



EMPLOYMENT TRIBUNALS

Claimant: Mrs A Hillsley

Respondent: Home-Start Colchester

Heard at: East London Hearing Centre (by Cloud Video Platform)

On: 15 and 16 December 2020

Before: Employment Judge Housego
Members: Ms P Alford
Ms J Henry

Representation

Claimant: In person
Respondent: Maebh McGee, of Counsel, instructed by DAS Law

JUDGMENT

The unanimous decision of the Tribunal is that the claims are dismissed.

REASONS

Summary

1. Ms Hillsley resigned her employment soon after returning to work after an absence of about 13 months caused by knee problems. She says that Home-Start Colchester did not handle her absence as they should have done, and the arrangements made when she returned were inadequate, such as to amount to fundamental breach of contract (causing her to resign) and their conduct amounted to disability discrimination in several ways. The Respondent agrees that the knee problem was a disability, but says that it did all that could reasonably be expected of it.

2. The Respondent is a small charity, under the Home-Start umbrella, with one full time employee (Shelley Henderson), one part time administrator (16 hours a week) and a variable number of zero hours casual staff, between 3 and

7. Ms Hillsley was taken on in 2014, but in 2017 was appointed to a 3 year fixed term contract on 30 hours, as the Respondent had obtained 3 years of Lottery funding for a project. The Respondent is a community outreach organisation focussing on helping vulnerable people in deprived areas.

Law

3. Ms Hillsley claims unfair constructive dismissal¹ contrary to S94 of the Employment Rights Act 1996 (“ERA”). The burden of proving facts to establish that lies on the Claimant, on the balance of probabilities. It is possible for there to be a fair constructive dismissal.

4. Ms Hillsley’s claim of disability discrimination relies on S15 of the Equality Act 2010, for which no comparator is needed:

“15 Discrimination arising from disability

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

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

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

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

5. She also says that the Respondent did not make reasonable adjustments:

“20 Duty to make adjustments

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

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A’s puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

¹ **95 Circumstances in which an employee is dismissed.**

(1) For the purposes of this Part an employee is dismissed by his employer if (and, only if)—

...

(c) 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.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—

(a) removing the physical feature in question,

(b) altering it, or

(c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—

(a) a feature arising from the design or construction of a building,

(b) a feature of an approach to, exit from or access to a building,

(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d) any other physical element or quality.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

21. Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

...”

6. She also claims direct disability discrimination², and harassment³.

7. The particulars of all these claims were set out in a Case Management Order of 10 February 2010.

8. The Claimant must provide evidence from which this Tribunal might find disability discrimination. If she does so, it is for the Respondent to show that the reason was not, even in part, to do with disability⁴. The question of whether an adjustment is or is not reasonable is a value judgment for which there is no burden or standard of proof, as when deciding whether a particular matter is a substantial disadvantage to a disabled person by reason of a provision criterion or practice, and whether it is a proportionate means of achieving a legitimate aim.

The Issues

9. The specific issues identified at the case management hearing were set out, as follows (and repeating the numbering from that order):

“2. The issues between the parties which fall to be determined by the Tribunal are as follows:

Constructive Unfair Dismissal

2.1 The Claimant claims that the Respondent acted in fundamental breach of contract in respect of the express and implied terms of contract on 24 November 2018, 2 July 2019 and between 15 and 26 July 2019.

2.1.1 The express breaches are alleged as follows:

- a. The Respondent failed to follow section 11 of the Sickness Absence Policy;*
- b. The Respondent failed to carry out a risk assessment under sections 3.7 and 3.19 of the Policy;*
- c. The Respondent breached the Equality, Fairness and Diversity Policy;*

² S13 Equality Act 2010

³ S26 Equality Act 2010

⁴ Igen Limited v Wong [2005] IRLR 258; Barton v Investec Henderson Crosthwaite Securities Limited [2003] IRLR 332 and Madarassy v Nomura International plc [2007] IRLR 246.

