



EMPLOYMENT TRIBUNALS

Claimant: Ms N Elliott
Respondent: Chief Constable of Derbyshire Constabulary
Heard at: Nottingham by Cloud Video Platform
On: 12-19 October 2020
Before: Employment Judge Hutchinson
Members: Mr J Hill
Mr G Edmundson

Representation

Claimant: In person
Respondent: Claire Palmer of Counsel

JUDGMENT

The unanimous judgment of the Employment Tribunal is as follows: -

1. The claims of maternity/pregnancy discrimination are withdrawn and dismissed.
2. The claims of disability discrimination fail and are dismissed.
3. The claim of unfair dismissal fails and is dismissed.

JUDGMENT having been sent to the parties on 3 November 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

REASONS

Background to the claim

1. The Claimant presented her first claim to the tribunal under case number 2601796/2019 on 14 June 2019. At that time, she was still employed by the Respondent as Duty Management Officer and had been employed by them since 2 February 2009. She complained of disability discrimination

only. That the Respondent had failed to carry out reasonable adjustments. Her complaints related to incidents that happened since 5 February 2019 until the time of her claim.

2. That claim was accepted and responded to by the Respondent. At that stage, they could not accept that the Claimant was disabled but denied the allegations of disability discrimination. The claim was listed for hearing and at a telephone case management preliminary hearing on 1 November 2019 my colleague, Employment Judge Clark, identified that the Claimant's claims were;
 - discrimination arising from disability;
 - failure to make reasonable adjustments;
 - harassment related to disability.
3. On 3 June 2020, the Claimant resigned from her employment and made a fresh claim to the tribunal on 8 July 2020 under case number 2602684/2020. This time, she claimed;
 - constructive unfair dismissal;
 - pregnancy/maternity discrimination;
 - disability discrimination.
4. That claim was consolidated with the earlier claim and the cases were listed together to be dealt with by our tribunal.
5. The Respondent subsequently accepted that the Claimant does suffer from a disability as defined in section 6 Equality Act 2010. She suffers from Inflammatory Arthritis, in respect of which she was diagnosed in December 2018. The immune system overreacts and begins to attack healthy joints. The Claimant is only 33 years of age and it has had a significant impact on both her physical and mental health. She also has two young children to care for.

Issues and claims

6. Section 15 Equality Act discrimination arising from disability

6.1 The matters complained of are;

- (i) the refusal, she says, to give her time off for attending CBT therapy in February 2019;
- (ii) refusing her paid time off under its compassionate leave policy to attend to her sick child.

6.2 In respect of these allegations, we must determine;

- (i) did the events arise as a consequence of her disability;
- (ii) did it amount to unfavourable treatment;

- (iii) did they treat her that way because of her sickness absence;
- (iv) was it a proportionate means of achieving a legitimate aim;
- (v) did the Respondent know about her disability or should they have known?

7. Claim of failing to make reasonable adjustments under section 20 EqA

7.1 The questions for the tribunal are;

- (i) did the Respondent know, or could it not reasonably have been expected to know, that the Claimant was a disabled person;
- (ii) did the Respondent have the following PCPs:
 - (a) requiring the Claimant to attend the workplace to carry out her duties;
- (ii) did any such PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that;
 - (a) her disability meant she had trouble getting up in the morning and getting ready for the day (including getting dressed and making breakfast);
 - (b) she finds driving to work painful and is easily fatigued;
 - (c) she sometimes suffers from a delay in reaching the point of the day when she is physically able to get to work/do her work;
- (iii) if so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?
- (iv) if so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant; however, it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows
 - (a) allow her to perform her duties from home as much and as she needed to

- (v) if so, would it have been reasonable for the Respondent to have taken those steps at any relevant time?

8. Harassment related to disability under section 26 EqA

8.1 Did the Respondent engage in conduct as follows;

- (i) that during a meeting held on 22 March 2019, Rachel Peat challenged the Claimant about spending too long in the quiet room that day and that she was “not prepared to argue with her about it”;
- (ii) that during the same meeting, Rachel Peat referred to “the rest of the team working their full hours and being busy and the Claimant was getting 70 hours for free”;

8.2 If so, was that conduct unwanted?

8.3 If so, did it relate to the protected characteristic of disability?

8.4 Did the conduct have the purpose or effect (taking into account the Claimant’s perceptions, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) of violating the Claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

9. Constructive unfair dismissal

9.1 Was the Claimant dismissed?

9.2 The Claimant says that there was a fundamental breach of the implied term of mutual trust and confidence. Did the behaviour of the Respondent towards the Claimant amount to such a breach?

9.3 Was that the reason for her resignation?

9.4 Did the Claimant delay too long and thus affirm the contract?

9.5 Did the Claimant resign because of disability discrimination that she says that she suffered since February 2019?

9.6 Did the events immediately before her resignation amount to some final straw justifying her decision to resign?

Evidence

10. The tribunal heard evidence from the following;

- The Claimant

- Mr Elliott
 - David Soar, the Claimant's father
 - Inspector Jason Ashley, previous line manager
 - Rachel Peat, final line manager
 - Chief Inspector Lambert, Rachel Peat's line manager
 - Arabella Lissaman, Human Resources
 - Inspector Patrick Howitt, grievance investigator
 - Richard Cariss, Appeal Manager.
11. The only real conflict of evidence in this case is between the Claimant and Rachel Peat. We are satisfied that whilst we preferred the evidence of Rachel Peat, it was simply a matter of their own perceptions of events. The Claimant, we are satisfied, has recalled events in line with her own perceptions of what was happening to her, rather than reality.
12. There was an agreed bundle of documents and where we refer to page numbers, it is from that bundle.

