EMPLOYMENT TRIBUNALS

Claimant: Ms J Chapman

Respondent: Carlisle Support Services Limited

Heard at: Manchester (by CVP) **On:** 18, 19 and 20 January 2021

Before: Employment Judge Ross
Mrs D Radcliffe (by CVP)
Ms L Hopley (by CVP)

REPRESENTATION:

Claimant: In person
Respondent: Mr Z Malik,solicitor.

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant's claim that the respondent failed to make reasonable adjustments pursuant to sections 20-21 of the Equality Act 2010 is well-founded and succeeds.

2. The claimant's claim that she was unfavourably treated pursuant to section 15 of the Equality Act 2010 because of something arising in consequence of disability, namely her constructive dismissal, is well-founded and succeeds.

3. The alternative claim that the claimant was unfairly constructively dismissed pursuant to section 95 and section 98 of the Employment Rights Act 1996 is well-founded and succeeds.

WRITTEN REASONS

Introduction

1. Oral reasons were given on the final day of this hearing. Written reasons have been produced following the respondent's request.

2. The claimant was employed by the respondent as a Security Officer in the control room at Peel Ports within the Police Station at Seaforth Docks in Liverpool. It is agreed that the claimant is a disabled person within the meaning of section 6 of the Equality Act 2010 by reason of the impairments of Crohn's Disease, spondylosis and rheumatoid arthritis.

3. In January 2018 the respondent, as required by their client Peel Ports, restructured so that the control room operators were required to undertake mobile patrols of the docks whilst they were on night shift. To do this they were required to drive. The claimant was not willing to undertake this driving duty and she initially objected because she was unhappy about what she perceived to be a breach of her contract of employment, but she later explained to the respondent that the real reason was her disability and she requested reasonable adjustments.

4. The respondent suspended the claimant. It carried out an investigation and took her to a disciplinary hearing entitled "third party pressure". The claimant lodged a grievance and then a grievance appeal, both of which were unsuccessful. After receiving the appeal outcome the claimant resigned and brought a claim for unfair constructive dismissal and disability discrimination.

5. The case was subject to two case management hearings before the final hearing today, and at the outset of this hearing on Monday 18 January 2021 the issues were clarified and agreed with the parties.

Evidence

6. We heard from the claimant and her witness, Ms Eaton. For the respondent we heard from Mr Woollam, the Grievance Appeal Officer, and from Mr Galt who was at the relevant time the Chief Officer for the Port of Liverpool Police employed by the third party client of the respondent, Peel Ports.

7. We did not hear from Mr Taylor,the Grievance Officer because Mr Taylor was unwell. Although we read his statement, we attached fairly limited weight to it because we were not able to question him on it.

Findings of Fact

8. There was no dispute that since the claimant had worked for the respondent, and for their predecessor from whom she was transferred under TUPE Regulations. She worked in the control room, and he had occasionally carried out some driving duties in 2015. There was no dispute that the claimant, prior to the change in her duties, was able to carry out her control room duties without difficulty. There was no dispute either that in the contract of employment the claimant is described as a Security Officer- Variable.

9. We find that the respondent, which was responsible for control room operator services and mobile patrol services for Peel Ports, agreed that from January 2018 there was a requirement for their control operatives to carry out mobile patrols when working the night shift. This was the behest of their third party client.

10. We rely on the evidence of the claimant and her colleague, Ms Eaton, that there was no detailed conversation about these changes with the control room

operatives, and employees were required to sign a driver declaration by their manager, Mr O'Keefe.

11. We find that the claimant was not prepared to do so and informed Mr O'Keefe accordingly. We find she told him this on several occasions when he visited the control room in January and February. We find that by her return to work following a cataract operation in early March the claimant informed Mr O'Keefe of her disabilities, in particular her Crohn's Disease, her back condition of spondylosis and her arthritis. We find that her Crohn's Disease had required an ileostomy and stoma bag and as a private person she had not wished to share this very personal information with her manager nor the detail of her arthritis and back problems.

