Case No: 2304129/2017/V
2304154/2018/V

EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**V**	**RESPONDENT**
Mrs S Raj		**Department for Work and Pensions**

Heard at: London South Employment Tribunal **On:** 4, 5, 6, 7, 8 & 11 January 2021 and 1 February 2021

Before: Employment Judge Hyams-Parish
Members: Ms J Forecast and Ms C Edwards

Representation:
For the Claimant: Ms S Idelbi (Counsel)
For the Respondent: Mr S Tilston (PCS Union Representative)

JUDGMENT

The claim of disability discrimination is well founded and succeeds.

The Claimant is awarded compensation for injury to feelings in the sum of £12,500.00, plus interest of £3,804.74.

The Claimant is awarded other compensation in the sum of £1,507.06, plus interest of £284.83.

REASONS

Claims and legal issues

1. The Tribunal has been presented with three claim forms by the Claimant: the first on 23 December 2017; the second on 17 November 2018; the third on 9 May 2019.

2. At a case management hearing before Employment Judge Corrigan on 30 September and 1 October 2019, a considerable amount of time was spent discussing the claims with a view to understanding them. During that hearing, it was agreed that the only claim being brought against the Respondent was one of failing to make reasonable adjustments contrary to s.20 and s.21 Equality Act 2010 ("EQA").

3. The above-mentioned claim form presented to the Tribunal on 9 May 2019 was struck out by Employment Judge Corrigan as having no reasonable prospects of success because it contained no cause of action within the Tribunal's jurisdiction.

4. The issues were identified at the above case management hearing, and agreed at this hearing as follows:

   (a) Did the Respondent apply a provision, criterion or practice to the Claimant, which was to work within the Kent Fraud Error Service ("FES") and/or within Mr Graham Smith's line management tier following her successful appeal against dismissal at the end of March 2017? ("the PCP")

   (b) Did the PCP put the Claimant at a substantial disadvantage in comparison to those who are not disabled? The substantial disadvantage relied upon is that this exacerbated the Claimant's depression and anxiety and led to an avoidable sickness absence and consequent loss of earnings including reduced earnings during a phased return.

   (c) Did the Respondent have the requisite knowledge of the disability and the disadvantage?

   (d) Did the Respondent take such steps as it is reasonable to have to take to avoid the disadvantage?

5. The Respondent accepts that the Claimant was disabled, within the meaning of the EQA, from October 2016. However, for the purposes of defending the reasonable adjustments claim, the Respondent's position is

that they did not know, and could not reasonably have been expected to know, that the Claimant was disabled and was likely to be placed at a disadvantage by the Respondent's PCP, until June 2017, upon receipt of an Occupational Health ("OH") report which advised that the Claimant was a disabled person.

6. The Claimant's position is that the Respondent was under a duty to make reasonable adjustments for her, as a disabled person within the meaning of the EQA, upon her reinstatement on 31 March 2017 following her successful appeal against dismissal. That is the date the Respondent ought reasonably to have known, says the Claimant, that she was a disabled person.

7. The Claimant accepts that there was eventual compliance with the duty to make reasonable adjustments by the end of July 2018, upon her taking up an alternative position with the Respondent. The Claimant claims, however, that the Respondent should have made adjustments earlier, from April 2017. In particular, she argues that the following reasonable adjustments should have been made, which if they had been made, would have avoided a further lengthy period of absence from 12 December 2017 to 30 July 2018:

   (a) appointed to the temporary position held by Patricia Downey;

   (b) given a position as a work coach at the Chatham office with her normal Monday to Thursday work pattern;

   (c) compensated for the additional time and expense of travelling to Bromley, which would have enabled her to take up that post; and

   (d) given a position within the Sittingbourne office team as a work coach, working the same Monday to Thursday work pattern.

8. In addition, it is alleged that the Respondent failed reasonably to find and offer the Claimant a suitable position once she had been approved for an equality move in June/July 2017 and that it was a failure to comply with the duty to make reasonable adjustments by forcing her to wait until July 2018 to appoint her to a suitable post.

9. The Claimant also alleges that she should have been given special leave during the period from 12 June 2018 until 30 July 2018, so as to enable the Claimant to have received full pay during this period

Practical matters

10. The Tribunal received witness statements from the Claimant and three witnesses:

(a) Kent Collins

(b) Thomas Restell

(c) Gerard Buckley

11. Only the Claimant and Mr Collins were required to give oral evidence. The Tribunal did not consider that the evidence from the Claimant's witnesses assisted her or was such that the Tribunal could give much weight to them; their evidence was of marginal or no relevance and was largely hearsay, i.e., what the Claimant had told them. Indeed, Ms Idelbi did not have any questions for Mr Buckley or Mr Restell, choosing instead to comment on them in submissions, and she only had two or three questions for Mr Collins.

12. The Respondent called the following four witnesses as part of its case:

(a) Sue Pirot, HR Business Partner.

(b) Steven Allinson, Team Manager for South Kent investigations team.

(c) Stephen Ashe, Claimant's line manager from February 2018.

(d) Paul Stevenson, grievance officer.

13. During the hearing, the Tribunal was referred to documents in a bundle extending to 1552 pages. However, the Tribunal was only taken to a fraction of those pages during questioning.

14. The Tribunal received two lengthy witness statements from the Claimant; the first consisting of 30 pages and 135 paragraphs; the second (which responded to the Respondent's witness statements) of 28 pages and 78 paragraphs. The Tribunal read all of the Claimant's witness statements but concluded that much of them were not directly relevant to the issues that the Tribunal needed to determine. All but one of the Respondent's witnesses also provided two witness statements each, the second one responding to the Claimant's first witness statement.