The facts

13. The Claimant commenced her employment with the Respondent on 2 February 2009. At that time, she was Assistant Disclosure Officer. She became Duty Management Officer in September 2013. She continued in this role until her resignation in June 2020.
14. The job often entailed working nightshifts and late shifts and undertaking weekend work and Mrs Elliott was regarded as a hard worker and valued member of staff.
15. During the period December 2016 to January 2019, Inspector Ashley was her line manager. Thereafter, Inspector Peat took over and she continued as her line manager until her resignation on 3 June 2020.
16. In the Department, there are 11 police staff members and 2 officers seconded.
17. The Respondent has several policies and procedures, including its Unexpected Absence Procedure.
18. The Claimant was diagnosed with Inflammatory Arthritis in December 2018 and the Respondent was aware of this from that date. It is an auto-immune disease where the immune system overreacts and begins to attack healthy joints. It is progressive and there is currently no cure.
19. There are medications which can help to control the disease and slow the progression. It is systemic and it can attack other organs. It causes widespread pain, fatigue, loss of mobility, stiffness and flu-like symptoms.
20. In her impact statement (page 52-53) the Claimant explained the devastating effect the disease has had, not only her physical health but her mental health too.

21. The disease is referred to in the occupational health report of 11 December 2018 (pages 99(B)).
22. It is a long-term condition. It is progressive.
23. The Claimant's sickness absence record is at page 65. It reveals that prior to April 2015, the Claimant had had a total of 90 days off in a period of 6 years. Since then, she has had two children. Apart from maternity leave, there were periods of absences, some of which were for pregnancy related conditions. At no stage was the Claimant subject to any absence procedures.
24. In the period commencing 14 August 2018 to 5 February 2019, the Claimant had initially been absent simply feeling generally unwell. There was no diagnosis of her condition until December 2018.
25. We heard about a welfare visit in October 2018. Inspector Ashley had been suspicious about her absences, partly because there had been no diagnosis of her condition. The only information they had was on the sick notes, which referred to "*respiratory condition (Inc. shortness of breath)*".
26. On 18 October 2018, Mrs Elliott was referred to occupational health and this was conducted by telephone. The note refers to a diagnosis of Inflammatory Arthritis and the referral explained that Mrs Elliott was going through a gradual programme of dose increases for her medication.
27. The report at page 75G refers to the effects of the condition and that the main issue for Mrs Elliott was that of fatigue from the disease process, as well as low mood because of the decrease in her capabilities.
28. It explained that Mrs Elliott would need a phased return to work and that duties would need to be monitored during this period, which would be over a period of 4 – 6 weeks.
29. At that stage, the Claimant had been off work for just under 10 weeks. The report is at pages 76 – 86. The report confirmed that Mrs Elliott was unfit to return back to work even in a recuperative capacity. At that time, it was not possible to give a timescale as to when Mrs Elliott would be able to resume work, although a further review would take place on 11 December 2018.
30. The report was sent by Amanda Middleton, Occupational Health Adviser, to Inspector Ashley on 30 October 2018 (page 88). The date for the follow up review was arranged for 11 December 2018.
31. Inspector Ashley wrote to the Occupational Health Adviser on 31 October 2018 (page 87). He asked for consideration being given to access the Claimant's GP records prior to her next occupational health review.
32. On 27 November 2018, Samantha Henshaw, HR Services Officer wrote to

the Claimant to explain that her salary would reduce to half pay with effect from 18 January 2019 once she had passed 6 months of absence (page 91).

33. On 12 December 2018, Superintendent Gascoyne reviewed her case and decided that there were no extenuating circumstances to justify maintaining the Claimant's full pay past the contractual date in January for her to reduce to half pay.
34. On 11 December 2018, a further occupational health report was obtained. This confirmed the Claimant's condition.
35. On 19 December 2018, Inspector Ashley wrote to the Claimant to invite her to attend a first stage meeting under the "*formal unsatisfactory performance and attendance procedures*" (UAP) – page 100E – 100F. The meeting was to take place on 4 January 2019.
36. On 4 January 2019, the UAP meeting took place. It was decided to issue the Claimant with an informal absence procedure notification. There was no formal improvement notice.
37. On 12 January 2019, the Claimant requested annual leave for the period between 19 January and 4 February (page 116). This was granted.
38. By this time, Rachel Peat became her line manager.
39. There was a further occupational health review on 30 January 2019 (pages 120 – 124). It made a recommendation, namely;
 - a phased return to work and the Claimant would be monitored over 4 – 6 weeks (page 120 – 124).
40. The report confirmed that the Claimant had limited function capacity in a number of areas.
41. The Claimant was due to start her first shift after return to work on 5 February 2019. It had been agreed that she would initially work 3 x 4-hour shifts and the shift lengths would be increased gradually to 5 hours and then 6 hours. She was paid her full rate of pay as if she was undertaking an 8-hour shift. This is confirmed in the Recuperative Return to Work Programme form at page 128.
42. The Claimant was therefore working 12 hours a week initially but being paid her full pay as if she was undertaking 24 hours a week.
43. Furthermore, her work pattern had been aligned with her husband, who is a police officer. The arrangements ensured that he was not at work when she was. It was agreed that they would undertake a workplace assessment on 7 February 2019.
44. There was a review meeting on 12 February 2019. This was conducted

with Rachel Peat. Mrs Elliott disagreed with the recuperative pattern, which had gradually increased from 4 to 6 hours in accordance with the occupational health recommendations. Mrs Elliott complained about how Miss Peat had completed the reasonable adjustment form and said that Inspector Ashley had failed to handle her matters correctly. Inspector Peat said that she would get back to her. They subsequently agreed to schedule a meeting for 26 February 2019 with the Claimant, HR and her union officer. The invitation is at pages 135 – 135.