12. We find the claimant told Mr O'Keefe that her disabilities meant she was unable to carry out driving duties as part of her job. We find she also spoke to Mr Eaton, who was her colleague, and Ms Eaton had offered to cover the driving duties so that the claimant could remain in the control room. We find the claimant told Mr O'Keefe in March 2018 of her disabilities and why she could not drive at work.

13. So far as the detail of the claimant's disability is concerned, we accept her evidence to this Tribunal and her evidence in her statement at paragraphs 2-5 and rely on it.

14. We find the claimant used her holidays for a second cataract operation on 7 April.

15. Meanwhile, we find Mr Galt on his own admission was becoming frustrated by the fact that the proposed changes which he had discussed in late 2017 with the respondent had not yet been fully implemented because at this stage the claimant was the only person not doing the mobile patrols.

16. Mr O'Keefe no longer works for the respondent and did not attend the Employment Tribunal, and so we heard no evidence from him.

17. Mr Galt was reliant on the information he was given by the respondent, in particular Mr O'Keefe and Mr Cooper, and we find that Mr Galt was not given a true picture.

18. We accept Mr Galt's evidence that he was unaware of the claimant's disability before he was told by Mr Cooper on 3 May (see page 169) where Mr Galt's email states:

> "As the respondent has found at today's date in addition to Joyce claiming she cannot fulfil the driving duties due to medical reasons she has now produced a doctor's note stating the same."

19. It is puzzling to the Tribunal that Mr Galt, the third party, was informed of the claimant's disability so late. We find the claimant told Mr O'Keefe in March. We rely on her evidence in that regard.

20. It is also clear from email evidence that Mr O'Keefe was aware of the position before May. His emails make it clear that he had knowledge of the claimant's disability in April. In an email dated 12 April to HR (page 10 of the supplemental bundle) he says:

> " I have spoken to her on numerous occasions over the last couple of weeks and Nick Cooper has also had a meeting with her. On these meetings in addition to her continuing to state we are changing her terms and conditions she is now citing certain ailments are preventing her doing these duties."
>
> Mr O'Keefe then goes on to say that he "went away and came back with suggestions of reasonable adjustments" (that was on 12 April). So Mr O'Keefe certainly had knowledge of disability by then, even on his own admission.

21. We find this email is consistent with the claimant's account that she had informed Mr O'Keefe in March and met Nick Cooper in April when she informed Mr Cooper of her disability.

22. There was a further conversation with HR with responses from Mr O'Keefe dated 13 April where he is discussing adjustments of the position of toilets on the port route and split patrols.

23. At this point Mr O'Keefe says that the claimant should have told him of her medical disability at the infancy of these conversations and has waited until the eleventh hour. We find this is likely to be a reference to the fact that Mr O'Keefe has been trying to change the position in relation to driving duties for control operators since January and he had not been informed until March of the claimant's disability.

24. We find that Mr O'Keefe was frustrated by the claimant's unwillingness to take on the driving duties, and on his own admission Mr Galt was also frustrated, and frustrated with Mr O'Keefe.

25. We find Mr Galt had met Mr O'Keefe on 6 April (see email of 19 April which refers to that meeting). On 19 April Mr Galt specifically refers to comments by Mr O'Keefe and Mr Cooper, and there is no reference to disability. P152. We find Mr Cooper and Mr O'Keefe have not informed the third party client of the claimant's disability and wrongly allowed him to think it was a wilful refusal rather than a disability related issue.

26. On 23 April the respondent suspended the claimant from her duties stating that it was the third party that wanted the claimant out of the control room.Her suspension letter specifically states:

> "Failure to carry out your duties resulting in a request for a removal from the client."p163.

27. The claimant was invited to a disciplinary investigation meeting concerning her refusal and then a disciplinary meeting which took place on 1 May.

28. Meanwhile, on 27 April the claimant had provided the respondent with a fit note from her GP. That was specific medical evidence stating she required a workplace adaptation to avoid driving duties (see page 168).

29. We find at the disciplinary meeting the reason given was notification of third party pressure.We find at that meeting the claimant attended and Ms Eaton attended as the claimant's witness. The hearing was conducted by Mr O'Keefe.