15. The parties were told clearly at the outset of the case that the Tribunal would not be drawn into making findings of fact that it was not necessary to make in order to determine the claims, and that the questioning should be focused on those matters relevant to the issues. To their credit, Ms Idelbi and Mr Tilston heeded this advice and did not stray into areas outside of the issues.

16. Submissions concluded on day 5 (Friday) and the Tribunal met to consider its decision. The parties agreed that they should be released for the remainder of day 5 and not attend the Tribunal on day 6 (Monday). It was agreed that the parties would next attend the Tribunal on day 7 (1 February

2021) so that the parties could be given an oral decision and the Tribunal would then determine remedy if appropriate.

17. Reasons for this decision were given orally to the parties at the hearing on 1 February 2021. These written reasons are provided at the request of the Claimant.

Background findings of fact

18. The Claimant commenced employment for the Respondent on 6 January 1986. She started work on a part time basis and has never worked full time. The Claimant's current contract, which dates back to 2004, states that she was contracted to work 32 hours a week over four days. Her working days since then have always been from Monday to Thursday. During the period from 2016-2018 the Claimant said that the long weekend was important to her because it was a time when her daughter came to stay with her and provided much needed support during a time when her mental health was not good.

19. As part of the "Employee Deal" (a collective agreement between the Respondent and various trade unions which incorporated new terms of employment into the contracts of employment for all employees of Respondent in grades Admin Assistant to Higher Executive Officer employed on 1 July 2016) the Respondent had the right to make changes to an employee's regular working pattern (with reasonable notice) in order to meet business requirements, albeit it could not increase the number of hours worked. The Claimant saw no changes to her hours or working arrangements as a result of the Employee Deal.

20. In 2002, the Claimant started working as a Fraud Investigator, Executive Officer grade, in the Chatham Job Centre Plus ('JCP'), which formed part of the Kent FES. She was line managed by Graham Smith. The FES sits within the Counter Fraud and Compliance Directorate ("CFCD"). The Claimant lived relatively close to Chatham, in Rainham, and her travel time to work by car was approximately 15 minutes.

21. The Claimant gave evidence that there was a history of a poor working relationship with Mr Smith. Very early on in her working relationship with him, she says she raised a number of issues which he ignored and which she says culminated in a legal dispute in 2005. Mr Smith moved to another area in 2005 but returned as the Claimant's line manager in 2015. The Claimant said in evidence that upon Mr Smith's return she started to relive the trauma that Mr Smith had previously inflicted upon her. This Tribunal does not make any finding as to what actually occurred between the Claimant and Mr Smith as it is not necessary to do so to determine the issues in this case. The Respondent does not take issue with the fact that the Claimant perceived there to be a significant problem with Mr Smith's

management of her which resulted in the Claimant suffering with her mental health and resulting in periods of sickness absence.

22. On 1 April 2016, Janice Wellard replaced Mr Smith as the Claimant's line manager, whilst Mr Smith was promoted to become Ms Wellard's line manager. In the Claimant's view, this did not change anything with regards her views about Mr Smith managing her. Due to his "hands on" approach to management, she felt that many decisions made in respect of her were in fact made by Mr Smith. The relationship with Ms Wellard was not much better, largely because the Claimant perceived her to be simply carrying out Mr Smith's instructions.

23. The relationship between the Claimant and Ms Wellard and Mr Smith deteriorated further in October 2016 when an investigation was commenced into allegations that the Claimant had committed acts of gross misconduct. During an investigatory meeting between the Claimant and Ms Wellard, attended by Mr Tilston, the working relationship and its effect on the Claimant, was discussed, resulting in Mr Tilston enquiring why she had not been offered a Stress reduction plan and an OH assessment.

24. The Claimant was subsequently referred for an OH assessment and the Tribunal were shown a report written by a company which carried out OH assessments for the Respondent, called OH Assist. The report, dated 12 October 2016 [1019], included the following extracts [sic]:

> ***Ms Raj is at work however she reports she has been experiencing stress, anxiety and depression. She reports this has been caused by work related issues dating back to 2005. This has been caused by interpersonal difficulties with management. She feels the relationship has broken down. She reports she saw her GP most recently and has started taking medication to help treat symptoms affecting her emotional wellbeing. She is pacing herself with activities of daily living.***
>
> ***She reports she has suffered with back pain for a while however this is well managed with medication that she takes as and when required.***
>
> ***<u>Disability Advice</u>***
>
> ***The Equality Act 2010 is legally defined and the decision on whether the definition of disability applies is ultimately determined by a tribunal. However, based on my interpretation of the relevant UK legislation, in my clinical opinion the anxiety, stress and depression is unlikely to be classed as a disability under the equality act as the condition is reactive to her work circumstances and it will be expected to resolve with resolution of her perceived stressors. The condition is not expected to have long lasting significant effects on her normal day to day activities.***

25. A stress reduction plan was conducted by Mr Allinson on 29 November 2016. Mr Allinson says this meeting was in December 2016 but the Tribunal has taken the above November date from the written plan produced by Mr

Allinson following that meeting. During this meeting, her relationship with Mr Smith was explored and she expressed a desire to be moved out of the FES. When giving his evidence, Mr Allinson suggested that the Claimant wanted to move out of the FES completely. The Tribunal does not accept this, primarily because it is inconsistent with their later discussion (see below) about moving to a FES role in Bromley where there was a different management structure. The Claimant also denied that is what she said. The Tribunal finds as fact that the Claimant wanted to move out of the FES in so far as the management chain led to Mr Smith. This clearly meant that she would need to move from the FES in Chatham and Sittingbourne since they were both managed by Mr Smith.