45. That meeting did take place on 26 February 2019 and the minutes are at pages 138 – 139. At the meeting, they discussed;
 - 4.1 the Claimant's phased return to work;
 - 4.2 the option to change working hours by submitting a flexible working request;
 - 4.3 her general welfare and overview of medication;
 - 4.4 whether it be possible for her to work from home;
 - 4.5 other reasonable adjustments;
 - 4.6 reasonable time off to attend appointments regarding her condition.
46. In relation to working from home, it was agreed that a referral to occupational health would be made to seek advice on the adjustments that would be required and they said that they would discuss that option further after the further occupational health report had been returned.
47. They identified several action points (page 139), which were;
 - 47.1 the Claimant would be referred to occupational health to discuss other adjustments;
 - 47.2 the Claimant would submit a flexible working pattern for 18 hours per week;
 - 47.3 in respect of time off to attend medical appointments, the Claimant was required to make a request for disability leave setting out the date and estimate of time. It was agreed that days off could be swapped if necessary to assist the Claimant.
48. On Monday 4 March 2019 at 6:30 am, the Claimant sent a text message to Rachel Peat requesting to take time off because her daughter was ill. This was authorised and Mrs Elliott was told that they would discuss how the time off would be covered when she returned to work.
49. On Wednesday 6 March 2019, Rachel Peat send an email to the Claimant (page 149) asking her how she would like to cover the hours. On 7 March 2019, the Claimant replied (page 147). She said that her daughter had had

a high temperature and had been in a lot of pain and was really upset and wanted Mrs Elliott to look after her. She said it would be impossible for her husband to look after their daughter and another 16-month-old son. The entitlement was to unpaid leave but was she was asking for compassionate leave, i.e. that she should be paid for the time off.

50. After taking advice, Rachel Peat responded on 8 March 2019 (pages 153 – 154). She said:
“...
*I have considered your request for time off for dependants this now all falls under compassionate leave.
I am not authorising this time off as paid because your husband was at home to support your daughter with the caring needs and responsibilities.
I understand your reasons for being at home with your daughter.
I feel this was your personal choice.
The day off can be taken as unpaid leave, annual leave, toil or worked back on another day....”*
51. One of the factors that Rachel Peat considered was that the Claimant had been granted a work life balance rota to assist her with childcare. The Claimant’s husband is a serving police officer and the Claimant had a 20-week rota which mirrored her husband’s rota. This rota enabled the Claimant and her husband to care for their children at home themselves while the other partner was at work.
52. Mrs Elliott responded (page 153), clearly unhappy about the decision, indicating that she was not able to make up the hours as she was already struggling with the hours. She only had 9 hours annual leave, no TOIL and no RDIL. She confirmed that she would take it as annual leave and would need to ask to bring forward some annual leave from her next year’s entitlement.
53. On 11 March 2019, Rachel Peat received the Claimant’s occupational health review form which noted that the Claimant’s medication had changed due to unacceptable side effects and the Claimant was now on new medication. This new medication was taken on a once weekly basis and the impact would be greater on day 1 and into day 2 of taking the medication. The review confirmed that if day 1 or day 2 were work days, the Claimant would experience variable reductions to her capabilities due to the symptoms (pages 159 – 166).
54. It was confirmed that the effect should gradually decline as tolerance built up over time. It was recommended that the Claimant would benefit from being allowed to work from home, if available to her, on occasions when severe symptoms are felt to obviate the need to travel.
55. The clinician noted that whether this potential adjustment would be considered reasonable or not would depend on the operational circumstances of the Department at the time. It was noted that there would be a need for discussion with the Claimant on the issue of appointment times at the hospital.

56. Chief Inspector Lambert asked Rachel Peat to set out the operational needs of the Department to ascertain whether the occupational health recommendation to work from home could be accommodated within the Department. As a result, Rachel Peat prepared the DMU Operational Needs document (pages 218 – 220) setting out the essential criteria of the post, daily essential tasks for the DMU role, telephone enquiries, team working, staffing, work streams and training.
57. A meeting was scheduled to take place with Mrs Elliott on 22 March 2019. The agenda is at page 173. Amongst other things, the agenda included the discussion about working from home.
58. On the day of the meeting and prior to it, the Claimant sent a letter (pages 170 – 175). She said that she had been diagnosed in December 2018 with Inflammatory Arthritis and suffered from joint pains. She also suffered from adverse side effects of the medication and asked her employer to consider the following adjustments or measures;
 - 58.1 to allow her to work from home when struggling with fatigue and/or pain;
 - 58.2 to allow her to take disability leave to attend appointments.
59. Mrs Elliott was accompanied at the meeting by her husband (Phillip) and Rachel Peat was accompanied by Arabella Lissaman (HR Adviser). The notes are at pages 184 – 184B.
60. They discussed Mrs Elliott spending time in the quiet room. Mrs Elliott was told that if she was not feeling better after a period of time, it may be appropriate to go home; that that would be ok.
61. They discussed the adjustments that had already been put into place. In particular;
 - 61.1 the phased return to work;
 - 61.2 the Claimant being supported by being paid for hours not worked during this phased return;
 - 61.3 the extended phased return to work;
 - 61.4 the flexibility over hours she worked;
 - 61.5 disability leave, if needed, for appointments;
 - 61.6 the workplace assessment and adjustments made;
 - 61.7 the signposting of CIC and BLC.
62. Mrs Elliott was frustrated that she was not allowed to work from home.

