claimant and to avoid the claimant having to address the Tribunal in submissions on remedy on day 3 (Monday 21 September 2020). This was explained and agreed by both parties. The claimant was also afforded overnight preparation of her submissions following the respondent's delivery of its submissions shortly after the evidence was completed. The Tribunal considered this to be fair and just in pursuance of the overriding interest as the claimant was a litigant in person and found the litigation distressing.

9. There had been more than one case management hearing. At the last one on 29 January 2020, the list of issues were agreed and set out (pages 54-61). The claimant had, however, since then withdrawn her direct disability discrimination complaint.

10. During the course of the hearing, the Tribunal sought to clarify and re-shape the alleged 'PCPs' relied upon in relation to the second broad alleged PCP which was that the respondent did not make four adjustments as recommended by Occupational health. These were stated as follows without objection from either party:

    - To work from the office 'PCP 1'
    - To work in an open plan environment, when in the office 'PCP 2'

- To carry out her contracted management hours (24) without a reduction in hours 'PCP 3'
- To perform her management role and not to perform her clinical activities during her phased return 'PCP 4'

Relevant Findings of Fact

11. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence given by witnesses during the hearing, including the documents referred to by them, and taking into account the Tribunal's assessment of the witness evidence.

12. Only relevant 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, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence.

13. The claimant was employed as Head of Counselling until her resignation on 1 November 2018. The claimant had founded the Release counselling service. This was a charity providing psychological support services to the community. This was subsequently acquired by YMCA London SW and there was subsequently a merger between YMCA London SW and YMCA East London which became the respondent.

14. The claimant had a part time contract (24 hours). The contract was at pages 75-80. Whilst the claimant said it was to work 'at least' 24 hours, the Tribunal found that to be a difference without substance as there was no evidence that the claimant did in fact do more than 24 hours of her management role. This was a management role to lead, develop and maintain the Release counselling service which comprised mainly of volunteer counsellors. The job description was at page 83-85.

15. In addition, and separately to her contracted management role, the claimant undertook clinical supervision of the volunteer counsellors and delivering some counselling/therapy support herself too. This was outwith her contract of employment. It was better paid (significantly).

16. The claimant resides on the Isle of Wight. The claimant's role was based in Surbiton. She stayed with family members in the Surbiton/Chessington area although this arrangement changed towards the end of her employment with the respondent.

17. The claimant was line managed by Mr Creed from August 2017. Before Mr Creed, the claimant reported to Gina King, who was made redundant in May 2017.

18. Mr Creed identified a need for the claimant to re-focus on her management role, including the formation of business and development plans and strategic direction. There was also a concern about the cost of continuing to provide support from the New Life Church in Surbiton because of the new rates for room hire from January 2018.

19. The respondent had undergone various changes to its organisation, mainly in relation to mergers. The respondent was keen to become more commercial to improve its sustainability.

20. The claimant wrote to Mr James on 13 November 2017, CEO about her professional concerns about the respondent. The letter was at page 105-108. The clamant felt the Release counselling was becoming invisible. The claimant expressed her view that the culture of health and well-being had changed dramatically from a family/spiritual mission to one based on strategy and business relational contact. The claimant had thought about resigning.

21. On 17 July 2018, the claimant had to deal with a threatened suicided incident by one of the clients of the counselling service. She completed a ‘cause for concern sheet’ on 19 July 2018 which was noted by the relevant staff member and then a safeguarding form. That evening she experienced a panic attack and sent a text to Mr Creed in this regard. Mr Creed replied by text the following day, a Friday. The text exchange was at pages 126-127. Mr Creed knew the claimant was on a non-working day (when he was responding the next day) and offered to discuss the matter with the claimant in their one to one catch up scheduled for the Monday after the weekend. The Tribunal found the text exchange to be professional and supportive and otherwise unremarkable.

22. The claimant also discussed the incident with HR and requested access to the employee assistance programme (‘EAP’) and was given their number. Mr Creed informed and updated Ms James of the situation too. The email exchange was at pages 128-129.

23. Mr Creed also met with the claimant on Monday 23 July 2018. In this meeting, the claimant confirmed she had met with her own clinical counsellor too on Monday. Further, that she had booked a GP’s appointment. The notes, at page 130-131, record that she stated she had felt better after 48 hours rest which the claimant disputed at the hearing. This had not been raised previously. The notes were contemporaneous. The Tribunal found the notes to be an accurate summary of the discussion. There was no reason for Mr Creed to record anything inappropriately, there was no formal dispute at that time and the statement in question was a particular rather than generic statement likely to be said. The claimant also expressed her disappointment about the eviction of a

YMCA Surbiton Hostel resident. The claimant said she was willing and capable to work which Mr Creed agreed to, but he limited her work to administration only and suggested she did not do client assessments for the next 2 weeks. Further, Mr Creed agreed for the claimant to work from home for the next two Thursdays. The claimant would be on holiday 3 August 2018 to 17 August 2018. Mr Creed agreed to schedule a meeting with the claimant's clinical supervisor upon her return from leave on 20 August 2018. There followed a discussion about the counselling support required for the client who had been talked out of suicide.