26. The Claimant explained how the situation was affecting her health. The plan [185U] recorded her saying the following:

> ***Prior to March 2016 Soma was placed on an informal Performance Improvement Plan by GS relating to her caseload management and NFS accuracy. She was under a lot of pressure/stress at the time as she had lots of IUCs arranged, had some holiday booked and had a difficult……that she was dealing….with…. about. She was suffering with chest pains and told GS that she was feeling under a lot of pressure/stress but GS disregarded her concerns. Soma said she had emailed GS. Things got so bad that on 04/03/16 Soma could not sleep with worry and out of desperation actually texted Mark Lumsden (Senior Leader at the time) at around 2am. She was suffering from stress and chest pains.***

27. There was a further OH assessment in December which led to a further letter by OH Assist on 12 December 2016 [981] which the Tribunal were shown. This contained the following extracts [sic].

> ***Current Health Situation***
>
> ***As you are aware Ms Raj is currently absent from work due to stress symptoms which she perceives to have been caused by workplace issues. Ms Raj cited a breakdown of relationship between her and her manager as the main issue. Ms Raj reported an improvement in her symptoms since the last OH assessment, she stated that she is less tearful and her sleep has improved. Ms Raj said that she still feels that her confidence has been knocked and would struggle to return to the same work environment, with everything that has transpired. Ms Raj has been consulting her GP, she is taking antidepressant medication and attending counselling.***
>
> ***Capability For Work***
>
> ***Based on today's assessment Ms Raj is considered fit for work in some capacity at the end of her current fit note. The main barrier to returning to work is her perception of work-related issues. In my opinion resolution of the issues causing Ms Raj's concerns would enable her to return to work. She will require some support in the short term while she settles back into the work routine.***

> ***Stress in itself is not a medical condition and there is no specific treatment. Managing the situation requires identification of the issues that are causing pressure and the development of a plan to deal with the issues. Failure to do so, or high levels of stress over a prolonged period can sometimes lead to a more significant mental health problem such as anxiety and depression.***
>
> ***……***
>
> ***Disability Advice***
>
> ***Ms Raj's condition does not meet the criteria to be considered under the disability provisions of the Equality Act, as her condition has not lasted over 12 months and her activities of daily living are not significantly affected.***
>
> ***…….***

28. On 20 December 2016, the Claimant was signed off work. She says that she was in a desperate state by this stage and was suicidal.

29. The Claimant was dismissed on 13 February 2017 in consequence of those matters raised at paragraph 23 above. The Claimant successfully appealed against her dismissal and was reinstated on 31 March 2017. The outcome letter contained the following two paragraphs [sic]:

> ***I have recommended that you be transferred to another arm of the business and this is being pursued, but I cannot personally guarantee that there will be no dealings between you and the Fraud Management Team in the future. As you know, changes in the Department do take place, sometimes on a large scale, and none of us can know what may change down the line. If you do have concerns in the future, then you will need to raise these through your new line management chain.***
>
> ***With my decision to reinstate you, the information relating to this incident will be removed from your records on RM etc. I would point out that I overturned the dismissal decision, not because I determined that gross misconduct did not take place, but primarily because I felt the Department may not have exercised its duty of care with regards your welfare prior to the incidents in question.***

30. The Tribunal understood the above paragraph to mean that the appeal had been upheld because the Respondent had failed to carry out a stress reduction plan and OH assessment on the Claimant much earlier in the year and prior to this incident.

31. The Respondent operates an “Equality Moves” policy [941]. The purpose of this policy is to facilitate moving employees from one job or location to another in circumstances where such move is required as a reasonable adjustment under the EQA. It is a condition of being approved for an ‘equality move’ that an employee is disabled within the meaning of the EQA.

32. The policy (966Z) includes the following guidance:

> ***1.1 Under the Equality Act 2010 the Department is legally obliged to facilitate moves where possible that are required as a reasonable adjustment relating to a disability. This is not a selection issue and such moves should happen outside of any selection process. Moves as a reasonable adjustment must not be handled via the Emergency Transfer or Supported moves policies.***
>
> ***1.2 For most cases these moves need to be considered where no other reasonable adjustment will enable the employee to continue performing in their current role. See A to Z of reasonable adjustments.***
>
> ***1.3 The Department is legally obliged to give first consideration for any vacancy to individuals who require a move as a reasonable adjustment under the Equality Act. The Department is not required to create a job role where none is identified. However, if there is a reorganisation where roles are being defined / designed, there can be a requirement to design a role that suits the employee.***
>
> ***1.4 Where a suitable role is identified, headcount and/or financial/budgetary financial/budgetary constraints should not automatically prevent moves as a reasonable adjustment from taking place.***
>
> ***1.5 The Line Manager and employee have joint responsibility for ensuring the progression of moves as reasonable adjustment cases. Line managers are responsible for retaining all related documentation.***
>
> ***……***
>
> ***2.3 The line manager and employee should discuss the need for reasonable adjustments, outline the process and establish the responsibilities of both parties in actively identifying reasonable adjustments and agree whether an alternative role is required.***
>
> ***2.4 The line manager may seek advice from OH Assist if required to identify what the employee can do and what role and/or location may be suitable as a reasonable adjustment.***

33. The decision whether someone is approved for an equality move requires a judgment to be made by managers as to whether someone is disabled within the meaning of the EQA, taking into account information provided by the Claimant and any other information, including that provided in an OH report. In reality, that decision appears to have been made, in respect of the Claimant at least, solely on the basis of the view of the author of the OH report as to whether she was a disabled person.

34. The Tribunal heard evidence that being entitled to an “equality move” meant that they were given a higher priority than those wishing to move for other

reasons, including those needing to be considered for a move because they are redundant. National and local networks of managers are appointed to look for, discuss and facilitate moves for all employees on the equality move list. Each local network is attended by a manager from each region, or particular geographical area. The Tribunal was told that Mark Chenham (Mr Smith's line manager) was the representative on the local network responsible for the Chatham office. The local network met on a monthly basis with a representative from HR in attendance. There are no minutes to these meetings, which surprised the Tribunal, and therefore no formal record of what is decided or discussed.