They discussed the potential issues there might be in respect of this because of changes at work and it was necessary for the Claimant to become familiar with the changes and updates.

63. The Claimant felt that she could remotely access other people's computers by using online assistance and that she had a room at home that was suitable. She wanted to be able to work from home if she felt she was not able to get in. They agreed that this request for working from home would be considered again and that Rachel Peat would explore the options suggested by Mrs Elliott. These were difficult discussions and the Claimant was upset during them.
64. Arabella Lissaman started considering the possibility of whether the Claimant could work from home. They were looking at doing this on a trial period for one shift per week. Advice from health and safety was obtained (page 185).
65. On 27 March 2019, the Claimant raised her formal grievance (pages 195 – 199).
66. She made several complaints about matters concerning her line manager, Rachel Peat, of events that had occurred since 5 February 2019.
67. On 29 March 2019, Rachel Peat replied to the letter that she had received on 22 March 2019. She referred to their discussions at the meeting on 22 March 2019 and the previous meeting held on 26 February 2019.
68. She pointed out;
 - 68.1 it had been agreed that Mrs Elliott could have disability leave to attend hospital appointments which fell on a working day;
 - 68.2 in line with occupational health recommendations, they had agreed that the Claimant's return to work on a phased basis and this had been extended;
 - 68.3 she had been offered the opportunity to amend her working pattern;
 - 68.4 a display screen equipment work station assessment had been undertaken and an alternative mouse had been provided, together with an offer of an alternative keyboard, which had been declined.
 - 68.5 Mrs Elliott had been offered a riser desk, which had been initially declined but subsequently agreed to;
 - 68.6 other adjustments included the ability to use the quiet room and to take time off if she was feeling unwell and to go home to recuperate;
 - 68.7 she was told of the support available from the blue light champions and CIC, together with other outside agencies.

69. After discussion with Chief Inspector Lambert, Rachel Peat prepared a document entitled "DMU Operational Need". This is dated 9 April 2019 and is at pages 218 – 221.
70. On 16 April 2019, Rachel Peat wrote to the Claimant with a detailed response in respect of her request to allow her to work from home when struggling with fatigue and/or pain (pages 232 – 234).
71. She said that she had liaised with other departments for advice. She confirmed that the DMU could accommodate the Claimant to work one pre-planned shift per week at home. She said that there would be insufficient work for home working for more than one shift per week as work completed at home would be of a different sort to daily business.
72. She said that one shift per week on a pre-planned basis would be difficult for the Department to manage and would require a trial period to assess its full impact for the Claimant and the organisation. She said that working from home on an ad hoc basis could not be accommodated due to the operational needs of the Department. She proposed that the trial period would be a temporary measure until 27 May 2019.
73. The pre-planned one shift per week would have to be in agreement with line management and would not take place on Monday or Friday due to operational needs. Monday and Fridays are the key days in terms of operational demand for the unit.
74. She highlighted that the DMU Department was understaffed by 4 or 5 full-time posts and this created significant pressure on the team. She said that unplanned events of working from home would have a significant adverse impact on the Department's ability to plan its workload effectively.
75. Rachel Peat said that she had considered Mrs Elliott's long-term absence from the work place and that she would require the support of the office environment to get back to speed with work processes. During her absence, work processes had greatly changed, including a significant upgrade of the work software system. This system had gone live in February 2018 and there were substantial issues in the performance of the system.
76. There had been complex issues which the team were trying to deal with and Rachel Peat felt that it was unfair to the Claimant to be placed under pressure in a home environment without any support from the team to assist her. She said that any error occurring, due to the system and its complexities, would take another team member a considerable time to unpick and correct the error. This would create some frustration within the team and against the staff member who made the mistake.
77. Prior to going on annual leave in April, the Claimant had made an error whilst working in the office environment and this had taken a colleague 8 hours to correct. Mistakes such as these set the unit back from achieving

their service delivery agreements.