24. The claimant was signed off sick from 13 August 2018 for 4 weeks by reason of work stress related illness. Mr Creed spoke to the claimant on 23 August 2018 and agreed to speak with her week commencing 3 September 2018. Whilst Mr Creed attempted to call the claimant on 7 September 2018, they did not speak but did exchange emails (page 138).

25. The claimant was signed off sick, by reason of work-related stress for a further month on 10 September 2018. An occupation health referral was made by Ms James on 12 September 2018. In a call on 14 September 2018, the claimant said to Mr Creed that she wished to have a reduced/amended role to focus on clinical support. The claimant provided a return to work date of 9 October 2018.

26. The claimant had been critical of the EAP support provided by 'Health Assured'. This was taken up with the organisation by Ms James and Mr Creed. The emails were at page 142-148. Mr Creed kept the claimant informed in this regard.

27. A conversation took place between Mr Creed and Ireni Esler regarding putting in place measures to support the claimant's return. This included contracting Ms Esler, to provide 1) supervisory support for all 20 counsellors for the month of October, 2) to do the allocations work, 3) in relation to GDPR to write a flowchart outlining the safeguarding process and to 4) review the current 29 forms operating in Release and refine them to a more consistent and clear format and to forward them to the DPO for compliance against GDPR. The emails confirming these measures were at pages 150-151.

28. The claimant said in evidence that the first of the above measures was in relation to her supplementary clinical work. Further that the second measure was in relation to her management role. The respondent agreed with this evidence.

29. However, in relation to the third and fourth measures, the claimant's evidence was that these went to both her supplementary clinical work and her management role. The respondent disagreed and said these were in relation to her management role only. The Tribunal preferred the evidence of the respondent. The writing of a flowchart for GDPR compliance would be a management task, albeit requiring clinical know how. The same applied to the

review of 29 forms to be forwarded to the DPO for compliance against GDPR. These were not clinical supervision of counsellors' issues or the direct provision of therapy or counselling by the claimant. The Tribunal also had regard to the emails from both Mr Creed and Ms Esler.

30. The respondent's measures were at a cost of just under £3,000 to the respondent for the period in question which was not insignificant. The Tribunal found the claimant's evidence that this was to support the provision of service rather than to support the claimant to be insincere.

31. The claimant said she had requested a face to face occupational health appointment, but the respondent proceeded with a telephone appointment. A face to face appointment was offered but this was declined by the claimant as she said she would need to travel and was severely anxious and could be absolutely flat on her back some days. The Tribunal found that a telephone consultation was reasonable.

32. An occupational health report dated 6 October 2018 was received by the respondent. This followed a telephone consultation on the 1 October 2018.

33. It was accepted by Mr Creed that he had not seen a written copy when he had a return to work meeting with the claimant on 9 October 2018. However, Miss James had received and read it and the Tribunal accepted that Mr Creed had been informed of its contents by Miss James. Mr Creed did receive a copy subsequently. The claimant had also read it. Mr Creed had already put in place some pre-emptive measures with Ms Esler (above). The Tribunal found it would have been better and more professional if he had a copy of the report with him at the return to work meeting.

34. The OH report was at page 153-154. The claimant had consented to the release of the report. The report stated that the claimant had made a good recovery without medication, that she was able to return to work in about a week, the restructuring and redundancy of the health and wellbeing manager had added to her stress, the open plan environment was not conducive to her confidential work and she felt unsupported following the suicide incident. In relation to her medical history, her neck and shoulder problems were cited. The report stated much of the stress in her personal circumstances was linked to the commute to London and that the transport and accommodation consumed a large part of her salary. A recommendation was made for the claimant to work from home as much as possible, in particular to aid the confidentiality point. The report acknowledged that the claimant had benefitted from support from her clinical supervisor. A phased return was recommended and for the claimant to undertake clinical duties only for the first month, management thereafter.