30. We find the issue of reasonable adjustments was raised at that meeting and we find Ms Eaton specifically stated to the respondent:

> "Can't Carlisle *(the respondent)* go back to the client and ask if Joyce can be reinstated and some employee can carry out the driving duties for Joyce. It seems we are cutting off our nose to spite our face as we are losing a good controller."

31. There is no evidence that Mr O'Keefe ever did that, or any evidence as to why Ms Eaton, whom we find had offered to carry out the driving duty part of the role, was not invited to do so.

32. The Tribunal finds there was no disciplinary outcome ever presented to the claimant following that meeting.

33. On 20 June the claimant went off work sick and she never returned to work.

34. On 16 July the claimant lodged a grievance and she asked for an adaptation to allow her to stay in the control room as a non driver or to move to another site at a similar rate of pay.

35. Mr Taylor heard the grievance. He did not refer to the claimant's suggestion that Ms Eaton carry out the driving part of the duties: instead he suggested an adjustment of splitting the driving, which we find is not consistent with the fit note provided by the GP which suggests the claimant should not be driving as part of her duties. In any event he rejected the grievance.

36. The claimant was referred to Occupational Health and appealed the grievance outcome. Mr Woollam, who conducted the Grievance Appeal hearing, primarily considered the adjustment of another role: he suggested a role at the Capitol Building. We find that role was 92 pence less per hour which the claimant rejected as unsuitable. We rely on the claimant's evidence that that reduction would have amounted to a reduction in pay of approximately £200 per month. We rely on her evidence she could not afford a pay cut of that amount.

37. Mr Woollam did not investigate the suggestion that another person could carry out the driving part of the duties, namely Ms Eaton or another control operator.

38. For the avoidance of doubt, the Tribunal is not satisfied that the respondent ever asked the other control staff about whether they would be willing either to change their shifts so the claimant could work permanent days or whether they were willing to drive on the claimant's night shift. It is not disputed that the driving duties applied only to the night shift. The claimant's job was 50% day shift,50% night shift.

39. We rely on the evidence of Ms Eaton, who was the claimant's job partner and the obvious person to ask, that she was never asked, and there is no email trail or any other documentary evidence to suggest that the other colleagues were asked whether they would be willing to do the driving duty.

40. On receipt of her appeal being rejected we find the claimant was very demoralised. She had been suspended and removed from her post. She was stressed and absent on sick leave, and she had had no success in her grievance or

her grievance appeal in terms of reasonable adjustments. In these circumstances she felt compelled to resign.

The Law

41. The relevant law is found in the Equality Act 2010 , Sections 20 to 21 (Duty to make reasonable adjustments) and Section 15 (Discrimination arising from disability). The burden of proof provisions is relevant, Section 136.

42. We reminded ourselves of the principles in Igen Limited & others v Wong [2005] ICR 931 CA; Anya v The University of Oxford [2001] IRLR 377; Shamoon v The Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 HL; Barton v Investec Securities [2003] ICR 1205; Madarassy v Nomura International PLC [2007] ICR 867; Laing v Manchester City Council [2006] ICR 1519; and Nagarajan v London Regional Transport [1999] ICR 877 HL and Chief Constable of Greater Manchester v Bailey 2017 EWCA Civ 425.

43. In the reasonable adjustments claim the Tribunal had regard to the principles in Environment Agency –v- Rowan 2008 ICR 218 EAT, Project Management –v- Latif 2007 IRLR 579 and Smith –v- Churchills Stair Lifts Plc 2006 IRLR 41 CA.

44. The Tribunal also had regard to the EHRC Code of Practice.

45. In the Section 15 claim the Tribunal had regard to Pnaiser –v- NHS England and Another 2016 IRLR 170 EAT. The Tribunal also had regard to para 5.9 EHRC

Applying the Law to the Facts

46. We turn first of all to the reasonable adjustments claim, because we find that that is the heart of this case.

47. The first question of course must be: what is the provision, criterion or practice ("PCP")? We find it is the PCP of requiring security officers at the respondent's site where the claimant was employed to drive on mobile patrol on the night shift.

48. The respondent sought to argue that this was in fact a third party PCP rather than a PCP of the respondent. We find that this is something of a red herring. We are satisfied that the insistence on this way of operating did come from the third party client, but the respondent was the claimant's employer and it was the respondent who applied the PCP to the control operators at that site, including the claimant.