- d. *The Respondent failed to consider the Claimant working from home.*

2.1.2 *The implied breaches are alleged as follows:*

- a. *The Respondent failed to take reasonable steps to protect the Claimant's health, safety and welfare under the Health and Safety at Work Act 1974 by providing a safe place to work;*
- b. *The Respondent intimidated and humiliated the Claimant and did not treat her with dignity;*
- c. *Breach of trust and confidence*

2.2 *Did the Claimant resign because of the breaches?*

2.3 *Did the Claimant tarry before resigning and affirm the contract?*

2.4 *In the event that there was a constructive dismissal, was it otherwise fair within the meaning of section 98(4) of the Employment Rights Act 1996? The Respondent would contend that the fair reason for dismissal would have been capability.*

Direct Disability Discrimination

2.5 *Did the Respondent treat the Claimant less favourably than it treated or would have treated an actual/hypothetical comparator (the Claimant is to confirm)? The Claimant relies upon the following acts of alleged less favourable treatment:*

- a. *Treatment within the workplace upon her return to work on 15 July 2019. When Claimant returned to work, she had her job duties changed from 'Project Leader' to ad hoc 'Admin Support' which amounted to a demotion;*
- b. *On 15 July 2019 Shelley Henderson told the Claimant that if she were to return, two other people would have to lose their employment;*
- c. *On 15 July 2019 Shelley Henderson told the Claimant that no sit-down jobs were available;*
- d. *On 15 July 2019 onwards, the Claimant was not provided with a phone, keys and laptop.*
- e. *Being "set up to fail" upon the Claimant's phased returned to work, due to excessive and impractical duties.*

Failure to Make Reasonable Adjustments

2.6 *Between 15 and 26 July 2019, did the Respondent apply the following provision, criterion and/or practice (PCP) generally, namely:*

- a. *Requiring the Claimant to drive as part of her role;*
- b. *Requiring the Claimant to complete visits within a set amount of time;*
- c. *Requiring the Claimant to complete visits;*
- d. *Reducing the Claimant's pay to half and then zero pay*

2.7 *Did the above amount to PCP's?*

2.8 *Did the application of any such PCP put the Claimant at a substantial disadvantage in comparison to persons who are not disabled in that the Claimant has reduced mobility?*

2.9 *Did the Respondent take such steps as were reasonable to avoid the disadvantage? The Claimant contends that the following adjustments should have been made:*

- a. *The provision of a leg rest;*
- b. *The provision of a taxi service;*
- c. *Being afforded a longer period of time to visit locations;*
- d. *Removing the requirement for the Claimant to visit specific locations;*
- e. *Permitting the Claimant to work from the office in Clacton;*
- f. *Assigning a volunteer to assist the Claimant with her duties;*
- g. *Allowing the Claimant to work from home;*
- h. *Allowing outstanding training to be completed before requiring the Claimant to undertake operational duties;*
- i. *Allowing the Claimant to undertake sit down duties.*

2.10 *Did the Respondent not know, or could the Respondent not be reasonably expected to know, that the Claimant had a disability or was likely to be placed at the substantial disadvantage set out above?*

Harassment

2.11 *Between 15 and 26 July 2019, did the Shelley Henderson engage in unwanted conduct as follows:*

- a. *Excluding the Claimant from lunch time conversation;*
- b. *Providing a wastepaper bin as a leg support;*

- c. *Telling the Claimant that there was no money and that everyone had been running around like headless chickens;*
- d. *Telling the Claimant that two colleagues would be dismissed because she returned to work;*
- e. *Failing to provide the Claimant with a phone, keys and laptop;*
- f. *Failing to ask the Claimant how she was upon her return to work.*

2.12 *Was the alleged conduct related to the Claimant's disability?*

2.13 *Did the alleged conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her? In considering whether the conduct had that effect, the Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.*

Jurisdiction

2.14 *Were the claim(s) for disability discrimination been submitted within the correct timescales, namely 3 months less one day of the date of the act?*

2.15 *Was there a continuing series of acts which would bring the claims within time?*

2.16 *If the claims were not submitted within the correct timeframes, is there any just and equitable reason to extend time and has the Claimant submitted any such reason?"*

Evidence

10. The Tribunal had an agreed bundle of documents of approaching 200 pages. The Claimant gave oral evidence, as did her husband and father. For the Respondent, Shelley Henderson and Kellie Norris gave oral evidence. Ms Henderson is the head of the Respondent, and reports to trustees, of whom Ms Norris is the chair.