35. The minutes of the return to work interview on 9 October 2018 were at page 155-157. Wenda Mooji from HR was also in attendance. The claimant challenged the accuracy of these minutes. The Tribunal noted that these were

taken by HR, contemporaneously at a time when there was no particular dispute between the claimant and the respondent. The claimant presented her annotated version of these minutes during the Hearing. Before doing so, the claimant had illustrated an example of inaccuracy in her evidence stating that she had said her head was 'clearer' not 'clear'. However, this change had not appeared in her manuscript change. The Tribunal observed that at least 2 changes made by the claimant linked her absence to the safeguarding incident in July 2018. Ultimately, the Tribunal concluded the minutes were a fair summary of the meeting. That was, after all, the role of the designated note taker from HR.

36. At this meeting the claimant said she started to feel better 3 weeks ago. The Tribunal found the claimant did say her head was clear not clearer. That was noted at the time and not one of the claimant's changes. The claimant stated she had stopped alcohol, improved her diet and started exercising. She spoke of a burn out and referred to a previous episode in 2011 citing her grandfather but stated she didn't have the current overwhelming anxiety. The claimant referred to the location in the office not being good and that her skills were being mis-used. She acknowledged she was not aligned with KPIs, marketing and the business plan. The claimant had also requested certification from her GP about her fitness to return to work. In respect of a return to work the claimant said accommodation was expensive locally. The claimant requested that she be permitted to work from home with one day in the office. The claimant was told that she would need to submit a flexible working request ('FWR') but in the interim, Mr Creed stated that the claimant should leave her (supplementary) clinical work to one side whilst the FWR was reviewed, he agreed for the claimant to work from home for the rest of the week. He agreed to review her OH report and agreed to cover Ms Elser's role whilst she was on holiday in 12 days' time.

37. There was a further meeting between the claimant and Mr Creed on 22 October 2018. The minutes were at page 184. Although the date shown was 1 November 2018, it was agreed by the parties that the date was incorrect. At this meeting there was discussion about remote working and equipment that would be required for that. The claimant was to put her proposals into a FWR. The claimant also mentioned a clinical supervision focus.

38. A FWR was received from the claimant on 26 October 2018 (page 178- 181). In relation to the question on the form *"Are you a disabled person whose request for flexible working is related to your disability*?" the claimant said "No". No further comments were made about that either.

39. Mr Creed acknowledged the application on 30 October 2018 and said it had been forwarded on to HR too. HR were copied in. He referred to setting up a follow up meeting and also referenced the recent meetings that had taken place (page 182).

40. On 1 November 2018, the claimant submitted her resignation. She referred to the recent OH review and return to work discussions and felt her role as Head of Counselling was not achievable in 24 hours. She referenced the job description not having been reviewed since 2015, with the team tripling in size increasing the pressure on her mental health.

41. The claimant did raise a grievance post-termination which was rejected. This was heard by Ms James. An appeal against that decision was heard by Mr James and the original decision upheld. As a matter of chronological logic, the process or the outcome could not feature as a reason for the claimant's resignation and was not cited by her either as being a reason. The grievance included a pay query too. There was no questioning of the claimant or the respondent's witnesses around the detail of the grievance.

42. During the course of the claimant's cross examination, the Tribunal was taken to various medical records of the claimant during 2017 and 2018 (pages 293-350). The Tribunal found as follows in relation to those records, relevant and proportionate to the issues including the question of whether the claimant was a disabled person at the material time and the respondent's knowledge if she was.

    - The claimant did take antidepressants between February 2017 and June 2017 because she had become anxious following ill health amongst her family members and because of the sickness absence of a work colleague (327)

    - There was reference to a previous 'bad' episode in 2011

    - There was reference at this point to anxiety disorder 'E200' but no indication of any diagnosis of the same

    - The claimant did not visit her GP between 12 July 2017 and 13 November 2017

    - On 13 November 2017, the claimant visited her GP in relation to a lump on her neck (page 329)
    - The claimant also discussed whether she might be pre-menopausal (page 330)

    - On 19 December 2017, the claimant was informed her ultrasound regarding her neck was normal (page 335)

    - The claimant did not visit her GP next until April 2018. In the entry, there was reference to the claimant having anxiety for 2 years. There was reference to the claimant being pre-menopausal (again). The claimant was given anti-depressant tablets for a month.

- The claimant saw her GP on 13 August 2018 when she was diagnosed as having burnout – anxiety and work-related stress. Medication was declined by the claimant. The claimant had also requested counselling.

- The claimant saw her GP on 10 September 2018 when the claimant was diagnosed with anxiety disorder and work- related stress. The claimant was signed off until 9 October 2018 (page 339)

- The claimant was certified as may be fit for work on 4 October 2018 (page 340).