35. Mr Allinson was appointed to support the Claimant during her sickness absence and then upon her reinstatement following her successful appeal against dismissal.

36. Mr Allinson told the Tribunal that in April 2017, he considered whether to approve the Claimant for an equality move. He decided against it, the reason being that he did not consider the Claimant to be disabled within the meaning of the EQA. In reaching this decision, he took into account the OH reports received in October and December 2016 but did not seek advice from senior management or from HR; neither did he consult the Claimant. Mr Allinson nonetheless continued to look for an alternative role in accordance with the recommendation from Ms Twyman, taking into account the Claimant's comments about her relationship with Mr Smith.

37. Mr Allinson sent the Claimant an email on 13 April 2017 summarising his discussions with the Claimant and his initial investigations into finding her an alternative role. This included exploring an Organised Fraud Investigator role in the fraud team in Bromley, but his role had been re-graded at the Higher Executive Officer (HEO) grade, one level higher than the Claimant and therefore was unsuitable. The Claimant was also offered a position in Mr Allinson's team, but the Claimant rejected this offer as Mr Allinson was line managed by Mr Smith. Mr Allinson enquired with London South who identified that their only vacancy was in Kennington. However, it was agreed that this role could be moved to Bromley JCP.

38. The Claimant agreed to work from Bromley but only subject to being compensated for the additional travel costs she would incur and the additional time it would take for her to get to Bromley. In her evidence to the Tribunal the Claimant said that she would not feel comfortable driving into Bromley as it was further into London. She would therefore need to take public transport, a combination of trains and buses. In her view it would take over an hour to get from her house to Bromley.

39. Mr Allinson arranged for the Claimant to be paid under the Respondent's Special Leave policy for 18 and 19 April 2017. This was because the Claimant's fit note expired on 18 April 2017 and she was therefore

considered fit to return to work, but the Bromley role had not yet been put in place. As Mr Allinson was on leave and unable to progress the new role, he did not consider it appropriate for the Claimant to return to Chatham, in her old role, in the same team given the previous concerns she had raised. In these circumstances, Mr Allinson considered that she met the criteria under the Special Leave Policy for the payment to be made.

40. Mr Allinson met with the Claimant on 20 April 2017 at a colleague's house because the Claimant wanted to meet at a neutral venue. At this meeting, the various options for an alternative position were discussed.

41. A further meeting was held on 25 April 2017 when the Claimant was accompanied by Mr Tilston. At this meeting, the options available for alternative positions were discussed once again. These were:

    (a) Returning to her old job under the same line management as at the date of her dismissal.

    (b) Working for Mr Allinson.

    (c) Working in the FES in the Bromley office.

    (d) Changing her role to that of a work coach based in Chatham.

42. The Claimant did not want to return to work in a position where she would be managed, whether directly or indirectly, by Mr Smith, which meant that she did not want to accept options (a) and (b). The Claimant's expressed a preference for option (d) as this would mean that she could remain in Chatham but not within Mr Smith's chain of command. She was keen for this change to happen as soon as possible. She again said that she would only work in Bromley if she was compensated for the additional costs and travelling time.

43. The Claimant provided a fit note which suggested a phased return to work from 20 April to 19 May 2017. Mr Allinson arranged for the Claimant to work at the Sittingbourne Job Centre carrying out administrative work during her phased return. This was intended to be a temporary measure until another, more suitable role could be identified. It was agreed with the Claimant that she would work two days a week until 15 May 2017, increasing to four days a week but with reduced hours for one week, and thereafter her contractual hours.

44. Mr Allinson also arranged for the Claimant to receive Special leave with pay to help ease her back into work during the first two weeks of her return. The Special Leave was awarded as whilst the Claimant was able to attend the office, she required her Trade Union representative to be present at her return-to-work meeting. The first day the Trade union representative was

available was 25 April 2017 and as such, it was agreed that the Claimant would be awarded Special leave pay from 20 April 2017 until the return-to-work meeting on 25 April 2017. In addition, whilst temporarily posted at Sittingbourne, it was agreed the Claimant would receive detached duty allowances which are intended to compensate an employee if they are temporarily posted away from their home base, in this case Chatham.

45. After the meeting on 25 April 2017, Mr Allinson contacted Ms Pirot to understand whether a move to Chatham JCP as a Work Coach was a possibility and to understand whether the Claimant could be supported under the Respondent's Excess Fares Policy (if she were to accept a position in Bromley). Mr Allinson also emailed Lorraine Brentnall, Kent District Officer Manager, in order that his enquiries about the Work Coach role in Chatham could be forwarded and discussed with Sarah Kennett, Kent District Manager.

46. Following his conversation with Ms Pirot, Mr Allinson received an email from Mr Noble, Customer Service Leader at Chatham JCP stating that he may be able to accommodate the Claimant suggesting that there may be a future Work Coach vacancy, but he may have difficulty accommodating a part-time work pattern. Mr Noble subsequently wrote to the Claimant on 9 May 2017 [202A] as follows:

> ***Hi Soma***
>
> ***Really pleased that you would like to join the team, but have to re-iterate we cannot support your current working pattern, I think it best you discuss your options with Steve. I am out of office today but back on Weds.***
>
> ***Sincerely***
>
> ***Howard***

47. The Tribunal concluded from the evidence that Mr Noble did not know any of the circumstances surrounding the Claimant's requested job move or the mental health problems she had been suffering. It is clear from the above that she was not given the priority of an 'equality move'. There was little attempt to unpick, challenge or validate Mr Noble's assertion that the Claimant's working pattern could not be accommodated, aside from a conversation which Mr Allinson had with Mr Noble. Following that conversation, Mr Allinson wrote to Jackie Skinner (HR Business Partner) in which he said [sic]:

> ***Howard has advised me that having reviewed his resources, he is not under-resourced at Chatham but does have capacity to include Soma. However, a significant number of Chatham WSD staff have working patterns with non-working days on Monday and Friday. Howard has made this clear to Soma in their informal discussion and has suggested that they have scope within their existing Employee Deal working***

pattern tool to offer Soma a position but that her NWD must be a Tuesday.