78. Rachel Peat intended to go through this issues with Mrs Elliott on her return from sickness absence to ensure she was fully trained and competent in her role.
79. Also on 16 April 2019 Rachel Peat met with Inspector Pat Howitt, who was the grievance investigating officer, to discuss the Claimant's Stage 1 Grievance and she explained to him the circumstances from when the Claimant returned to work on 5 February 2019 and highlighted the adjustments and measures that had been put in place (pages 235 – 237).
80. On 24 April 2019, Inspector Howitt met with Arabella Lissaman, also about the grievance, and the notes are at pages 237 – 239.
81. On 26 April 2019, the Claimant was signed off sick and she never returned to work.
82. A meeting to discuss the Claimant's grievance was due to take place on 1 May 2019 but the Claimant could not attend because she was off sick, although she did not contact either Inspector Howitt or Rachel Peat directly about this.
83. Mrs Elliott had contacted ACAS and commenced early conciliation about a potential claim of disability discrimination on 8 April 2019. This was due to expire on 8 May 2019. The Claimant was being assisted by UNISON at the time and there was pressure to deal with the grievance as expeditiously as possible.
84. Inspector Howitt referred to these issues concerning a potential claim of the Claimant in his report dated 9 May 2019, which is at pages 299 – 305. Before he finalised that report, he had tried to contact the Claimant on the telephone on Wednesday 8 May. He regretted that he had not been able to speak with Natalie Elliott prior to writing the report but because of the timescales decided that he should provide a response to it.
85. His findings were that;
 - 85.1 the grievance had been submitted prematurely while work was still ongoing around reasonable adjustments. He noted that reasonable adjustments had been made and working one day a week from home with a pre-planned day for a trial period to see if this worked;
 - 85.2 he suggested mediation in respect of the relationship between Natalie Elliott and Rachel Peat;
 - 85.3 he recommended continued meetings between Rachel Peat and Natalie Elliott with HR and the second line manager to develop and monitor any further adjustments;
 - 85.4 there is a phased return to work in place and that all parties should

look at an action plan to enable Natalie Elliott to get back to her allocated hours and she should submit a suitable working plan to assist that process.

86. Having again failed to be able to contact Mrs Elliott, he decided to send the report to her on 10 May 2019 (page 308A).
87. Also on 10 May 2019, the Claimant was notified that her pay would be reduced to half pay with effect from 22 May 2019.
88. On 10 May 2019, the Claimant appealed against the decision (page 328).
89. Gemma Johnson wrote to the Claimant on 21 May 2019 pointing out that as part of the grievance procedure, a formal grievance meeting should be attended by the stage 1 investigating officer, Inspector Howitt, and Mrs Elliott. She suggested that there should be a meeting with Inspector Howitt and amendments made if necessary to the report before there was a stage 2 panel hearing. Mrs Elliott responded to this saying that she wished to proceed to the stage 2 grievance (pages 346 – 347). She did not wish to attend a meeting with Inspector Howitt and so a stage 2 panel review meeting was arranged for Monday 10 June 2019. The panel would comprise Richard Cariss, Head of Information Services and HR Manager, Melanie Clarke. The Claimant attended the meeting with her husband, Phillip Elliott. Also in attendance was Inspector Howitt. The notes of the meeting are at page 350. They confirmed that the outstanding grievance issues were as follows;
 - 89.1 discrimination on the grounds of disability and failure to make reasonable adjustments in a timely manner;
 - 89.2 disciplinary action should be taken against the Claimant's line manager;
 - 89.3 lack of support from the Claimant's line manager;
 - 89.4 further support and training for line managers and HR in reasonable adjustments.
90. The panel said that the grievance procedure was not the appropriate process to seek punishment and so would not be discussing disciplinary action against Rachel Peat.
91. The panel heard evidence from the parties and considered the documents in the grievance pack, including the investigation report. They determined as follows;
 - (a) that they were pleased that the issue around time off for medical appointments had been satisfactorily resolved;
 - (b) the grievance procedure had been followed, although it noted that Mrs Elliott had not received a copy of the pack before the meeting.

She had confirmed though that she had previously seen all the documents in the pack and appropriate time was given to the Claimant to review and consider the pack;

- (c) they were satisfied that the appropriate line management support was given to the Claimant and noted that the relationship between the Claimant and her line manager had “*somewhat*” broken down;
- (d) the panel found no grounds that the Claimant had been discriminated against on the grounds of disability and was satisfied that the Force had taken appropriate steps, considered options, actioned and implemented numerous reasonable adjustments as documented in the investigation officer’s report to assist and support the Claimant;
- (e) they were satisfied that the stage 1 investigation report was detailed and addressed all the relevant issues. They were concerned though that the investigation officer did not make further attempts to discuss the investigation report with the Claimant before sending it to her;
- (f) they stated that the Claimant should be given additional training and support to bring her up to speed with changes in working practices within the Department. Their view was that training needs analysis should take place within the first week or two of the Claimant returning to work.

92. They then made a number of recommendations that;

- (a) Mrs Elliott’s training needs analysis and training schedule should be created within the first couple of weeks of her return to work;
- (b) a mentor/work buddy should be considered to support her and refresh her skills;
- (c) whilst they were mindful that not every role in the Force would be suitable for flexible/agile working, they recommended that the Duty Management Unit should further explore how working from home could potentially be trialled;
- (d) Mrs Elliott was to submit a revised flexible working pattern as the DMU shift pattern and departmental hours had changed;
- (e) both parties to be involved in a form of facilitated discussion/joint problem solving at a time when parties are at work and feel able to participate to support their working relationship.

93. On 5 July 2019, an occupational health report was received about the Claimant’s condition (pages 380 – 382) from Dr A Booth. The Claimant was unfit for all work and there were no adjustments that had any potential for change in that situation at the present time.