- The clamant saw her GP on 5 November 2018 and was diagnosed as having work-related stress-anxiety and was prescribed anti-depressants (page 341)

43. The Tribunal also had regard to the claimant's Disability Impact Statement at pages 279-280. This was written in October 2019 and the Tribunal found read as an account of her *then* current position, not retrospective. It referred to matters following her grievance, that she 'currently' cannot drive, an admission into hospital in July 2019. Further, her reference to medication in October 2018 did not correspond with her medical records which recorded that medication had been prescribed on 5 November 2018 (pages 340/341).

Applicable Law

44. Under S. 95 Employment Rights Act 1996 ('ERA'), an employer is treated to have dismissed an employee in circumstances where he is entitled to terminate the contract by reason of the employer's conduct.

45. The legal test for determining breach of the implied term of trust and confidence is settled. That is, neither party will, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee ***Malik v BCCI 1997 ICR 606.***

46. The correct test for constructive dismissal was set out and established in ***Western Excavating v Sharp 1978 ICR 221*** **a**s follows:

- Was the employer in fundamental breach of contract?
- Did the employee resign in response to the breach?
- Did the employee delay too long in resigning i.e. did he affirm the contract?

47. The law on the definition of "disability" is provided by S.6 Equality Act ('EqA') 2010 and further assistance is provided in Schedule 1 of the same Act.

48. S.6(1) of the EqA defines disability as follows:

"A person (P) has a disability if P has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities"

49. The above definition poses four essential questions:

    a) Does the person have a physical or mental impairment?

    b) Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?

    c) Is that effect substantial?

    d) Is that effect long-term?

50. Under paragraph 2(1) of Schedule 1 to the EqA, the effect of an impairment is long term if it:

    a) has lasted for at least 12 months

    b) is likely to last for at least 12 months, or

    c) is likely to last for the rest of the life of the person affected.

51. Under paragraph 2 (2) of Schedule 1 to the EqA, if an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day to day activities, it is to be treated to have that effect if that effect is likely to recur.

52. The term "substantial" is defined in S.212(1) EqA as meaning 'more than minor or trivial'.

53. Likely means 'could well happen' which is a different test to a balance of probabilities ***SCA packaging Ltd v Boyle [2009] KHL 37.***

54. In ***Nissa v Waverly Education Foundation Ltd and another UKEAT/0135/18/DA*** the EAT (HHJ Eady QC presiding) stated regarding long term effect:

"*Having considered both terms - long-term and substantial - separately as the ET did in this case, I note that these words go hand in hand; they qualify each other. The substantial effects must also be long-term; see Cruikshank at page 739F-G.*"

55. Guidance on the definition of "disability" is also contained in a document produced by the Office for Disability Issues in May 2011 called "Guidance on matters to be taken into account in determining questions relating to the definition of disability" ('the Guidance').

56. The burden of proof on establishing disability is on the claimant.

57. Subject to that, the general burden of proof is set out in S.136 EqA. This provides:

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

58. S 136 (3) provides that S. 136 (2) does not apply if A shows that A did not contravene the provision.

59. The guidance in ***Igen Ltd v Wong 2005 ICR 931 and Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR 1205 EAT*** provides guidance on a 2-stage approach for the Tribunal to adopt. The Tribunal does not consider it necessary to set out the full guidance. However, in summary, at stage one the claimant is required to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, (now any other explanation) that the respondent has committed an act of discrimination. The focus at stage one is on the facts, the employer's explanation is a matter for stage two which explanation must be in no sense whatsoever on the protected ground and the evidence for which is required to be cogent. The Tribunal notes the guidance is no more than that and not a substitute for the Statutory language in S.136.

60. In ***Laing v Manchester City Council 2006 ICR 1519 EAT***, the EAT stated that its interpretation of Igen was that a Tribunal can at stage one have regard to facts adduced by the employer.

61. In ***Madarassy v Nomura International PLC 2007 ICR 867 CA***, the Court of Appeal stated:

    "*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal "could conclude" that, on a balance of probabilities, the respondent had committed an unlawful act of discrimination*"

62. More specifically, in relation to reasonable adjustments, a claimant must establish he is disabled and that there is a provision, criterion or practice ('PCP') which has caused the claimant his substantial disadvantage (in comparison to a non-disabled person) and that there is apparently a reasonable adjustment which could be made. The burden then shifts to the respondent to prove that it did not fail in its duty to make reasonable adjustments ***Project Management Institute v Latif 2007 IRLR 579.*** The respondent may advance a defence based on a lack of actual or constructive knowledge of the disability and of the likely substantial disadvantage and the nature and extent of that S.20, Part 3, Schedule 8 EqA & ***Newham Sixth Form College v Sanders 2014 EWCA Civ 734***.