48. The Tribunal did not hear evidence from Mr Noble, nor did it hear any evidence about the arrangements at Chatham JCP or working patterns of those working there, aside from the fact that there were a number of people whose non-working days were Mondays and Fridays. The Tribunal was therefore unable to understand why the Claimant's work pattern could not be accommodated in circumstances where Mr Noble was not under resourced and therefore the Claimant would have been presumably surplus to requirements. In addition, the nature of the work, it was established in evidence and which the Tribunal finds as fact, was diary driven and therefore the Tribunal could not understand why appointments could not be scheduled on the Claimant's working days. The Tribunal therefore were given very little information about the reasons why the Claimant could not be accommodated with her existing work pattern.

49. The Respondent did not agree to provide the Claimant with compensation for the additional time and cost of travelling to Bromley as this did not fall within what was allowed under the Respondent's excess fares policy. The Respondent did not consider the Claimant's request as a reasonable adjustment.

50. The Claimant did not therefore feel that she could take up the offer of a position at Bromley or Chatham JCPs. She also expressed a willingness to be considered for a vacancy as a work coach at Sittingbourne JCP, but this was refused because they could not accommodate the Claimant's work pattern. The Tribunal noted that it heard very little evidence about the extent of any consideration of the Claimant for a position at Sittingbourne.

51. On 19 May 2017, Mr Allinson wrote to the Claimant [211] in which he said [sic]:

I have explored the potential of you remaining within the Fraud and Error Service but moving locations to Bromley JCP. This would allow for a new line management chain (HEO & SEO) in a different district. You have advised me that this is not agreeable to yourself and that you wished for an alternative role outside of Fraud and Error Service.

I have also explored the possibility of you working as Work Coach based at Chatham JCP. You had a preliminary discussion with Howard Noble (WSD Chatham manager) about this role, which seemed positive. However, Chatham WSD was unable to accommodate your working pattern of a non-working day of Friday. You volunteered to change your non-working day to a Monday but again Chatham WSD was unable to accommodate this based on their existing staffs working patterns, they could not sustain another non-working day on a Monday or a Friday as they need to ensure they have the resources to deliver to customers every day, their existing levels of non-working days on Mondays and Fridays are already very high. Howard Noble offered a potential solution

of changing your non-working day to a Tuesday, but you have declined this offer.

You have also recently expressed a wish to be considered for a Work Coach role at Sittingbourne JCP. My enquiries with the District Office have revealed that the position regarding resources at this location is the same as at Chatham i.e., they cannot accommodate a working pattern with a non-working day of Monday or Friday.

Through HR Business Partners. I have explored alternative roles in other Directorates but there are no vacancies available.

In our correspondence, you have made it clear that ideally you do not wish to return to your existing role as a Local Service Fraud Investigator at Chatham JCP.

I have explored all these options without arriving at a solution that you are willing to accept.

Therefore, as your line manager I have decided to post you to a role of Local Service Compliance Officer. You have the choice as to whether you wish to work from Chatham JCP or Sittingbourne JCP. Your new line manager will be Trish Penn, who can be contacted on 01303 713905 or patricia.a.penn ©dwp.gsi.gov.uk.

Please advise Trish as to your preference of working location so she can arrange to have measures in place for your return to work on Wednesday 24/05/17.

52. The Claimant started work as a compliance officer on 24 May 2017. She chose to work from Sittingbourne JCP but was unhappy as she still fell within the management chain of Graham Smith, albeit she would be line managed by Patricia Penn. She asked a number of times throughout 2017 to be moved out of CFCD. This again took its toll on the Claimant's mental health and she was referred for an OH assessment by Patricia Penn in June 2017. The letter from OH Assist dated 26 June 2017 [262] said the following [sic]:

<u>Current Health Situation</u>

I understand that Ms Raj is currently at work with health issues. On assessment today, Ms Raj advises me that she is suffering from anxiety and depression that she attributes to both personal and perceived work-related issues.

Ms Raj informs me that she has had 2 recent family bereavements. She is under the care of her GP and is compliant with medication. Ms Raj has benefitted from counselling in the past and is due to start counselling via EAP this week.

Currently Ms Raj informs me that her mood is very low, she is tearful, her concentration levels are variable, her motivation is poor and her sleeping pattern is disturbed.

Capability for Work

In my opinion Ms Raj is fit for work; however, I would like to make the following recommendations for management consideration:

As a result of the perceived work-related issues triggered by interpersonal difficulties, it would be pertinent to consider a move for Ms Raj to a different arm of the business.

To review the stress reduction plan on a regular basis

A supportive and empathic approach would be advised as likely to help sustain the return to. Work

The above will enable Ms Raj to move forward and make a good recovery. I leave it to you as the manager to decide if these recommendations are feasible for the business to support.

Outlook

With perceived Work-related issues symptoms are usually alleviated by resolution of the cause factors. If Management can understand the issues that she feels are contributory and take measures to resolve or supports this should minimise occurrences. In cases such as this it is not uncommon for symptoms to recur should the original triggers recur.