94. The Claimant was due to attend a supportive meeting on 10 July 2019 but was unable to do so and this was ultimately rearranged for 14 August 2019. At the meeting, the Claimant was accompanied by her UNISON representative. Miss Peat and Mrs Elliott discussed the outcome of the grievance. Miss Peat said that she would speak to the Equality Unit and Health and Safety Department to explore the difference in the information provided and agreed to see if this would affect the working from home request. Arabella Lissaman asked whether the Claimant would be interested in doing other work from home but Mrs Elliott was not well enough to work in any capacity at that stage. They also discussed redeployment possibilities if Rachel Peat had not been able to accommodate the working from home request in their Department. They also discussed the possibility of medical retirement. A further meeting was agreed for 18 September 2019 but the Claimant again was unable to attend that meeting.
95. On 2 October 2019, Rachel Peat wrote to Mrs Elliott (pages 391A – 391B). She said that she had contacted the Equality Unit and Health and Safety again as agreed and attached an amended working from home document to further support Mrs Elliott. She confirmed that there would be a further referral to occupational health to explore if anything could be done to support her. She noted that a return to work date was set for 21 October 2019 and if Mrs Elliott failed to return to work, then the circumstances would be reviewed. She said that a full skills analysis assessment would be carried out on the Claimant's return to work and a mentor allocated to offer guidance and support. She asked for a flexible working pattern to be submitted before she returned to work.
96. Mrs Elliott did not return to work on 21 October 2019 and Rachel Peat telephoned her to ask her why. By now, the Claimant had been absent for 158 days with no return to work and she was invited to attend a stage 1 UAP meeting on 29 October 2019.
97. On 24 October 2019, Mrs Elliott said that she would be unable to attend the UAP meeting because of unavailability of her union representative and asked that Rachel Peat and Arabella Lissaman should not attend the meeting and requested mediation prior to the stage 1 meeting. That meeting did not go ahead.
98. Mrs Elliott was offered mediation and was asked to provide details of dates and times that she could attend.
99. On 29 October 2019, a further occupational health report was obtained (page 391F). It said that little had changed and that the Claimant was considered unfit for all work now. No adjustments could improve this situation.
100. On 14 November 2019, Rachel Peat contacted the Claimant on the telephone for a welfare check but without success. Mrs Elliott then emailed Rachel Peat and said that it was not appropriate for her to

undertake welfare checks and that this should be allocated to someone else.

101. On 19 November 2019, Chief Inspector Jon Clark contacted Mrs Elliott and confirmed that welfare would now be undertaken by Sergeant Gemma Thursfield and informed her that her half pay had been extended until 30 November 2019 until a decision was made about her appeal. This was further extended on 27 November 2019 until 8 January 2020 to allow for further discussions.
102. Inspector Phil Booth was then appointed to manage the UAP stage 1 procedure and a date was provisionally agreed for 14 or 15 January 2020. This was put on hold until the end of January 2020 because of a meeting that was due to take place on 15 January 2020 to review the Claimant's circumstances. On 15 January 2020, the Respondent extended the Claimant's half pay to 31 January 2020. This was whilst discussions were taking place to see if matters could be resolved amicably between the parties.
103. By 17 February 2020, it was apparent the parties could not reach any agreement and a further occupational health report was obtained on 6 March 2020. The Claimant was still unfit for work and no adjustments were possible.
104. On 31 March 2020, the Claimant confirmed that she had received a letter requiring her to self-isolate for 12 weeks until 22 June 2020 due to challenging circumstances relating to COVID-19.
105. On 7 May 2020, the Claimant wrote to Arabella Lissaman about delays to the stage 1 UAP process (page 392R). She said that she had expected to receive a letter within 2 weeks from 2 April 2020 and said that it was late. She asked why the UAP stage 1 was "being threatened several times and not followed through?". She went on to say;

"... I am beginning to believe this is just another way to bully me back to work by telling me I'm going to have to attend a meeting several times and then not finalising the plan.

..."

106. Arabella Lissaman replied to this letter on 13 May 2020 (page 392Q). She explained the reasons for the delay, which were a supportive measure for Mrs Elliott. She explained;
 - 106.1 the original UAP stage 1 meeting on 29 October 2019 had to be adjourned because the Claimant could not attend it and she had requested that Rachel Peat should not chair that meeting or be involved in the process. As a result, Inspector Booth had been asked to chair the meeting;
 - 106.2 during the period, ACAS had contacted the Respondent's Legal Team for negotiations and they agreed to put the UAP stage 1 on

hold during those negotiations, which had not been concluded until February 2020;

106.3 there had then been a further occupational health report necessary, which had been obtained on 9 March 2019;

106.4 on receipt, Inspector Booth had been contacted to reconvene the meeting but this had to be reallocated to Inspector Neate. During this, the COVID-19 lockdown had occurred;

106.5 Mrs Elliott had notified the Respondent that she was to self-isolate on 31 March 2020 for a period of 12 weeks;

106.6 in April 2020, they had decided to pend the formal proceedings because of this self-isolation for a period of 12 weeks;

106.7 this was meant to be a supportive measure and would be reconsidered as soon as possible after the 12-week period of self-isolation.

107. On 3 June 2020, the Claimant submitted her resignation (page 398). She said;

...

I am writing to confirm my resignation from the post of Duty Management Officer. I am resigning with immediate effect from today's date. Please arrange for any Annual leave payment to be paid to me as soon as possible and any correspondence sent to my home address and my email.

I feel that I am left with no choice but to resign in light of my recent experiences regarding a fundamental breach of contract. This is due to the disability discrimination I have suffered since February 2019.

*It is also a last straw **doctrine** due to several incidents of negative treatment towards me on your part and now the recent email I have received regarding Stage 1 unsatisfactory attendance procedures.*

I would be grateful if you could acknowledge this letter at the earliest opportunity.

..."

