EMPLOYMENT TRIBUNALS

Claimant: Mrs N Ali

Respondent: Sheffield City Council

HELD by CVP in Sheffield **ON: 12, 13, 14 and 15 January 2021**

BEFORE: Employment Judge Little
Members: Mr D Wilks
Mr M Taj

REPRESENTATION:

Claimant: In person
Respondent: Mr J French of Counsel

JUDGMENT having been sent to the parties on 22 January 2021 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

1. These reasons are provided on the application of the respondent in their solicitor's email to the Tribunal of 28 January 2021.
2. **The complaints**
   2.1. In a claim presented to the Tribunal on 10 September 2019 Mrs Ali brought various complaints of discrimination against the respondent local authority by whom she remains employed.

2.2. The complaints were identified and clarified at a case management hearing conducted by Employment Judge Smith on 27 November 2019. That clarification was that the complaints which were being pursued were as follows:-

- Disability discrimination – failure to make reasonable adjustments.
- Disability discrimination arising from disability.
- Harassment related to disability.
- Direct race discrimination.
- Direct religious discrimination.

2.3. In the Judge's Order, the direct race discrimination complaint was, it was agreed at our hearing, erroneously referred to as a direct disability discrimination complaint.

2.4. The complaints of direct race discrimination and direct religious discrimination were about two discrete matters. The main thrust of the disability discrimination complaints centred upon the claimant's second return to work.

3. **The issues**

These had also been defined and agreed at the case management hearing before Employment Judge Smith. We summarise these issues as follows:

<u>Reasonable adjustments</u>

3.1. Did the respondent apply the provision criterion or practice whereby only blue badge holders were entitled to park in the office car park?

3.2. If so, did that provision put the claimant at a substantial disadvantage in comparison with persons who were not disabled?

3.3. If so, did the respondent take such steps as were reasonable to avoid the disadvantage?

3.4. Did the respondent apply a further provision criterion or practice, namely the requirement for its employees to complete their full contractual duties?

3.5. If so did the application of that provision to the claimant put her at a substantial disadvantage (The context of this aspect of the claim is the claimant's phased return to work and the advice given by the respondent's occupational health physician.)

3.6. Did the respondent take such steps as were reasonable to avoid the disadvantage.

<u>Discrimination arising from disability</u>

3.7. Was the claimant treated unfavourably by the respondent when it refused to permit the claimant to take annual leave during the phased return period?

3.8. If so was that because of something arising in consequence of the claimant's disability? (The claimant contends that the "something" was that her phased return followed on from a disability related absence.)

3.9. Can the respondent show that refusing annual leave during the phased return was a proportionate means of achieving a legitimate aim? (The respondent

contends that absence by reason of annual leave during the phased return would deny it the opportunity to assess whether the employee could show regular attendance and resilience for a work pattern limited by reason by the phased return, but not affected by other absences.)

Harassment related to disability

3.10. Did the claimant's line manager Mr J Loveless engage in unwanted conduct towards the claimant on 3 July 2019 by behaving in an aggressive manner and shouting at her when she explained that, contrary to expectations, she would not be able to return to work on 8 July 2019?

3.11. Did Mr Loveless engage in unwanted conduct on 28 August 2019 by contacting the claimant by telephone at home knowing that she would be sleeping? (Although the unwanted conduct was described in that way in the case management order, during the course of cross-examination in our hearing the claimant accepted that Mr Loveless would have had no reason to expect that the claimant would be asleep when he telephoned her during the course of the afternoon of a day on which she had worked in the morning).

3.12. If there was one or both aspects of unwanted conduct was it related to the claimant's disability?

3.13. Further did the conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

3.14. If the conduct had that effect, was it reasonable for it to have that effect taking into account the claimant's perception and the other circumstances of the case?

Direct race discrimination

3.15. Was the claimant treated less favourably when the respondent required her to obtain confirmation from her general practitioner that she would benefit from disability leave to undergo a Pilates and yoga course?

3.16. If so was that because of the claimant's race? (The claimant describes herself as of Pakistani racial origin).

3.17. The claimant relies upon a comparator called Ms J Paduch (nee Higgins).

Direct religious discrimination

3.18. Was the claimant treated less favourably when on or about 12 August 2019 she was denied an annual leave request in order to celebrate the Eid festival?