Disability Advice

My interpretation of the relevant UK legislation is that Ms Raj's mental health condition is likely to be considered a disability because:

has lasted longer than 12 months

is having a significant impact on her ability to undertake their normal daily activities

is likely to recur

would have a significant impact on normal daily activities without the benefit of treatment

53. As a result of the OH assessment, the Claimant was approved for an equality move on 4 July 2017. Despite this, it appears that the network did not meet next until September 2017. There was little evidence before the Tribunal about the active steps that were taken by the Respondent between July and December 2017, whether through the network or otherwise, to find an alternative position for the Claimant. Ms Pirot could provide no evidence to the Tribunal of the discussions had by the network about the Claimant or any decisions made. In the meantime, the Claimant remained in the same job she returned to on 24 May 2017. She became increasingly exasperated with the Respondent's failed attempt to provide an alternative position and was signed off for stress at work which were causing symptoms of depression.

54. On 1 February 2018, Stephen Ashe became the Claimant's line manager, replacing Patricia Penn when she retired.

55. The first contact Mr Ashe had with the Claimant as her new line manager was on 31 January 2018, when the Claimant emailed him regarding her future reduction in sickness pay, keeping in touch arrangements and an OH referral. The Claimant made it clear in that email that she would not be returning to work until a new role had been found for her, on her current working pattern, outside her existing management chain. Mr Ashe was aware that despite being posted to a compliance role in Sittingbourne, which was outside her previous role in investigations but still within CFCD, the Claimant was unhappy that she was not wholly outside Mr Smith's chain of command given that he was both Mr Ashe's and Ms Penn's line manager.

56. On 12 March 2018, Mr Ashe received an email from the Job Centre Plus Secretariat with details of a job vacancy as a District Complaints Resolution Manager (DCRM) in a new Customer Resolution Team for the Kent District. This email was sent to everyone on the Folkestone Job Centre email distribution list. The job vacancy details did not specify (as it later transpired) that the vacancy was only open to applicants within the Kent Work Services Directorate. He forwarded these job vacancy details to the Claimant the same day.

57. The Claimant attended a telephone consultation with OH on 14 March 2018 and a report of the same date was produced. The OH report stated that the Claimant had some personal issues which had impacted on her mental health for several years. These had been exacerbated by the 'work situation'. The report stated that the Claimant was suffering from depression and that she was not currently fit for work. The report suggested that the Claimant's current work pattern (Monday to Thursday) was a reasonable adjustment to maintain a 'healthy life – mental health / work balance' as it would enable her to visit her daughter at weekends. This had been the position maintained by the Claimant for some considerable time.

58. Mr Ashe conducted an Attendance Review Meeting with the Claimant at her house on 15 March 2018. Mr Tilston was also present. During this meeting, the OH report was discussed. The Claimant clarified that if there was no job outside of CFCD in the foreseeable future she would not be returning to work in her old role.

59. The Claimant submitted an application for the DCRM role on 18 March 2018. On 19 March 2018, Mr Ashe emailed the manager in charge of the application process (Ms Hayley Moore), confirming that the Claimant was looking for a move under the Equality Act. Ms Moore responded to the Claimant's application via email dated 20 March 2018. She explained that, unfortunately, the vacancy was an internal vacancy, which was only open

to applicants within the Kent Work Services. Ms Moore was under the impression that the vacancy had only been distributed to colleagues in Kent Work Services, but this was not the case, since Mr Ashe had received it.

60. On 27 April 2018, the Claimant emailed Mr Ashe requesting that she be paid special pay in place of any future reduction in pay. This was because her full sickness pay would be reduced to half sickness pay in June and to nil pay in October, in line with her entitlement under the Respondent's sick pay policy. Mr Ashe replied on 15 May 2018. He explained that, although there was no such thing as 'special pay', she could potentially apply for Special Leave nearer the time that her pay was to be reduced. Mr Ashe said he was unsure whether Special Leave could be granted in cases where an employee had a current medical certificate stating that they were not fit to work. Mr Ashe said that he would seek HR advice, which he did following the Claimant's formal application for Special Leave on 6 June 2018.

61. On 1 June 2018, Mr Ashe emailed CFCD HR highlighting the need to prioritise matching Equality Act movers to vacancies and inform them of the reasons when they were not matched. He received a response to this email on 4 June 2018, confirming that Equality movers took priority and attaching a list of vacancies. Clearly Mr Ashe was concerned about the lack of progress in the Claimant's case.

62. Mr Ashe considered the Claimant's application for special leave to start at the point that the Claimant's pay reduced to 50%. However, he refused this on 22 June 2018 on the basis of his understanding that the special leave policy was not to be used in circumstances where the Claimant was on sick leave. The Claimant appealed against that decision. The appeal was considered by Paul Stevenson and refused.

63. On 4 July 2018 the Claimant accepted a position at Chatham as Team Leader of Telephony. This role was completely outside the line management of Mr Smith and was therefore considered to be a reasonable adjustment.

64. On 27 July 2018, the Claimant submitted a statement of fitness to work covering the period 27 July 2018 until 14 September 2018, which stated that the Claimant would be fit for work on a phased return basis. She decided to use her annual leave so that she would not suffer any reduction in pay. The Claimant returned to work on 30 July 2018.

65. The Claimant's absence continued until 30 July 2018. She received full pay during her absence until 12 June 2018, reducing to 50% in accordance with the Respondent's sick pay scheme.

66. The Claimant ceased working for the Respondent on 7 March 2020 when she accepted ill-health retirement.

Relevant legal principles

67. A claim for failure to make reasonable adjustments is to be considered in two parts. First, the Tribunal must be satisfied that there is a duty to make reasonable adjustments; then the Tribunal must consider whether that duty has been breached.