Discrimination arising from disability

108. Section 15 EqA provides that an employer (R) discriminates against a disabled person (C) if they treat C unfavourably because of something arising in consequence of their disability, and if R cannot show the treatment was a proportionate means of achieving a legitimate aim.

109. Miss Palmer referred us to the case of ***Pnasier v NHS England [2016]***

IRLR 170 and the guidance provided in that case. That says the questions before the tribunal are;

- (a) to ask whether there was unfavourable treatment and by whom. No question of comparison arises. If there is none, that is the end of the claim;
- (b) the tribunal must determine what caused the impugned treatment, i.e. what was the reason for it? At this stage, the question is on the reason in the mind of R. The something that caused the unfavourable treatment need not be the sole or the main reason but must have at least a significant (or more than trivial) influence on the unfavourable treatment and so amount to an effective reason for it.
- (c) motives are irrelevant. The focus on this part of the enquiry is on the reason for the treatment and R's motive for acting is simply irrelevant;
- (d) the Tribunal must determine whether the reason /cause (or, if more than one), a reason or cause is "something arising in consequence of C's disability". At this stage of the causation involves an objective question;
- (e) it does not matter precisely which order these questions are addressed.

Harassment

110. Harassment is defined in section 26 of the Equality Act 2010, which provides:

- "(1) A person (A) harasses another (B) if—*
- (a) A engages in unwanted conduct related to a relevant protected characteristic, and*
 - (b) the conduct has the purpose or effect of—*
 - (i) violating B's dignity, or*
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
- ...
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*
- (a) the perception of B;*

- (b) *the other circumstances of the case;*
 - (c) *whether it is reasonable for the conduct to have that effect.*
- ...

111. Miss Palmer also referred us to the cases of;

- ***Richmond Pharmacology v Dhaliwal [2009] IRLR 336;***
- ***Land Registry v Grant [2011] EWCA Civ 769***

112. The three elements for us to focus upon, namely;

112.1 the unwanted conduct;

112.2 whether the conduct has the purpose or effect of either violating the Claimant's dignity or creating an adverse, intimidating, hostile, degrading or humiliating environment for her;

112.3 on the prohibited grounds, i.e. it is related to a relevant protected characteristic; in this case disability.

Duty to make reasonable adjustments

113. Section 20 EqA provides that;

20 *Duty to make adjustments*

...

- (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.*
- (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.*

...”

114. Miss Palmer referred us to leading case of ***Environment Agency v Rowan [2008] IRLR 20*** which sets out the way in which we should approach cases, namely we should identify;

- a provision, criterion or practice applied by or on behalf of an employer;
- non-disabled comparators (where appropriate);
- the nature and extent of the substantial disadvantage suffered by the Claimant;
- we must examine the overall picture and should not jump from a finding of a substantial disadvantage to a finding of what adjustment it would have been reasonable to make without further considering how that proposed adjustment would overcome the substantial disadvantage question.

Constructive unfair dismissal

115. Miss Palmer identified that the relevant legal provision is that in section 95(1)(c) of the Employment Rights Act 1996, which provides;

“95 Circumstances in which an employee is dismissed.

...

(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.”*

116. Only if the Claimant can establish that she was constructively dismissed would we then go on to consider the general test of fairness set out in section 98 of the ERA.

117. We were referred to several cases, namely;

- ***Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978***
- ***Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445***
- ***Morrow v Safeway Stores plc [2002] IRLR 9***
- ***Woods v W M Car Services (Peterborough) Ltd [1981] ICR 666***
- ***Amnesty International v Ahmed [2009] UKEAT/0447/08***

Our Conclusions

Discrimination arising from disability

118. The Claimant contends that two decisions made by Rachel Peat amount to discrimination arising from disability. These are the decisions she made on 5 February 2019 when the Claimant had to undergo CBT and 5 March

2019 when she says that she was refused paid time off under the Respondent's Compassionate Leave Policy to attend a sick child.

119. In respect of the incident on 5 February 2019, we are satisfied that the Claimant's usual shift was 8 am until 6 pm and that she was paid for the whole of that shift. She was only at the office on that day between 11 am and 3 pm. She did not therefore receive any unfavourable treatment.
120. In respect of the incident on 5 March 2019, we are satisfied that the Claimant was given time off to attend her sick child. The Respondent had already ensured that the shift pattern of her husband mirrored the shift pattern of the Claimant and that he was at home that day.
121. In respect of time off for a family emergency, the Claimant is only entitled to unpaid time off. What she complains about is a refusal to give her paid time off under its Compassionate Leave Policy to attend her child.
122. We are satisfied that although there is a right to unpaid time off, there is no right to paid time off because that under the Respondent's policy is at the discretion of her line manager.
123. Rachel Peat declined to exercise her discretion in this case. We are satisfied that she considered that the policy did not apply in the circumstances of this case and, again, the Claimant has not suffered unfavourable treatment. In fact, she was paid for this shift by taking it as annual leave and had been offered the opportunity to make up the hours, use unpaid leave or time off in lieu.
124. In any event, we were satisfied that the reason for Rachel Peat's decision was because the Claimant's husband was at home and available to care for their sick child. If the tribunal had been satisfied that there had been unfavourable treatment, we would have been satisfied that it was not because the Claimant had had time off because of her sickness. Claim of discrimination arising from disability fails.