3.19. If so was that unfavourable treatment because of the claimant's religion? (Muslim).

3.20. Here the claimant relies upon a hypothetical comparator.

4. **Evidence**

The claimant has given evidence. Her witness statement has been taken as a document entitled Statement of Case which the claimant had served as a witness statement. In addition the Tribunal have treated the document which the claimant

had attached to her ET1 claim form (also called Statement of Case) as a witness statement. Mr French raised no objection to those two documents being treated as the claimant's written evidence. The respondent's evidence was given by Mr J Loveless, Community Engagement Manager in the respondent's Housing and Neighbourhood Service (and the claimant's line manager) and Mrs S Simpson, HR advisor.

5. **Documents**

There was an agreed trial bundle which ran to 489 pages.

6. **The Tribunal's findings of fact**

6.1. The claimant was diagnosed with breast cancer in December 2016.

6.2. The claimant was absent from work from 19 December 2016 to 2 April 2018.

6.3. She returned to work on 3 April 2018, but only working two hours per week, That was increased to three hours per week by September 2018.

6.4. The claimant began a further absence from work on 1 October 2018 and the reason for the absence was the claimant's need to recover from cancer treatment and in respect of side effects.

6.5. During this period of absence the parties gave consideration to ill health retirement, but on 1 May 2019 the insurance provider, on medical advice, rejected that application.

6.6. Also during this second absence the respondent instigated its Managing Absence and Performance policy (MAP) which led to what was described as a Stage 4 dismissal hearing on 16 May 2019.

6.7. However the claimant was not dismissed. That was because she told that hearing that she was fit to return to work and that she would shortly be visiting her GP so that the GP could sign the claimant back as fit to work.

6.8. On 6 June 2019 the respondent's occupational health physician, Dr Ephraim prepared a report. That is at page 267 in the bundle. He advised that the claimant was fit for work with support and adjustments. He further advised a phased return to work with a time frame of "about 10 to 12 weeks". There was also a recommendation in that report that the claimant should be given time for her to "attend activities meant to help her improve her resilience". The activities were not identified or defined.

6.9. In the event the claimant returned to work slightly later than had been envisaged. The actual return was on 22 July 2019 whereas initially the claimant had indicated that she would be returning on 8 July 2019.

6.10. During June and July 2019 there were discussions between the respondent and the claimant as to the arrangements for the claimant's phased return to work. In an email dated 18 June 2019 (page 268 in the bundle) HR had advised Mr Loveless to follow the occupational health advice that the phased return to work should be over a period of between 10 and 12 weeks, rather than the "standard" six week period that would usually be allowed for a full time employee returning to work. In fact the claimant was, when working her normal hours, part time. The Phased Return to Work guidance which the respondent issued to its managers (page 417) suggests that for a

part time employee a phased return to work would not normally last for more than three to four weeks.

6.11. Mr Loveless then set out his proposals for the phased return in an email to the claimant dated 24 June 2019 (page 271). This set out two models. One was for a return over 10 weeks and the other was 11 weeks.

6.12. The claimant's GP, Dr Joshi subsequently commented on those proposed models in a fit note which she issued to the claimant on 3 July 2019 (page 227). At the same time she also made some annotations to the second of the two models prepared by Mr Loveless. That is at page 273.

6.13. The claimant and Mr Loveless had a telephone conversation on 3 July 2019. The claimant explained what her GP had advised and that the claimant had now been signed off until 22 July 2019, as opposed to the earlier proposed return date of 8 July. During the course of this telephone conversation Mr Loveless did not have the fit note or annotated document before him (as the claimant had only seen her GP that morning) but the claimant sent those items to him attached to her email of 4 July 2019 (page 279).

6.14. On 22 July 2019 the claimant returned to work. On that first day of return there was an issue about car parking arrangements. This is the subject of the first part of the claimant's reasonable adjustments complaint and is a matter which we return to.