49. We come to the next question: did it put the claimant at a substantial disadvantage in relation to a relevant matter? We find that it did.

50. The claimant relied on the substantial disadvantage of being suspended and of her constructive dismissal in the list of issues document. We find there is a link just before she reaches that point. The PCP put the claimant, a disabled person, at a substantial disadvantage because due to her stoma bag resulting from her Crohn's Disease and due her back condition(spondylosis) she was unable to carry out a role at work which involved driving, and that in turn led to her suspension and to her constructive dismissal.

51. We rely on and accept the claimant's evidence that although she could manage a short drive to work she could not drive for longer periods due to her back problem and her stoma bag issue, and she gave detailed evidence at the Employment Tribunal about the specific problem of driving at work: risk of an "accident" where the bag leaked or broke due to pressure of the seat belt on the bag, the embarrassment of being in a patrol vehicle when that happened, a vehicle that would be used by other people, the difficulty of not being immediately close to shower facilities and then the problems with her back which was aggravated by driving. Therefore we find the PCP placed the claimant at a substantial advantage in relation to a relevant matter.

52. We turn to the next issue.Did the respondent know the claimant was a disabled person? We have found that they did, through Mr O'Keefe, who was informed in March 2018.

53. Did the respondent know of the substantial disadvantage? Once again, yes they did, firstly because the claimant told Mr O'Keefe that she could not drive because of her disability in March 2018, but more particularly by 27 April the respondent had a GP fit note which said the claimant was unable to drive at work.

54. The last question is: did the respondent make such adjustments it was reasonable to make to avoid the substantial disadvantage? We find that the respondent did not.

55. The claimant made three suggestions of reasonable adjustments. The respondent did not explore the first request, which was to work permanent days, and this was despite uncontested evidence that in the past other control operators had changed their shift pattern on a permanent basis, for example for childcare reasons.

56. The second adjustment sought by the claimant was to work with a colleague who would drive the patrols, and the claimant says Ms Eaton offered. This was the adjustment that was most surprising that the respondent did not appear to have investigated. There was no evidence that they ever specifically asked the other control operators, they just seemed to have made an assumption they would not be willing to do the driving duty. We rely on the evidence of Ms Eaton that she was never specifically asked.

57. It is also puzzling to the Tribunal because the evidence of Ms Eaton, which again was uncontested, was after January 2019 (quite a short time later) the respondent used mobile security officers to carry out the patrols, and the trained control operators remained in the control room, which suggests that this was an adjustment that was eminently possible and reasonable. Mr Galt was unable to comment on this because he left his role with the third party in November 2018.

58. No clear reason was ever given to the claimant or indeed to this Tribunal why those two adjustments could not have been introduced, in particular there was no clear explanation as to why the driving duty could not be done by someone else: there was suggestion that perhaps that would not be fair on other individuals, but no evidence was adduced that any control operator had specifically said that.

59. By contrast the adjustment which was suggested by the respondent in relation to splitting the driving was not reasonable (see the GP note).

60. The final suggestion from the claimant for an adjustment was an alternative job at a similar rate of pay. The respondent did raise the issue of an alternative job at the Capitol Building, but it was (they agreed) at a lower rate of pay (almost £200 a month). Furthermore, at the time it was never made clear to the claimant what sort of contract she would be on if she had taken that position at a lower rate of pay. She believed it to be on a zero hours contract basis because she was aware the respondent had employees on such contracts in the past, and although it was said at the Employment Tribunal that the claimant's position would have been protected because she was a TUPE employee with protected terms and conditions, there was no evidence that that was ever said to the claimant at the time. Indeed in terms of the rate of pay, it was specifically said to her at the time that if she went to work in a different role at a different site she would get the rate of pay for that job, which we find was an indication that she would be on a lower rate of pay.

61. Some further details were given at the Tribunal hearing such as distances to walk to work and train travel which might have reduced the claimant's outgoings but those were never discussed with the claimant at the time, and in any event the Tribunal finds that offering an alternative job with a significant reduction rate of pay is not suitable alternative work in these circumstances.