Facts found

11. Ms Hillsley was one of 3 permanent staff: the person heading the Respondent from 19 January 2011 was (and is) Shelley Henderson, whose job title is Scheme Manager. Ms Hillsley had fixed term contracts for particular projects, was then bridged from the overall budget until April 2017 when Lottery funding was obtained for a project "*Home-Start Plus*". She then became 30 hours a week, for 3 years ending March 2020 (when the funding for her post was to end, and did in fact end). There was an administrator who worked 16 hours a week, usually over 4 days. Ms Hillsley's post was as "*Organiser*", a title within the Home-Start national framework. Home-Start provide a suite of policies for the

individual affiliated local charities to adopt. Ms Hillsley did not care for that title, and it was agreed that she could style herself "*Project Leader*".

12. The role involved community visits and overseeing others making such visits. 80% of the role was in the community. There was an office-based element as such visits need reports made about them, and the supervision has to be recorded. This was done at the Colchester office. Ms Hillsley lives in Clacton, and it was intended that there was to be more work in that area. A Clacton office was to be set up, and Ms Hillsley visited some prospective premises with Ms Henderson. Nothing came of that before Ms Hillsley went off work with her knee problem, but subsequently a small office was taken. No one was based there, but it could be used for the writing of reports, and it was used to store things taken on such visits, such as nappies. It had a desk, but otherwise was not equipped as a modern office, for example not having a telephone landline.

13. In spring 2018 Ms Hillsley began having serious problems with her left knee. On 06 June 2018 at a hospital appointment she was told there was a tumour in it, which understandably caused her great distress. The exact medical situation appears to be that (happily) this is benign and that the problem is early onset osteoarthritis. It has been debilitating for Ms Hillsley and remains so today. Ms Hillsley nevertheless carried on working until 18 June 2018 when she went to an emergency appointment at the hospital because of the great pain she was in. She was signed off from then until she returned to work on 15 July 2019.

14. In February 2019 Ms Norris met Ms Hillsley in the Clacton office, to discuss matters. Ms Henderson had the key and was to let them in. She was late, coming from work, and when she arrived went straight to the door to open it. Ms Hillsley says that Ms Henderson ignored her, and walked straight past her, ignoring her, to do so. Ms Hillsley was in, or by, her car in the carpark. Ms Henderson was late, in a rush, tired, it was February and dark at the end of the day, and she simply did not see Ms Hillsley.

15. Another trustee, Emma Bridges, took the notes. Ms Hillsley was accompanied by her father, who took photographs of the handwritten notes. Ms Hillsley was upset that she had not received any contact nor anything like a bunch of flowers. She wanted to come back to work, at the Clacton office, to do pretty much anything. She could not drive, but she would take a taxi to work. She was concerned that her half pay was about to run out. She had been told that she would always need crutches.

16. While off from work Ms Hillsley was paid full pay for 5 months, and half pay for a further 5 months. This was her contractual entitlement. Before it ran out Ms Sanderson got in touch with Ms Hillsley to let her know that Ms Norris was going to write to her about this, so that she would not be taken by surprise.

17. Ms Hillsley was very upset at this, and on 21 October 2018 sent a long email to Ms Norris about how she felt ignored and had lacked any form of support from her colleagues. Ms Norris went to see her on 26 October 2018. She was concerned such that she overlooked to ask to collect the phone and keys and they were collected by a casual worker later.

18. On 12 November 2018 Ms Hillsley emailed to say that she was signed off for a further 2 months and was on morphine, unable to drive and with thyroid problems too. On 23 November Ms Norris asked for Ms Hillsley to give her phone back, and her keys, and computer. Ms Hillsley says this was because they had in effect decided that she was never coming back. The Respondent's policy is that phones and keys are handed over when going on holiday, as the numbers are used by those in need to contact service providers. That would not really apply here, as Ms Hillsley had the phone for months, but it was a contract phone so a monthly cost was incurred. Others were using pay as you go phones so it was not sensible to leave the unused phone with Ms Hillsley. The Clacton keys were security keys and so of limited number. There was no point in Ms Hillsley having them. The staff handbook had a list of keyholders on it: Ms Hillsley's name was taken off that at some point. This is unsurprising given such a lengthy and indeterminate absence. Ms Hillsley would have had cause for annoyance had she been called on to act as a keyholder at this time.

19. On 18 December 2018 and 15 January 2019 there were further GP reports which gave no indication of progress towards being able to return to work.