6.15. On 22 August 2019 occupational health provided a further report and a copy is at page 314. Although that report was not provided until some five weeks into the claimant's phased return to work, Mr Loveless had promptly sought that advice as soon as it emerged that the claimant's GP was taking a slightly different view of the matter than that of occupational health and the respondent. Mr Loveless had made the referral on 25 July 2019 (page 300).

6.16. In the 26 August 2019 report, Dr Ephraim suggested that the claimant's line manager should "agree a middle ground" as between Dr Joshi's proposed revision and the proposals which had initially been set out by Mr Loveless.

6.17. At a meeting between the claimant and Mr Loveless on 28 August 2019 the claimant was informed that the respondent now accepted the GP's modifications and recommendations. There is a note of that meeting at page 322.

6.18. Eid, or "Big Eid" as it is has been referred to during the course of this hearing, had in 2019 taken place on 12 August. Accordingly that was during the claimant's second phased return period. The claimant had in the past not worked on Eid. However in 2019 she made no request for leave on 12 August or for that matter for her birthday which was on the following day.

6.19. On 3 September 2019 the claimant and Mr Loveless had another meeting (page 332). Disability leave was discussed. During that meeting it transpired that the "activities meant to help her improve her resilience" which Dr Ephraim had referred to in his 6 June 2019 report, meant a course of yoga and Pilates which was being run at the St Luke's Hospice in Sheffield. Mr Loveless asked the claimant if she could provide a recommendation from a doctor that the claimant needed to attend that course of sessions. We find that this instruction was in line with the respondent's Disability Leave Policy

(page 444). This provided that paid time off would be granted for among other things "treatment" and treatment was defined as "medical treatment or therapy provided or recommended by a medical practitioner" (see page 445).

6.20. The claimant duly sought that recommendation and her GP Dr Joshi provided it in a letter dated 26 September 2019 (page 358). Once that had been received by the respondent the leave was granted.

6.21. Returning to the time of the claimant's second return to work in July 2019 and the car park issue, on the claimant's first day she had enquired of Mr Loveless about access to use of the car park beneath the office building where she was based – the Moor Foot building. The claimant had been allowed to use that car park on her first return to work in April 2018. However by July 2019 the usage of the car park was greater. In those circumstances Mr Loveless met the claimant's request by asking if she had a Blue Badge. That would have given her automatic priority. However the claimant did not have such a badge.

6.22. The claimant renewed or repeated her request for parking in an email the following day 23 July 2019 (page 283) and Mr Loveless resolved the matter that day so that thereafter the claimant was permitted to use the car park.

7. **The Tribunal's conclusions**

7.1. Reasonable adjustments – the car park

The PCP which was defined at the case management hearing in November 2019 is that only Blue Badge holders were entitled to park at the Moor Foot car park. We find that the respondent had no such PCP. This means that the complaint would fail on that basis. We would need to permit an unasked for amendment if we were to treat the PCP as being, for instance, that an employee needed line manager's support for such a request, if the claimant was to get beyond this first hurdle. Even if we did allow such an amendment, the next question would be establishing substantial disadvantage. We find that there would have been none. The claimant did not have mobility issues as a result of her disability. In fact she had a practice of walking up many flights of stairs on her arrival of work on route to her office rather than using the lift. We accept counsel's point that the claimant's request for car parking, not made until the day she returned to work, was only made because the claimant had simply assumed that she would have a parking place because one had been provided on her previous return to work. In any event and in the absence of a Blue Badge, Mr Loveless obtained a parking place for the claimant by the next day. In all these circumstances we find that this complaint fails.

7.2. Reasonable adjustments – phased return to work

We find that the PCP of a requirement for the respondent's employees, including the claimant, to fulfil or complete their full contractual duties did exist. Further we find that the PCP did put the claimant at a substantial disadvantage as on her return to work her "deconditioning", as Dr Ephraim had described it, meant that she could not immediately return to her usual hours of an average of 18.5 hours on a two day per week/three day per week two week cycle.

The issue therefore centres upon whether the phased return which the respondent arranged and implemented amounted to a reasonable adjustment so as to avoid the disadvantage.