63. In relation to discrimination arising from disability, once a claimant has established he is a disabled person, he must show that 'something' arose in consequence of his disability and that there are facts from which the Tribunal could conclude that this something was the reason for the unfavourable treatment. The burden then shifts to the employer to show it did not discriminate. Under S.15 (2) EqA, lack of knowledge of the disability is a defence but it does not matter whether the employer knew the 'something' arose in consequence of the disability. Further an employer may show that the reason for the unfavourable treatment was not the 'something' alleged by the

claimant. Finally, an employer may show the treatment was a proportionate means of achieving a legitimate aim.

Conclusions and Analysis

Was the Claimant disabled at the material time – October 2018

64. The following conclusions and analysis are based on the findings which have been reached above by the Tribunal. Those findings will not in every conclusion below be cross-referenced unless the Tribunal considered it necessary to do so for emphasis or otherwise.

65. The respondent's key challenge was in relation to the long- term effect – either looking back 12 months or projecting forward 12 months.

66. In relation to long-term effect, the Tribunal needed to consider the substantial adverse long-term effect at the material time. The material time is the date of the alleged discriminatory act (***Cruickshank v VAW Motorcast Ltd 2002 ICR 729 EAT.***

67. Looking back first from the material time, there was nothing prior to April 2017 in the claimant's witness statement. In her GP notes however, there was reference to 'anxiety Disorder E200 'first'' (page 327) in February 2017 (see above findings too). It was not clear if that was diagnostic. There was a separate reference to 'anxiety NOS' too. There was no other supporting medical evidence in this regard. The Tribunal noted the medication prescribed was stopped on 30 June 2017. In November 2017 (page 329), the claimant had discovered a lump. She also informed the GP that she was having stress at work but there was no diagnostic assessment (page 330). There were also references to the claimant possibly being premenopausal. There had been no doctor appointments in August, September or October 2017 and as set out above, the November appointment was because of the lump. There was reference on 4 December 2017 to stress/anxiety (as a symptom) but there were also references to the claimant possibly being premenopausal and her lump (page 333). The entry on 9 April 2018 which referred to a 2-year history of anxiety (page 335) was not corroborated with any medical evidence from April 2016, or any evidence of medication or in her witness statement or her disability impact statement. There was no evidence of a substantial adverse impact on ability to carry out normal day to day activities as per the appendix to the guidance at the material time, looking backwards (***Nissa*** applied). In addition, there was no evidence medically or from the claimant's impact statement about the effect on her without medication or indeed any counselling/therapy, at the material time and whether there would have been substantial adverse effect on her ability to carry out normal to day activities on a long term basis under paragraph 2 (1) or 2 (2) of Schedule 1. No medical expert was called in this regard either. In ***Woodrup v London borough of Southwark 2003 IRLR 111,*** the Court of Appeal stated:

"*In any deduced effects of the present sort, the claimant should be required to prove his or her alleged disability with some particularity. Ordinarily one would expect clear medical evidence to be necessary, those seeking to invoke the peculiarly benign doctrine [under paragraph 6] should not readily expect to be indulged by the Tribunal of fact… in the present case, no medical evidence whatsoever was called to support the applicant's case under paragraph 6. Instead the applicant's case was confined to what the applicant herself surmised would have happened. The EAT were right to conclude that the medical documents which the applicant produced in evidence, coupled with her own evidence, were bound to have been regarded as insufficient to establish her case fell within paragraph 6 (1). "*

68. The Tribunal also concluded that even if there was substantial adverse effect on normal day to day activities which had ceased, there was no likelihood ('could well happen') of recurrence either in February 2017 or April 2018 (C5 of the guidance considered). The claimant agreed under cross examination that the GP letter at page 291 accurately recorded symptoms of Depression, Anxiety & PTSD from the end of summer 2018.

69. In determining likelihood that an impairment may last for 12 months i.e. projecting forward, a Tribunal should not have regard to subsequent events; the likelihood must be assessed as it existed at the date of the alleged discrimination, not in the light of what has happened after including by the time of the Hearing. (***McDougall v Richmond Adult Community College 2008 EWCA Civ 4 CA).*** Only medical evidence obtained after the event, as long as it relates to the circumstances at the material time, can be considered.