20. On 04 April 2019 there was an occupational health report. This said that she was not fit for work, was unlikely to be so for at least 3 months, and no opinion could be given as to when that might be possible. Ms Hillsley was unable to drive her car as it was not automatic, and her left knee would not permit her to use the clutch.

21. On 02 July 2019 there was a further meeting, prior to Ms Hillsley's latest 3 month fit note ending. Ms Hillsley said that she was fit to return to work from 08 July 2019. This was a surprise to Ms Norris and Ms Henderson. They asked that Ms Hillsley take a week's holiday to give them time to plan. Ms Hillsley agreed, and does not say that this was unreasonable.

22. Ms Hillsley objects that she has not seen the manuscript notes of that meeting from which the typed notes were prepared, but she does not say that the typed notes are inaccurate, and nor did she make specific request for them. The manuscript notes of the earlier meeting were photographed by her father at the end of the previous meeting, with the Respondent's consent. Ms Hillsley does not say that such a request was made at the end of this meeting. This point has no substance.

23. Ms Hillsley takes exception to an email she saw later which drew Ms Norris' attention to the casual workers whose hours would be cut unexpectedly by reason of Ms Hillsley's return, and says that Ms Henderson said something similar on 15 July 2019. That was no more than to express a proper humane concern for their interests, and a reflection of the fact (for such it was) that over a 10 month period Ms Hillsley's job had been secure, in the hope of an eventual return (and even though none was ever in prospect until Ms Hillsley said that she was fit to return, on 02 July 2019).

24. Mrs Hillsley returned on 15 July 2019. Ms Henderson was off the following week, and so there was limited time for them to interact. Ms Hillsley takes exception to Ms Henderson saying that they had all been running round "*like headless chickens*" as implying criticism of her. This is unfair on Ms Henderson, who had, during the time Ms Hillsley had been absent had substantial personal

matters of her own to contend with, and in addition had lost a key person (Ms Hillsley) in the organisation. Salaried staff comprised only Ms Henderson, Ms Hillsley on 30 hours a week, and an admin assistant a few hours most days of the week, 16 hours in all. There was no money to fund anyone else, and for 5 months Ms Henderson did Ms Hillsley's job as well as her own. It must have been exceptionally difficult for her. After 5 months Ms Hillsley went to half pay and so Ms Henderson had some flexibility to increase the hours of the casual workers, but was still having to cover the rest herself.

25. Ms Hillsley was upset that she was not welcomed back on 15 July 2019 with sufficient enthusiasm. It is not possible to view this, even if it was so, as harassment, and the Tribunal does not. Ms Hillsley objected both that she was given demeaning and too onerous work to do. She was asked to review and to shred files: these were her own case files, and the Respondent had moved to a digital format. This was not unreasonable, particularly when Ms Hillsley had given so little time to plan.

26. Understandably, the Respondent wanted an up-to-date occupational health report and one was undertaken by telephone on 15 July 2019 by the same therapist. That report supplied the next day, 16 July 2019, recorded that Ms Hillsley felt able to undertake all parts of her job without limitation, and had bought an automatic car so as to be able to drive. This appears to be a misunderstanding, for Ms Hillsley had hired one. (There is in the bundle a report dated 24 April 2019 – this was simply misdated: it refers to the telephone conversation of 15 July and is identical to that of 16 July 2019).

27. Ms Hillsley was asked to undertake a risk assessment of her roles, and they came back uniformly as high risk. Ms Hillsley had asked for some changes to the first occupational health report and these had been accommodated. When she asked for changes to the report of 16 July 2019 the therapist refused, saying that Ms Hillsley had not been honest with her in the telephone conversation, and a whole new assessment would be needed. Ms Henderson arranged one, but Ms Hillsley resigned before it could take place.

28. Ms Hillsley complains that she had to hire an automatic car to get to work, and that the extra time to use public transport was inadequate and that she could not do her role without a car. She says that the Respondent should have arranged taxis for her and that they must have known that she had hired a car as she parked it in the car park. The Tribunal accepted the evidence that the only way they knew that Ms Hillsley had arrived by car was because her husband telephoned them on 15 July 2019 to ask if she had left, as he was concerned. The window through which he said they must have seen her was at a previous premises, and the car park at the office was not visible from it. Ms Hillsley did not tell them she had hired a car. In any event this was wholly unreasonable. It must long have been apparent to Ms Hillsley that she was going to be unable to drive a manual car: she had a car. There is no reason why she could not have traded in her car for an automatic.