We instruct ourselves that for an adjustment to be reasonable it does not have to be precisely what an employee seeks, nor what her doctor may advise. In the case before us we find that the respondent had taken occupational advice. It then went on to permit the claimant to have a phased return to work and it waived its normal rule that the period of phased return for a part time employee would usually be three or four weeks. As we have noted, it also went beyond the normal six weeks period which would usually be afforded to a full time employee. Instead, as we have found, on the advice of both occupational health and HR the claimant was offered the two models of either 10 weeks or 11 weeks duration.

The claimant complains that in requiring her to work only two hours in the second week (which was what the phased return plan provided for) the respondent was going against the GP's advice that the normal cycle of work which we have described should be followed. That would mean that the claimant would have worked three hours in week two. We note that it is somewhat ironic that the claimant is complaining that the respondent required her to work less hours in that week of phased return. Whilst there was a delay in the provision of further occupational health report, (a delay for which the respondent was not responsible) the respondent had by 28 August 2019 accepted that what may be described as the fine tuning sought by the claimant's GP would be adopted.

Accordingly we find that whilst the respondent was under a duty to make a reasonable adjustment it did so. The duty was discharged. It follows that this complaint also fails.

7.3. Harassment related to disability

7.3.1. The 3 July 2019 telephone conversation between the claimant and Mr Loveless

There is a stark difference in the two accounts of this conversation which the claimant and Mr Loveless, the only participants, give. The claimant describes Mr Loveless as becoming very angry and aggressive in his manner towards her and that he "vehemently stressed" various matters. Those included that the phased return period would be six weeks. We find that in itself implausible. Whilst Mr Loveless had mentioned the normal six week period in his 22 May 2019 referral to occupational health (page 266) we have found that since the 24 June 2019 telephone conversation between Mr Loveless and the claimant, it was the 10 or 11 week models that were being proposed.

Mr Loveless denies that he conducted himself during the 3 July conversation as the claimant alleges. He candidly accepts that he was a little frustrated that the claimant, contrary to what had earlier been understood to be her position, was now saying that she would not be fit to return to work until 22 July. Part of the reason for that

delay was that, with her GP's blessing, the claimant had incorporated a weeks' holiday at the end of her now extended sick leave.

We also note that during this telephone conversation Mr Loveless was being informed by the claimant of the proposed amendments to his proposal which the claimant's GP felt were appropriate. He did not however have the relevant fit note and annotated document before him during the course of that telephone conversation as the claimant had only seen her GP, or at least the fit note had been only issued, that morning.

Mr Loveless accepts that he raised his voice. We were impressed by his evidence when he told us that if he had acted as the claimant alleges he would have felt remorse and would have apologised to the claimant and sought guidance from his own manager, Mr Brown.

The claimant seeks to corroborate her account that Mr Loveless was shouting at her during the phone call by telling us that her son, who was in the house at the time, came to the claimant to see what the problem was. In our judgment it is more likely that the claimant's son would have been responding to hearing his mother speaking on the telephone in a raised voice. We do not accept the claimant's subsequently offered explanation that she had been using the speaker phone facility. We also note that subsequent to this telephone conversation the claimant made no complaint about Mr Loveless' alleged behaviour. For instance when writing her email to him the following day (279) no reference was made. She did not approach Mr Loveless' line manager. She did not raise a grievance.

Even in a subsequent Dignity and Respect process, which we understand was instigated by the respondent of its own volition rather than at the claimant's request, the claimant only referred to Mr Loveless' behaviour in relation to a different interaction on a different occasion, when he allegedly failed to make eye contact with her. In that process the claimant also said that she had believed Mr Loveless to be indecisive as a manager and she felt that his more decisive behaviour at around the time we are concerned with was not coming from him, but from his manager.

On the balance of probabilities we prefer Mr Loveless' account. We do not find that a robust exchange of views in a conversation which, because of what the claimant brought to it, was bound to be a difficult one, can sensibly be described as "unwanted conduct". Accordingly we do not need to go into a consideration of whether any such conduct was disability related.