68. Section 20 of EQA deals with when a duty arises, and states as follows:

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

69. Section 21 of the EQA states as follows:

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

70. Paragraph 20(1) of Schedule 8 to the EQA provides:

> ***A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—***
>
> ***…….***
>
> ***(b) that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement***

71. In determining a claim of failing to make reasonable adjustments, the Tribunal must therefore ask itself three questions:

- What was the PCP?
- Did that PCP put the Claimant at a substantial disadvantage compared to someone who is not disabled?
- Did the Respondent take such steps that it was reasonable to take to

avoid that disadvantage?

72. The key points here are that the disadvantage must be substantial, the effect of the adjustment must be to avoid that disadvantage and any adjustment must be reasonable for the Respondent to make.

73. The effect of the knowledge defence at paragraph 20 above was that an employer will not be liable for a failure to make reasonable adjustments unless it had actual or constructive knowledge both (i) that the employee was disabled, and (ii) that he or she was disadvantaged by the PCP.

74. The burden is dealt with at s.136 EQA which states:

> ***(1) This section applies to any proceedings relating to a contravention of this Act. Equality Act 2010***
>
> ***(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.***
>
> ***(3) But subsection (2) does not apply if A shows that A did not contravene the provision.***

75. Where it is alleged that the employer has failed to make reasonable adjustments, the burden of proof only shifts once the Claimant has established not only that the duty to make reasonable adjustments had arisen but also that there are facts from which it could reasonably be inferred - absent an explanation - that the duty has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. Rather, there must be evidence of some apparently reasonable adjustment that could have been made. The EAT noted that the respondent is in the best position to say whether any apparently reasonable amendment is in fact reasonable given its own particular circumstances. Therefore, the burden is reversed only once a potentially reasonable amendment has been identified.

Submissions

76. The Tribunal heard oral submissions from the parties which the Tribunal considered carefully before reaching its decision. In her submissions Ms Idelbi referred to the Tribunal to a number of authorities which the Tribunal also considered.

Analysis, conclusions and associated findings of fact

Did the Respondent apply a provision, criterion or practice (PCP) to the Claimant?

77. The Tribunal concluded that the requirement to work within the line management chain of Mr Smith was capable of being a PCP. Further, the PCP was applied to the Claimant. Although the Tribunal was referred to the case of ***Ishola v Transport for London [2020] I.C.R. 1204*** by Ms Idelbi, the Tribunal concluded that it was not applicable to this case because the Claimant had relied on a PCP that was more neutral in character and was applicable to others. The PCP did not therefore only apply to the Claimant. The Claimant was not alleging that the mistreatment of her by Mr Smith was the PCP and therefore the Tribunal did not think that the PCP was circular as Ms Idelbi submitted, relying on ***Taiwo v Olaigbe [2013] I.C.R. 770***.

Did the above PCP put the Claimant at a substantial disadvantage in comparison to those who are not disabled?

78. There is no doubt, in the Tribunal's view, that the Claimant was placed to a substantial disadvantage because she was unable to work and was therefore forced to take sickness absence which reduced to 50% in June 2018 and created a poor sickness absence history for the Claimant.

Did the Respondent have the requisite knowledge of the disability and the disadvantage?

79. Whilst the Respondent did not have actual knowledge of the Claimant's disability, they had constructive knowledge. The Tribunal finds as fact that the following information was available about the Claimant in January 2017:

- A stress reduction plan in which the Claimant complained that she could not sleep and was suffering from chest pains.
- An OH report which confirmed that the Claimant was on anti-depressants and attending counselling.
- An OH report which said that she "*was less tearful and her sleep had improved*" suggesting that these symptoms had been worse than when she attended the appointment previously but were nevertheless persisting.
- A GP fit note in January which described the Claimant as suffering from depression.

80. The only evidence of anyone considering the OH reports was Mr Allinson. The Tribunal finds that he took at face value what the author of the OH report said under the heading "Disability Advice" that the Claimant was not disabled because "*as her condition has not lasted over 12 months and her activities of daily living are not significantly affected*". Mr Allinson did not enquire why the report did not address whether the Claimant's impairment

was likely to last for 12 months. Neither did he enquire about the OH report assertion that daily living was not affected and whether this might be due to the effects of the anti-depressant medication.

81. In her submissions on this point, Ms Idelbi referred the Tribunal to the case of ***Donelien v Liberata UK Ltd [2018] EWCA Civ 129***. The Tribunal said that it also had in mind the case of ***Gallop v Newport City Council [2014] IRLR 211***. There were different outcomes in both these cases, but the Tribunal considered that the principles applied were the same. An employer is of course entitled to attach weight and rely on a report prepared by OH. That is not the same as blindly following the advice of an OH report or rubber stamping it. In ***Donelien*** the employer most certainly did not accept that the first version of the OH report answered all of the questions it needed to and they there followed a lengthy conversation with the author of the OH report. In this case, there was no such further enquiry of OH and the Tribunal concludes that Mr Allinson blindly followed the advice given in the report. Whilst Tribunals do not expect managers in such a position to have the same knowledge and expertise as medical practitioners and OH advisors, it is not unreasonable to expect them to have some knowledge of the EQA and the definition of a disability, particularly if they are making important decisions about employees and whether they are disabled. Even if Mr Allinson did not have the relevant experience, it is reasonable to expect him to have consulted others or made enquiries of the Respondent's HR or legal departments. He did not consult anyone and did not even consult the Claimant before deciding whether to approve her for an equality move, which required that she be disabled. Mr Allinson met with the Claimant to discuss return to work issues and alternative positions, but not in relation to the OH advice or approval for an equality move. Had Mr Allinson made the above enquiries, the Tribunal finds it is very likely that he would have reached a different conclusion.

Did the Respondent take such steps as it is reasonable to have to take to avoid the disadvantage?

82. On this issue, the Tribunal concluded that the Respondent had an evidential difficulty and was surprised at the lack of solid evidence supporting their position that appointing the Claimant to the Patricia Downey post, or the Chatham work coach positions, to take two examples, were not reasonable adjustments.