29. Ms Hillsley complains that she had to put her foot on an upturned bin on her first day. She provided photographs of the bin. There were no photographs of her foot on the bin, which was the right way up and with waste paper in it. The limit of this was that Ms Henderson appreciated that a leg rest was needed and ordered two, the next day, one for Colchester and one for Clacton, in case Ms

Hillsley was there.

30. During the second week (Ms Hillsley was at work only 9 days over two weeks) Ms Henderson was away on pre-booked holiday. Ms Norris (who works full time) rang her and asked how she was. Ms Hillsley said that she was tired: Ms Norris told her to take the next day, a Wednesday, off to recover. This displays a concern for Ms Hillsley from the Chair of Trustees, in the unavoidable absence of Ms Henderson.

31. Ms Hillsley says that she should have been allowed to work at the Clacton office. It had been intended to be an office, but was not effective as one. It was a drop in place to do notes and store supplies for service users. It might have turned into an office she could use (and Ms Henderson organised a leg rest for that eventuality), but it would have been wholly inappropriate to have placed Ms Hillsley there as a lone worker. She would also have been isolated there.

32. Ms Hillsley says it was discriminatory that she was told there were no sit down jobs. Her role was 80% out in the community. It was not a sit down job. There was no vacancy and there is no obligation to create a job for someone disabled⁵, and funding one would not be possible.

Conclusions

33. We return to the individual heads of complaint.

Constructive Unfair Dismissal

2.1 *The Claimant claims that the Respondent acted in fundamental breach of contract in respect of the express and implied terms of contract on 24 November 2018, 2 July 2019 and between 15 and 26 July 2019.*

2.1.1 *The express breaches are alleged as follows:*

- e. *The Respondent failed to follow section 11 of the Sickness Absence Policy; The Respondent did not so fail – it paid her fully in accordance with the policy, and had regular reviews. The only way it did not follow the policy was in not commencing a capability dismissal procedure.*
- f. *The Respondent failed to carry out a risk assessment under sections 3.7 and 3.19 of the Policy; There were risk assessments about her return: that is why she did not go to Clacton. It was not unreasonable to ask her to undertake those assessments, and appropriate action was taken when she recorded the risk as high.*
- g. *The Respondent breached the Equality, Fairness and Diversity Policy; The way in which this was alleged appears to be that insufficient pastoral care was given. Ms Hillsley would have liked more contact: it was not a breach of contract not to*

⁵ Archibald v. Fife Council [2004] UKHL 32

contact her more frequently. Many employees think it harassment to be contacted too frequently. Perhaps they may have asked her how much contact she would have liked, but not to do so is not a breach of contract.

- h. The Respondent failed to consider the Claimant working from home.* This was not a proposal the Claimant ever put forward, and when she first said that she wanted to return to work she said that she was fit to undertake all her duties (although plainly she was not).

2.16.2 *The implied breaches are alleged as follows:*

- d. The Respondent failed to take reasonable steps to protect the Claimant's health, safety and welfare under the Health and Safety at Work Act 1974 by providing a safe place to work;* This is not understood. The office in Colchester was safe. She had a car parking space. She was not asked to do anything she could not do. She said she needed a leg rest and one was ordered immediately.
- e. The Respondent intimidated and humiliated the Claimant and did not treat her with dignity;* The narrative above does not display anything that could be so described. The expectations of Ms Hillsley and her family are too high. Yes, it might have been nice if the Respondent sent her a bunch of flowers, but the absence of such was not, as was suggested, insulting in any way.
- f. Breach of trust and confidence* Ms Henderson and Ms Norris did all that could reasonably have been expected of them. There were regular reports, including from an occupational health specialist. Her job was kept open. Nothing was done to start a capability process (and there could have been no criticism of that being done as 10 months on sick pay came to an end). When Ms Hillsley said she was fit to return, she was allowed to return, subject only to medical reports.

2.17 *Did the Claimant resign because of the breaches?* There were none.

2.18 *Did the Claimant tarry before resigning and affirm the contract?* This is not applicable

2.19 *In the event that there was a constructive dismissal, was it otherwise fair within the meaning of section 98(4) of the Employment Rights Act 1996? The Respondent would contend that the fair reason for dismissal would have been capability.* Again, not applicable. Ms Hillsley was not, in fact, fit to return to work, however much she wanted to do so. She would inevitably have been dismissed for capability reasons at some point.