7.3.2. <u>The 28 August 2019 telephone call</u>

The claimant must have told Employment Judge Smith at the earlier hearing that the allegation was that Mr Loveless had phoned the claimant at home on the afternoon of 28 August, knowing that she would be asleep, to insist that she attended a meeting – a meeting that was scheduled for some two weeks later. However as we have noted, under cross-examination the claimant readily accepted that

Mr Loveless would not have known that she was asleep. That admission removes the basis for the allegation in our judgment. In any event the claimant had previously indicated to Mr Loveless that he could ring her at home and she had previously made no objection when he did that.

We find that Mr Loveless had a valid reason for ringing the claimant. That is so even if he had, as the claimant now alleges, needed to make the call because he had not managed his own time properly with the result that he needed to give the claimant a last minute invitation to a MAP review meeting where a specific period of notice was required. Further Mr Loveless was not ringing at an anti-social hour and as the claimant agrees would have no reason to expect the claimant to be asleep at approximately 4.40pm. Moreover, as Mr French has suggested, if the claimant wanted undisturbed time to rest she could have simply turned her phone off.

If we should be wrong about there being no unwanted conduct, we find that Mr Loveless did not have the purpose that the call would be harassing. If it had that effect, we do not consider that it was reasonable for it to have had that effect. Accordingly this aspect of the harassment complaint also fails.

7.4. Discrimination arising from disability

As we have noted, the unfavourable treatment as defined in Employment Judge Smith's Order is the refusal of annual leave for the claimant during the period of her return to work. We find that the claimant did not in fact make any request for annual leave. She confirmed to us that she knew that the respondent's policy was that leave was not to be taken during a phased return to work and we have noted, that is enshrined in the respondent's guidance at page 416.

In the absence of an actual request we find that it is doubtful that we can consider there to have been unfavourable treatment. It appears that the respondent may have exercised discretion in favour of the claimant *if* she had made a request. We were told that because the phased return in the claimant's case was significantly longer than the usual period, that would have influenced the decision in favour of the claimant, had she actually made a request. We find that rather than there having been unfavourable treatment by reason of a refusal, the claimant is simply complaining about an assumption which she made which was probably a wrong assumption.

Even if there was unfavourable treatment we find that it would not have arisen out of the claimant's disability absence but rather out of the respondent's policy which applied to all those who were on a phased return. That would include non-disabled employees who had nevertheless had a long term absence. Further we consider that the respondent would have a valid justification defence if required. In all these circumstances we find that that complaint also fails.

7.5. Direct race discrimination

As we have noted, this is the discrete issue of the granting of disability leave for the claimant to attend the yoga and Pilates course. The claimant relies

upon a colleague Ms J Paduch (nee Higgins) as a comparator. This is because the claimant believes that Ms Paduch was permitted to undertake a hydrotherapy treatment during working hours simply by making an informal verbal request to Mr Loveless. The claimant made that assumption because she overheard the exchange between Ms Paduch and Mr Loveless on 10 September 2019, apparently to that effect. However it is now clear that the treatment of Ms Paduch's request was dealt with in exactly the same way as the claimant's and so in line with the respondent's Disability Leave Policy. Unknown to the claimant at the time, Mr Loveless had on the same day as the verbal request by Ms Paduch, asked her to provide him with "a letter or something from the physio recommending the hydrotherapy". That can be seen from his email to Ms Paduch of 10 September 2019 which is at page 338 in the bundle.

In these circumstances we find that the direct race discrimination complaint fails.

7.6. Direct religion discrimination

We find that there was no less favourable treatment by the claimant being refused leave for Eid. That is for the simple reason that she never requested it. She may have assumed that she would not be granted any such request during the course of her phased return, but that is not the same thing. In fact the respondent's evidence before us was that if she had made a request it probably would have been granted in line with the respondent's Time off for Religious Observance policy. At the very least the respondent says that the claimant would have been able to swap her days of work to facilitate not working on Eid. Accordingly we find that this complaint also fails.

8. We should add that when we gave our full reasoning to the parties at the end of the hearing we recorded our thanks to the claimant for the manner in which she had presented her claim. We were aware that the claimant had expressed concerns in advance of the hearing about it being conducted by video but in the event we do not consider that this put the claimant at any disadvantage and we are satisfied that there was a fair hearing for both parties.

Employment Judge Little
Date 16th March 2021

REASONS SENT TO THE PARTIES ON
Date: 17th March 2021