62. Finally, the respondent ran an argument that actually because the requirement to introduce the PCP had come from the third party, then any failure to adjust meant that they were hamstrung, essentially, by the third party, and so not liable.

63. We find that firstly that is very unattractive argument from a public policy point of view because if it was right it would mean an employer could escape Equalities legislation because where a third party behaved in a discriminatory fashion.

64. Secondly, as Mr Galt of course properly explained in evidence, it was the respondent who was the claimant's employer and it was the respondent who was responsible for carrying out reasonable adjustments. Accordingly we find the respondent failed in its duty to carry out reasonable adjustments.

<u>Unfavourable treatment because of something arising in consequence of disability – section 15 claim</u>

65. The first question is: what is the unfavourable treatment? The claimant relied on her constructive dismissal, and there is no dispute that the claimant resigned.

66. What is the "something"? The claimant relied on her inability to drive, and it is her inability to drive at work on the mobile patrol that is relevant in this case.

67. Does that arise in consequence of the claimant's disability? We find that it does. We rely both on the claimant's evidence and also on the medical note from her GP saying that she is not suitable for a driving role at work.

68. The last question that we have to ask ourselves is: does the unfavourable treatment arise in consequence of her disability? We find that it does.

69. The claimant, supported by her GP, was unable to carry out the mobile patrol driving duties. The respondent knew that she was disabled and had that note from the GP. The claimant had made a number of suggestions of reasonable

adjustments. The respondent failed to fully investigate those and in fact they removed the claimant from her role and they suspended her and took her to a disciplinary hearing. The claimant tried to pursue the matter by way of suggestion of adjustments at a grievance hearing and a grievance appeal, both of which were unsuccessful, and so we find by the time her appeal had been rejected she was left with no alternative but to leave, and so the answer to the question "was she unfavourably treated because of something arising on consequence of disability?" is yes.

70. The very last part of the section 15 claim is the defence. An employer has a potential defence if they can show the treatment is a proportionate means of achieving a legitimate aim, and the burden is on the respondent to satisfy us of both the legitimate aim and whether they discharged it.

71. The legitimate aim relied upon by the respondent in this case was the business need of the third party to have control room personnel as competent drivers and operators, but no clear evidence was adduced to the Tribunal as to why this had to be the same person, and indeed the evidence adduced by Ms Eaton that from January 2019 it was not the same person, causes us to find that it was not a proportionate means of achieving a legitimate aim, and accordingly the defence does not succeed.

"**Ordinary" unfair dismissal pursuant to s95 and s98 ERA 1996**.

72. It is no longer relevant so we do not really need to consider the claim for "ordinary" unfair dismissal, because the claimant cannot recover twice, but we consider this briefly for the sake of completeness.

73. The claimant relied on a breach of the implied duty of trust and confidence, and she relied on it in two ways. We find the first way she relied on it was not a breach. The claimant thought it was a breach of her contract of employment to require her to drive , and we find that that part of her claim is not well-founded. Her contract of employment describes her as a "security officer variable". She also has a clause in her contract which states she will carry out other duties, and we find in those circumstances there is no contractual breach in the respondent requiring her to carry out driving.

74. Where we find there is a breach of contract is in the breach of the implied duty of trust and confidence is when the respondent failed to deal with the claimant's request for reasonable adjustments, having been made aware she was a disabled person. The claimant relies on the three adjustments of permanent days, working with a colleague who will cover her driving duties or an alternative role at a similar wage on the same type of contact.

75. For the reasons we have already given, we find the respondent did not properly investigate those matters. We find having been suspended , then put through a disciplinary hearing, having her grievance and appeal rejected, we find the claimant had no alternative but to resign. We are satisfied she resigned because of the breach. She delayed for a short period of time- there was a week from her grievance outcome being issued until she resigned. We are satisfied she did not affirm the breach. She was absent on sick leave and was weighing up what to do.

She informed us that given her age, not too far from retirement, it was not a decision she took lightly.

76. There was no fair reason for the dismissal.

77. Accordingly, the alternative of constructive unfair dismissal claim is also well founded.

Employment Judge Ross

Date 28 January 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON
12 February 2021

FOR THE TRIBUNAL OFFICE