Direct Disability Discrimination

2.20 *Did the Respondent treat the Claimant less favourably than it treated or would have treated an actual/hypothetical comparator (the Claimant is to confirm)? The Claimant relies upon the following acts of alleged less favourable treatment:*

- f. *Treatment within the workplace upon her return to work on 15 July 2019. When Claimant returned to work, she had her job duties changed from 'Project Leader' to ad hoc 'Admin Support' which amounted to a demotion; Ms Hillsley had only a courtesy title of "Project Leader". When she returned the occupation health report (which was on the basis that Ms Hillsley was fit for work without restriction) recommended getting her back into the swing of work by giving her admin support duties, as tiredness would be a big factor after so long away from work. This is not made out.*
- g. *On 15 July 2019 Shelley Henderson told the Claimant that if she were to return, two other people would have to lose their employment; As set out above, this was to stress that her job had been kept open by the use of casual staff: but there needed to be some sensitivity as the return of Ms Hillsley after so long a period during which they had increased hours would impact adversely on their income.*
- h. *On 15 July 2019 Shelley Henderson told the Claimant that no sit-down jobs were available; No sit-down jobs were available.*
- i. *On 15 July 2019 onwards, the Claimant was not provided with a phone, keys and laptop. Ms Hillsley was in no state to be a keyholder, which involves being called out. She was not in touch with service users on her return, and that is what the phones are for, and in the short time available (with return being unexpected, and Ms Henderson going on holiday) the return to work plan was always going to be makeshift.*
- j. *Being "set up to fail" upon the Claimant's phased returned to work, due to excessive and impractical duties. This is unclear, as Ms Hillsley also complains that the job of shredding was demeaning, not that it was one at which she was bound to fail. It is not made out.*

Failure to Make Reasonable Adjustments

2.21 *Between 15 and 26 July 2019, did the Respondent apply the following provision, criterion and/or practice (PCP) generally, namely:*

- e. *Requiring the Claimant to drive as part of her role; Ms Hillsley was able to drive. She was not able to drive a manual car and needed an automatic car. This is dealt with above. In fact she was not required to drive in the 9 days after her return. As her role was 80% in the community she could have been expected to drive, and she could do so.*

f. *Requiring the Claimant to complete visits within a set amount of time;* She did not undertake any visits, and did not raise any objection to any suggested timings. She was accorded extra time to use public transport if she could not drive, and while she now says that was never going to be possible it was not something she said to the Respondent at the time.

g. *Requiring the Claimant to complete visits;* As above, she was not so required.

h. *Reducing the Claimant's pay to half and then zero pay* Ms Hillsley had a very generous sick pay scheme. Anyone running through 10 months off sick is likely to qualify as disabled. It would be totally unreasonable to expect the Respondent to pay even more, particularly when the effect of doing so was to burden Ms Henderson with all or some of the work Ms Hillsley would have done.

2.22 *Did the above amount to PCP's?* Not applicable on the facts found.

2.23 *Did the application of any such PCP put the Claimant at a substantial disadvantage in comparison to persons who are not disabled in that the Claimant has reduced mobility?* If appropriate, no.

2.24 *Did the Respondent take such steps as were reasonable to avoid the disadvantage? The Claimant contends that the following adjustments should have been made:*

j. *The provision of a leg rest;* This was ordered the day after Ms Hillsley asked for it, and a spare for Clacton. Ms Hillsley had made reference to one on 02 July 2019, but the delay, if there was one, was short and exactly what she asked for was provided without question. This is not made out.

k. *The provision of a taxi service;* This is totally unrealistic. Ms Hillsley had 13 months off with her knee problem, which she knew early on was permanent. She could drive an automatic car but took no step to change her manual car for an automatic. It is not reasonable to expect the Respondent to solve that issue for her.

l. *Being afforded a longer period of time to visit locations;* It never got to that point, but the Tribunal has no doubt that Ms Henderson would have accommodated Ms Hillsley's needs.

m. *Removing the requirement for the Claimant to visit specific locations;* This was not developed in any form of evidence, oral, witness statement or document, and so is not established.

n. *Permitting the Claimant to work from the office in Clacton;* The reasons why this was not appropriate are set out above,

o. *Assigning a volunteer to assist the Claimant with her duties;* Superficially, having a volunteer with her at all times may sound attractive. However volunteers are not going to be able to be

timetabled like employees. This was not a viable solution, but the issue is academic as Ms Hillsley resigned before attending a further occupational health meeting to explore what she could or could not do.