70. The safeguarding incident was in July 2018. The claimant saw a GP on 13 August 2018 when the claimant was diagnosed with work related stress. On 10 September 2018, there was a diagnosis of anxiety disorder and work-related stress (page 339).The claimant said she had PTSD 'symptoms' in August 2018 (DIS) and in October 2018 (witness statement) but these did not appear in the GP notes until 13 December 2018 (page 343) which stated that the claimant was seeing a counsellor for it. There was no evidence provided of that counselling. There was evidence on 21 August 2018, in the claimant's 'Patient Boarding Card' of adverse impact on the claimant's day to day activities. This was the only evidence of this kind (page 353). It referred to the claimant's difficulty preparing a meal, low motivation or persistently wanting to avoid people.

71. In assessing whether the substantial adverse effect on the claimant's ability to carry out normal day to day activities was likely to last for 12 months i.e. 'could well happen' C3, the Tribunal had regard to the occupational health report at page 153. The report referred to her 'good recovery without the requirement for medication.' Further that the claimant was ready to come back to work in a week. The claimant's fit certificate dated 13 August 2018 certified her as unfit until 9 September 2018 (339). She was signed off again until 9 October 2018

(339) following which she had her return to work interview. At this meeting, the claimant said she had started to feel better 3 weeks ago and was not on any medication. The claimant said she had stopped alcohol, improved her diet and started exercising and said "I'm in a better place now". She had also gone to her GP to request a fit note to return to work. All of these entries were unchanged in the claimant's version of these notes. The claimant was also working towards a return to work with possible flexible working (22 October 2018 page 184). There was nothing at that time specifically about the claimant's health, rather the return to work arrangements. The claimant's FWR (page 178) was not consistent with a deteriorating condition. Notably, the FWR form asks if the FWR relates to a disability. The claimant responded 'No'. In the Tribunal's view, this begged a different answer with supporting narrative if her impairment was other than episodic/transient, especially having regard to her professional role as she deals with mental impairment on a regular basis. It was not credible that she thought it meant disabled as 'a registered person' which she said under cross examination. There was also reference to an issued fit note on 4 October 2018 (page 340) (which was not in the bundle) purportedly saying the claimant was fit to do amended duties and altered hours.

72. Having regard to the above findings and analysis, the Tribunal concluded the claimant was <u>not</u> a disabled person within the meaning of S.6 EqA at the material time as she did not have a long term impairment which had a substantial adverse effect on her ability to carry out normal day to day activities – more particularly which had lasted for at least 12 months or was likely to last ('could well happen) for at least 12 months or more. That is not to say however that the claimant had not had episodic periods of impairment or that she was not unwell at the material time by reason of anxiety.

73. Although this conclusion means the claimant's disability discrimination claims can go no further, in the event that the Tribunal is wrong in its conclusion, the Tribunal addresses below, in the alternative only, its conclusions on knowledge and discrimination as if the claimant had been found to be a disabled person.

<u>Knowledge</u>

74. The letter at pages 105-107 dated 12 November 2017 did not put the respondent on notice of any mental health issues. The issues raised related to professional organisational issues and the claimant's assertion of her services being 'Invisible'. The text exchanges at page 109 (with Jacky Bone) were evidence of relationship issues with Mr Creed and in relation to the lump in the claimant's neck. There was nothing in the text on page 110 regarding mental health either wherein Jacky Bone said she had spoken to Mr James and Angela Garett. Mr James also stated, and the Tribunal accepted, that any other discussions in so far as it is alleged would have been in confidence only especially having regard to Angela Garett's pastoral role. The letter at page 276 (dated 16 January 2020 – 'to whom it may concern' from Justin O'Brien also revealed nothing about discussion or disclosure about the claimant's mental

health. Stress (and anxieties) were mentioned in the narrow context of merger and organisational change only.

75. The respondent did not have access to the claimant's medical records at the time. The respondent relied on the medical evidence from occupational health and input from the claimant. There was nothing within the fit certificates other than work related stress (pages 456 and 457). The GP's letter at page 291 was dated October 2019. There was no prior GP letter. There was nothing from the high intensity crisis mental health team (see paragraph para 10 of the claimant's witness statement). The patient boarding card was not referenced in the claimant's witness statement. In cross examination, the claimant said she had self - referred. It was not mentioned in her return to work interview or mentioned in her own annotated version of the minutes. As noted above, there was no reference in her FWR form either (178) – she had answered no to the question related to disability.

76. The Tribunal thus concludes the respondent did not know and could not reasonably be expected to know of the claimant's alleged disability or, in the case of reasonable adjustments, that the claimant was likely to be placed at a substantial disadvantage by reason of a 'PCP'.