83. In respect of the Patricia Downey position, this was a position which the Claimant argued should have been given to her, whether it was a temporary position or not. It was an appropriate position at her grade which she would have accepted and would have moved her from Mr Smith's management chain. The Tribunal concluded that a duty to make reasonable adjustments had arisen, as stated above from 1 April 2017, and that absent an explanation from the Respondent, which there was not, the duty had been

breached. None of the Respondent witnesses could give evidence about this role or why it had not been offered to the Claimant. The Tribunal found it surprising that the Respondent had not come to the Tribunal prepared and briefed to answer questions about this role. In these circumstances, the Tribunal concluded that the Patricia Downey role would have been a reasonable adjustment and that by failing to offer the Claimant the role they had breached their duty under s.21 EQA.

84. There was, at least on the face of it, a reason provided by the Respondent why the Claimant was not offered the Chatham work coach role (see above). However, there was little evidence from which the Tribunal could conclude those reasons were reasonable in the circumstances. Mr Allinson conceded that the decision may well have been very different had the Claimant been given approval for an equality move because she would have been given priority. The Tribunal notes that Mr Noble knew little about the circumstances of the Claimant to make an informed decision as to whether she should be offered a position with her existing work pattern. The Tribunal could see no reason why she could not be offered the role on the terms she requested. For these reasons, the Tribunal concluded again that the Respondent had breached its duty under s.21 EQA.

85. The Tribunal concluded that it is reasonable to expect that the Claimant would have been in a position to start either of the above roles from mid-April 2017 at the latest.

86. In light of the above conclusions, and there being two roles which were reasonable adjustments, the Tribunal did not consider it necessary to go on to determine whether the Respondent ought to have made other adjustments.

87. Turning to the reasonable adjustment allowing the Claimant to take special leave from 12 June – 30 July 2018. The Respondent argues that it did not consider it appropriate to give special leave in circumstances where the policy was intended not to operate where someone was on sick leave. In legal terms, Ms Idelbi argued that the duty to make a reasonable adjustment cannot have been breached if the Claimant was on sick leave. In addition, the Respondent argued that as Mr Smith had resigned in any event, the Respondent was under no duty to make reasonable adjustments.

88. Taking her own evidence, the Claimant said that she learned "*on or around 14 June that Mr Smith had suddenly retired*". The Tribunal finds that the end of his employment would therefore have occurred on or before 12 June when the Claimant was still on full pay. The Respondent would have been no longer under a duty to make reasonable adjustments once Mr Smith had left and therefore the Tribunal concludes that the Respondent did not breach the duty.

Remedy

89. The Tribunal proceeded to remedy, having given its decision on liability. The Claimant had provided an updated schedule of loss in readiness for the hearing.

(a) Pension loss and holiday pay

90. As a preliminary issue the Tribunal considered whether it could award the Claimant the pension loss she was claiming. It was not entirely clear to the Tribunal how the pension loss in the schedule had been calculated, but what became clear, the Claimant having explained it, was that such losses arose from a period outside that which the Tribunal was concerned, after the Respondent had complied with its duty to make reasonable adjustments. It was a matter that was wholly unrelated to this claim. The Tribunal noted that it had not heard evidence on the issue, and neither was this a claim included in any of the Claimant's claim forms. Accordingly, the Tribunal made no award.

91. The Tribunal also considered the Claimant's claim for unpaid holiday but noted there was no such claim before the Tribunal. The Tribunal decided that it would not be appropriate to make such an award where this claim had not played any part in the proceedings.

(b) Injury to feelings

92. In assessing injury to feelings, the Tribunal considered the following:

(a) The Tribunal did not consider the treatment by the Respondent to have been deliberate or malicious, as suggested by the Claimant, and neither did it accept that the Respondent's actions were in any way engineered to achieve the Claimant's removal from her employment. It is correct that the Tribunal found failings which it is hoped the Respondent will take on board going forward, but the Tribunal accepted that both Mr Allinson and Mr Ashe made attempts to find alternative work, albeit the criticism of the Respondent is that it should have done more.

(b) The Tribunal could see that the Claimant had been suffering with her mental health for some considerable time. In her closing submissions, the Claimant said she had been suffering for 4/5 years with her mental health. The Tribunal was mindful of the need to extract from this the hurt feelings felt by what the Claimant says was the treatment of Mr Smith, including the dismissal, and then what happened after August 2018 leading up to dismissal. Such matters were only indirectly relevant to this case and the fault found on the

part of the Respondent.

(c) On the other hand, the Tribunal recognised the failings by the Respondent – notably not placing her in to the Chatham JCP work coach role, the apparent failings of the equality move process, and the obvious hurt feelings felt by the Claimant.

93. Taking all of the above into account, the Tribunal considered an award in the lower middle Vento bracket to be appropriate in the circumstances. It therefore awarded £12,500.00 with interest of £3,804.74.

(c) Compensation

94. The Tribunal awarded the sum of £1450.06 representing the financial loss suffered by the Claimant which flowed directly from the Respondent's failure to make reasonable adjustments. This figure was agreed by the parties at the hearing. The Tribunal also awarded the sum of £284.83 in interest.

(d) Unpaid travel time

95. The Tribunal did not think such an award was appropriate. There was no basis for calculating or awarding such a sum.

(e) Expenses

96. The Tribunal did not make any award for expenses apart from petrol expenses of £57.00 as the Tribunal considered that this loss flowed from the discriminatory act. It was not at all clear how the Claimant's expenses had been calculated or to which period they related. The Tribunal was not persuaded it had received sufficient clarity about these expenses and there was a complete absence of receipts.

……
Employment Judge Hyams-Parish
5 February 2021

decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.