Reasonable adjustments

125. It is not in dispute that the Claimant suffers from a disability. It is a most serious condition and has had a devastating effect on the Claimant, who is a young woman with two young children.
126. In this case, the PCP relied on by the Claimant is requiring her to attend the workplace to carry out her duties. That requirement only continued in fact until 16 April 2019 because thereafter the Respondent had indicated that, subject to 2 weeks' notice, the Claimant could work at home one day a week, Tuesday to Thursday for a trial period.
127. There were three ways in which the Claimant was asserting that she was placed at a substantial disadvantage and we deal with these as follows;

127.1 Her disability meant that she had trouble getting up in the

morning and getting ready for the day's work.

We are satisfied that the Claimant was impacted in this way and the Respondent knew this. The Claimant though would still need to get up, get dressed and make breakfast for herself even if she was working from home. On these days that she would be working, her husband would be at home and responsible for the children and could help make her breakfast.

127.2 The Claimant finds driving to work painful and is easily fatigued.

We accept and are satisfied that the Claimant is easily fatigued and she is in pain when she is driving. It must be borne in mind though that the journey to work was only 3 miles and took no more than 10 minutes.

127.3 The Claimant sometimes suffered from a delay in reaching the point in the day when she was physically able to get to work or do her work.

We are satisfied that working from home in respect of this would make no difference. Whether she was at work or at home she would still suffer that issue.

128. All the evidence showed that there was very little prospect of the Claimant's health improving and we are satisfied that whatever steps the Respondent had undertaken, it would have little impact on her ability to do her work, bearing in mind the serious condition that she suffered from.

129. We have to consider the reasonableness of the adjustments sought, including the extent to which the steps sought would prevent the effect in relation to which the duty is imposed and the extent to which it is practicable to take that step.

130. We are satisfied that the Claimant working from home on an ad hoc basis simply when she felt she was not able to go into work would have seriously affected the Respondent's operational needs.

131. In any event, the Respondent had not ruled this out and were prepared to allow the Claimant to work from home on a trial basis to see how this would affect the operation and whether the Claimant could work from home. The Claimant declined to accept this offer. We are satisfied that at the time that she declined to accept the offer, she knew realistically that it would not assist her in her being able to do her work.

132. We also consider the other substantial adjustments to alleviate the disadvantage that had already been taken, namely

- the provision of the desk;
- the provision of mouse and keyboard;

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- the alteration of hours;
 - the trial period in respect of working from home one day per week, which the Claimant rejected.
133. We are satisfied that the Claimant should have at least been prepared to undertake that trial if she really did think that it could possibly resolve the issue.
134. We are satisfied that the Respondent had legitimate concern about;
- the allocation of work whilst the Claimant was working from home;
 - relationships with colleagues;
 - changes in work processes and new IT system.
135. We are satisfied that it would not have been reasonable for the Respondent to simply agree to the Claimant working from home on an ad hoc basis without a trial period. The claim of failure to make reasonable adjustments fails.

Harassment

136. The Claimant relies on two alleged comments from Rachel Peat at the meeting on 22 March 2019.
137. We are satisfied that Rachel Peat did not challenge the Claimant as she alleges about spending too long in the quiet room and that she was “*not prepared to argue with her about it*”. We are satisfied that the amount of time that the Claimant was spending in the quiet room was discussed but we are not satisfied that the alleged comments were made.
138. We are also not satisfied that Rachel Peat said, “*The rest of the team working their full hours and being busy and the Claimant was getting 70 hours for free*”. In the conversation we are satisfied that there was a discussion about the adjustments that had been made, which included the fact that the Claimant in her phased return to work was being paid an extra 70 hours pay.
139. As we are satisfied that she did not make such comments, that is the end of the matter. The conversation did not amount to harassment. The claim of harassment fails.

Constructive unfair dismissal

140. We are not satisfied that the Claimant was dismissed. Mrs Elliott resigned not because of any breach of contract by the Respondent; there had been no breach of mutual trust and confidence committed by the Respondent and, as we have found above, we are satisfied that the Respondent had not discriminated against her.
141. The Respondent had been in negotiations with the Claimant for a period of one year before she resigned. They had entered into those negotiations in

good faith to try to resolve the issues regarding the Claimant's employment.

142. During those negotiations, there were many extensions for the Claimant in receiving her full pay, which under normal circumstances she would have lost.
143. She would also normally have been subjected to the UAP procedure at a much earlier stage if the Respondent had not been involved in negotiations with the Claimant.
144. As we have highlighted, this is a very sad case where a young woman in her early thirties with two young children has suffered from a debilitating disease which will affect her for the rest of her life.
145. We are satisfied that the reason for her resignation was that the negotiations to settle her claim had broken down which meant that she would not receive any pay and would be subject to the absence procedures, which would have in our view inevitably led to her dismissal on grounds of capability.
146. In this case;
 - 146.1 there was no breach of the implied term of trust and confidence as alleged. A settlement had been offered to the Claimant, which she was not prepared to accept;
 - 146.2 the conduct complained of by the Claimant was not calculated to destroy trust and confidence but was undertaken with a willingness to either assist the Claimant to return to work or to leave her employment by agreement;
 - 146.3 we are satisfied that the Respondent behaved reasonably and with proper cause throughout and was entitled to contemplate starting the stage 1 absence procedures given the length of time the Claimant had been off work.
147. For these reasons, all the Claimant's claims fail and are hereby dismissed.

Employment Judge Hutchinson
Date 15 January 2021

REASONS SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE

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