Reasonable Adjustments – S. 20/21 EA

77. PCP 1 – By reliance on Mr Creed's letter of 22 October 2018 regarding the FWR and paragraph 68 of his witness statement, it was clear that flexible working was a live, outstanding consideration regarding whether and if so the extent to which the claimant could work from home. The claimant's request to work one day in the office and four half days working remotely, was subject to the FWR determination. A PCP was not applied notwithstanding the instruction to work from office on 1 November as that was subject to the caveat "in the absence of any new working arrangements". Alternatively, if a PCP was applied, the Tribunal concluded that the substantial disadvantage was caused by the cost and duration of travel as set out in the occupational health report and the claimant's return to work interview (pages 153 & 155. There was no medical (mobility or otherwise) issue.

78. PCP 2 – The Occupational health report did not recommend the provision of a private office when in Surbiton. However, it was the case that the respondent's environment in Surbiton was open plan. That was a PCP applied. It did not however cause the claimant a substantial disadvantage. There were meeting rooms available and offices to book out. The respondent gave evidence about the availability of rooms and that the claimant had block booked a room out which was not challenged by the claimant. In fact, the claimant agreed that in her email of 10 October 2018 (page 164). Moreover, it was of equal disadvantage to the claimant by reason of her disability and to another who did have her disability alike. It was about the alleged lack of confidentiality. The Tribunal rejected the reasons given by the claimant in para 95 of her witness

statement. It was not consistent with paragraphs 56, 86, 87, 92 or with the recommendations of occupational health. There was no mention of this in her FWR either, which went beyond confidentiality.

79. PCP 3 – The occupational health recommendation was for her management function to be introduced gradually after her the first month. The Tribunal concludes that to do her contracted management role of 24 hours without a reduction in hours was a PCP applied by the respondent. However, there was no substantial disadvantage because the claimant was, concurrently, being asked not to do her clinical supervision work to reduce any pressure on her and because there was no reason linked to her alleged disability why she could not resume her management role for 24 hours. Her preference was not to do GDPR, meet KPIS, undertake marketing and the business plan, the Tribunal concludes, because of dissatisfaction with the cultural change and evolution of the role. There was no comparative substantial disadvantage. Ms Esler was also in place to absorb and support her return to work – mainly management but clinical supervision too and Mr Creed would cover Ms Esler during her holiday.

80. PCP 4 – The PCP to perform her management role and not to perform her clinical activities during her phased return was applied. Occupational Health had recommended that she undertake clinical duties and not her management function i.e. the opposite. The Tribunal repeats its conclusions above under PCP 3 regarding the absence of substantial disadvantage. In addition, the Tribunal noted the claimant's significantly higher hourly rate for the clinical supervision (of counsellors) role – it was more than a 150% increase. The claimant referred in her RTW to her higher hourly rate (page 156) and in paragraph 6 of her witness statement she said her (contracted) role was an underpaid post. That was, in the Tribunal's view motivating her not to continue with her management role. Any (substantial) disadvantage was because of her pre-existing dissatisfaction with her contracted role, though it was not the claimant's stated case that the respondent ought to have considered redeployment/an alternative role. There was no comparative substantial disadvantage. The Tribunal also noted it was a clinical matter which had triggered her sickness absence.

<u>Discrimination arising from Disability – S.15 EA</u>

81. The 'something' arising from the claimant's disability was the claimant's sickness absence from 13 August to 9 October 2018. As a result of that sickness absence, the clamant saw Occupational Health and alleges she was treated unfavourably by reason of the non-implementation of the recommendations.

82. It appeared to the Tribunal that it needed to assess, in the circumstances, whether in fact there had been any unfavourable treatment.

83. The treatment of requiring the claimant to work from the office, or not allowing remote working was not because of the sickness absence. The reason at that time was because it was the subject of a FWR and had not been determined. Even if the Tribunal was wrong about that, it was not unfavourable treatment as the FWR which included remote working was under review. (Some homeworking had also been permitted). In the further alternative, in furtherance of a legitimate aim to ensure the Counselling service could be managed and delivered properly, it was proportionate to determine the FWR first.

84. The treatment of requiring the claimant to work in an open plan environment was not because of the claimant's sickness absence. Even if it was, it was not unfavourable treatment. The Tribunal refers to its conclusions above (under reasonable adjustments PCP 2).

85. The treatment of requiring the claimant to do her contracted management hours (without a reduction) was not because of the claimant's sickness absence. Even if it was, it was not unfavourable treatment. The Tribunal refers to its conclusions above (under reasonable adjustments PCP 3).