- p. *Allowing the Claimant to work from home;* This was, as set out above, not a role that could be performed from home.
- q. *Allowing outstanding training to be completed before requiring the Claimant to undertake operational duties;* The Respondent was asked by Ms Hillsley to allow her to complete training while off sick, on line. The Respondent took the view that it was not appropriate to do so when off sick. The Tribunal does not necessarily share that view – it might afford time to upskill when not able to work – but a reasonable adjustment has to be to enable someone to work. This is the reverse – Ms Hillsley had the opportunity to do some training only because she could not work.
- r. *Allowing the Claimant to undertake sit down duties.* That was precisely what was asked of her, short term. Long term it was not possible. Her role was 80% out in the community. That was what the Lottery funding funded her to do.

2.25 *Did the Respondent not know, or could the Respondent not be reasonably expected to know, that the Claimant had a disability or was likely to be placed at the substantial disadvantage set out above?* The Respondent has always accepted that Ms Hillsley was disabled by her knee problem.

Harassment

2.26 *Between 15 and 26 July 2019, did the Shelley Henderson engage in unwanted conduct as follows:*

- g. *Excluding the Claimant from lunch time conversation;* There was no oral evidence of this, and it is highly unlikely given the huge support Ms Henderson had been to Ms Hillsley. It is certainly the case that Ms Henderson was extremely pressed, and this is another example of Ms Hillsley feeling undervalued on her return, but perhaps having unrealistic expectations.
- h. *Providing a wastepaper bin as a leg support;* This was not done. When Ms Hillsley said that was what she was going to have to do, 2 leg supports were ordered.
- i. *Telling the Claimant that there was no money and that everyone had been running around like headless chickens;* There was no money to replace her when she was away. Ms Henderson had done all Ms Hillsley's work for 5 months and half of it for another 5. She had been missed. There was every reason for Ms Henderson to be delighted by Ms Hillsley's return, particularly given the warm and respectful relationship that existed before she went off with her knee problem.

- j. *Telling the Claimant that two colleagues would be dismissed because she returned to work; This was not said: the circumstances are set out above.*
- k. *Failing to provide the Claimant with a phone, keys and laptop; Dealt with above and not established.*
- l. *Failing to ask the Claimant how she was upon her return to work. Even if this was so, which is doubtful, not being solicitous enough about a returning colleague is not harassment.*

2.27 *Was the alleged conduct related to the Claimant's disability? Not applicable.*

2.28 *Did the alleged conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her? In considering whether the conduct had that effect, the Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.* The Tribunal does not doubt that Ms Hillsley has a sense of grievance, but it is founded on Ms Hillsley's perceptions and expectations, which were not fulfilled to her satisfaction. This is perhaps best exemplified by the level of indignation she and her family feel at there being no bunch of flowers at any time during the 13 month absence. While not suggesting that there was any lack of consideration by Ms Henderson or by Ms Norris (and the reverse was displayed in the patient and kind way they gave their oral evidence, itself consistent with the care taken over getting reports, covering her work without complaint and Ms Norris ringing Ms Hillsley after her return when Ms Henderson was away, and giving her the day off), that is the most it might amount to. That is very far from harassment.

34. In coming to our conclusions we have borne in mind that it is for the Claimant to prove facts from which discrimination could be inferred, and if it does so it is for the Respondent to show that it was not tainted by discrimination. In this case detailed analysis of burden of proof considerations is not required⁶. Our findings of fact make it clear to us that the actions of the Respondent were properly supportive of Ms Hillsley, however sincerely she feels otherwise.

35. We find that none of the matters claimed succeed so that it is not necessary to consider the issue of whether any are out of time.

36. Accordingly none of the disability discrimination claims succeed.

37. The Tribunal finds no fault in the procedures adopted. This was not a constructive unfair dismissal, because there was no breach of contract by the Respondent.

⁶ Ayodele v Citylink Ltd & Anor [2017] EWCA Civ 1913

38. Accordingly all Ms Hillsley's claims are dismissed.

**Employment Judge Housego
Date 21 December 2020**