86. The treatment of requiring the claimant to do her contracted management hours (only) and to give up her clinical supervision work during her phased return was because of the claimant's sickness absence. It was unfavourable to the claimant financially. However, the Tribunal concluded that the respondent had a legitimate aim of not wanting the claimant to undertake any additional work on top of her contracted management role during her phased return and to continue to have the counselling service managed. Asking the claimant not to do her clinical supervision work in this period was a proportionate means of achieving that. In addition, the Tribunal refers to its conclusions above (under reasonable adjustments PCP 3 & 4).

<u>Harassment – S.26 EA</u>

87. 'Private practice' comment - the Tribunal accepted jurisdiction to hear this allegation out of time. It was just and equitable to do so under S.123 EqA. The respondent was not prejudiced and did not raise any objection regarding prejudice. Ms James gave evidence and was able to deal with the allegation. Her position was the comment was not said. Ms James denied it and challenged why the claimant would say she did. She had no recollection of any career path conversation. The Tribunal noted there was no contemporaneous email from the claimant, neither was it raised in any meeting. If the Tribunal was wrong about that, it concluded the alleged comment did not relate to the protected characteristic of disability. Further, the Tribunal has concluded from its analysis above, that the claimant was not a disabled person in September 2017.

88. 'You two need to get your relationship sorted' alleged comment 23 July 2018 - the Tribunal repeats its conclusions above regarding jurisdiction. Ms James

denied this comment too, comprehensively, in paragraphs 21 -23 of her witness statement. The claimant did not raise it at the time or in any meeting. There was no evidence offered from anyone who might have heard it (from two departments). If the Tribunal was wrong about that, it concluded the alleged comment did not relate to the protected characteristic of disability. Further, the Tribunal has concluded from its analysis above, that the claimant was not a disabled person in July 2018.

Constructive Unfair Dismissal

89. The Tribunal had regard to the following key events in the period 13 August 2018 to 9 October 2018 extracted from the chronological findings above to analyse if, the respondent breached the implied term of trust and confidence.

- 20 July 2018 – text exchange between Mr Creed and the claimant post safe-guarding incident (pages 126-127)
- 23 July 2018 – Mr Creed asks if the claimant is ok to work. The claimant raised EAP concerns. Mr Creed suggested the claimant did not undertake client assessments. He also agreed for the claimant to work from home for the next 2 Thursdays and agreed the claimant's annual leave (page 130).
- 23 August 2018- Mr Creed spoke to the claimant (page 136)
- 10 September 2018 – The claimant acknowledged Mr Creed's attempt to call her. They exchange emails about her sickness absence and continuing communication (page 138).
- 12 September 2018 – Mr Creed takes up the claimant's EAP concerns with Ms James (pages 142-143)
- 12 September 2018 – Ms James instructs occupational health (page 141).
- 13 September 2018 – the claimant is invited to consent to Mr Creed taking up the claimant's EAP concerns with 'Health Assured' on her behalf. The claimant consents (page 146)
- 17 September 2018 – Mr Creed provides an update regarding EAP and separately asks the claimant if she has received the counselling referral form (page 148)
- 27 September 2018 – Mr Creed puts in place support arrangements with Ms Esler (pages 149-150)

- 1 October 2018– Occupational Health consultation. This was offered as a face to face appointment (page 499) but it was held by telephone. In cross examination the claimant said she had no money (to travel) and was unwell.

- 9 October 2018 – the return to work interview took place which also included the reference to Ms Esler's support

- 15 October 2018 – a further meeting took place between Mr Creed and the claimant which included reference to Mike Vine, who the claimant went to for counselling as her clinical supervisor (page 166)

- 22 October 2018 – there was a further RTW meeting which made reference to the claimant's intended FWR (page 184)

90. In pursuance of the foregoing findings and analysis, the Tribunal concluded, emphatically, that there was no failure to support the claimant during the period specified. Neither had the respondent failed to discharge its duty of care. The chronology, written communications and meetings did not show any failing on the part of the employer. The Tribunal was not informed what more they could and should have done. The Tribunal reached an inescapable conclusion that the claimant resigned prematurely, before her FWR had been determined. It could have been accepted, rejected or a middle ground worked out. Further the operating reason on the claimant's mind for her resignation was her desire to cease doing her contracted management role and instead perform clinical or clinical supervision only on a adhoc/better paid basis. In response to Tribunal questioning she referred to the 'shock and trauma' from April 2018 onwards of the re-organisation and restructuring changes.

91. The respondent did not, without reasonable and proper cause act in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the claimant.

92. The claims are dismissed.

Public access to Employment Tribunal decisions

All judgments and reasons for the judgments are published, in full, online at *www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

____

Employment Judge Khalil

3 November 2020