EMPLOYMENT TRIBUNALS

Claimant:
Miss J Philpott

Respondent:
Maximus UK Services Ltd

Heard at: **Cardiff CVP** **On: Tuesday 18th Wednesday 19th and Thursday 20th May 2021**

Before: **Employment Judge A Frazer**
Tribunal Member Mr M Lewis
Tribunal Member Mr C Stephenson

Representation:
Claimant:
In person

Respondent:
Mr S Crawford
of Counsel

JUDGMENT

The claimant's claims for disability discrimination (s.15 Equality Act 2010), a failure to make reasonable adjustments (s.21 Equality Act 2010), harassment (s.26 Equality Act 2010) and unfair (constructive) dismissal are dismissed.

REASONS

1. The final hearing of the claimant's claims took place remotely via CVP on Tuesday 18th, Wednesday 19th and Thursday 20th May, the Tribunal administration having curtailed the listing from four to three days. A case management timetable was agreed with the parties at the outset. We heard from the claimant first on Tuesday, the respondent's witnesses on Wednesday

and heard submissions on Thursday. Owing to time constraints we reserved our decision. We are grateful to the parties for observing the timetable. We had before us a core bundle of documents, a shorter bundle comprising the claimant's medical records, the respondent's sickness policies 2017 and 2019, all of the parties' witness statements, a cast list and a chronology. We received skeletal submissions in writing from Mr Crawford in closing. We received oral submissions from both the claimant and Mr Crawford in closing.

The Issues

2. On 7th April 2020 the claimant brought a claim for disability discrimination. At that point she was still employed by the respondent but was off sick. The claimant's second claim, which was for unfair dismissal, was lodged on 30th October 2020. In the meantime, a preliminary hearing was held by EJ Howden Evans on 25th August 2020 at which the claimant indicated she would be bringing a claim for unfair constructive dismissal. The issues noted by EJ Howden Evans therefore included constructive unfair and wrongful dismissal at paragraph 15 contingent on the claimant amending her claim/ bringing a claim, which she duly did. The claimant was to identify the last straw and the nature of the breach of the implied term of trust and confidence. The issues which we have had regard to are set out at pp 50 to 53 of the hearing bundle and are set out below. The unfair dismissal issues were refined at the hearing before EJ Brace on 17th December 2020. The issues are set out as follows:

Constructive unfair dismissal & wrongful dismissal

Constructive unfair dismissal

a. Was the Claimant constructively dismissed?
i. Did the Respondent breach the implied term of mutual trust and confidence in the Claimant's employment contract, i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the Claimant?
ii. The conduct the Claimant relies on as the Respondent's conduct that was breaching trust and confidence was:

1. The recording of the Claimant's reduced hours as a 'variation of contract' and not as a reasonable adjustment.
2. That this was deliberate
3. The Respondent's negative response to the Claimant subsequently.

iii. If so, did the Claimant "affirm" the contract of employment before resigning? (To "affirm" means to act in a manner that indicates the Claimant remains bound by the terms of the contract.)
iv. If not, did the Claimant resign in response to the breach of contract (was the breach a reason for the Claimant's resignation – it need not be the only reason for the resignation)?
b. If the Claimant was dismissed, they will also have been wrongfully

dismissed, if they resigned without notice.
c. If the Claimant was dismissed: what was the principal reason for dismissal and was it a potentially fair one in accordance with Sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA"); and, if so, was the dismissal fair or unfair in accordance with Section 98(4) ERA, and, in particular, did the Respondent in all respects act within the "band of reasonable responses"?)

Equality Act section 15: discrimination arising from disability

a. Did the Respondent treat the Claimant unfavourably as follows (no comparator is needed):

i. Not giving her request for reasonable adjustments proper consideration;
iii. Giving the Claimant the impression she was unsupported to continue in her role as Health and Safety Business Administrator;
iv. “managing” the Claimant out of a role that she could do (Health and Safety Business Administrator) into a role that she could not do (Customer Service Representative); and/or
v. Constructively dismissing the Claimant?

b. Did the following things arise in consequence of the Claimant's disability:
i. The Claimant’s request for flexible working; and/or
ii. The Claimant’s difficulty continuing to work 5 days per week?

The Claimant asserts these resulted from tiredness and low mood that she was experiencing as a result of treatment for cancer.

c. Did the Respondent treat the Claimant unfavourably because of any of those “things” eg Did the Respondent “manage” the Claimant out of a role that she could do (Health and Safety Business Administrator) into a role that she could not do (Customer Service Representative) because of her difficulty working 5 days per week?
d. If so, has the Respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

17. EqA, sections 20 & 21: reasonable adjustments for disability

a. A "PCP" is a "provision, criterion or practice". Did the Respondent have / or apply the following PCPs:
i. A practice of requiring staff to work 5 days per week, particularly in the Health and Safety Business Administrator role;
ii. A policy of requiring employees to maintain a certain level of attendance or face formal attendance management procedures;
iii. A practice of not recording and/or progressing flexible working requests in a timely manner; and/or
iv. A practice of not undertaking and/or recording a proper assessment of adjustments needed following ill health, in a timely manner?
b. Did any PCP put the Claimant at a substantial disadvantage in relation to

a relevant matter in comparison with persons who are not disabled at any relevant time?
c. If so, did the Respondent know or could it reasonably have been expected to know the Claimant was likely to be placed at any such disadvantage?
d. If so, were there steps that were not taken that could have been taken by the Respondent to avoid the disadvantage? The burden of proof does not lie on the Claimant, however it is helpful to know what steps the Claimant alleges should have been taken and they are identified as follows:
i. Allow the Claimant to work the same hours per week, but over 4 longer days in the Health and Safety Business Administrator role;
ii. Allow the Claimant to work 4 days per week, with a slight reduction in her weekly hours and pay, in the Health and Safety Business Administrator role;
iii. Allow the Claimant a trial period, working either of these work patterns;
iv. Shortly after the Claimant's diagnosis and regularly thereafter, discuss with the Claimant the reasonable adjustments that she needed and record these clearly;
v. Shortly after the Claimant's diagnosis, increase the number of days the Claimant could be absent with ill health before formal attendance management procedures were implemented; and/or
vi. Disregard absences due to disablity-related illness.
e. If so, would it have been reasonable for the Respondent to have to take those steps at any relevant time?

18. EqA, section 26: harassment related to disability

a. Did the Respondent engage in conduct as follows:
i. Matthew Reed tell the Claimant, in June 2019, the Occupational Health report (that supported reasonable adjustments) was "shit"
b. If so, was that conduct unwanted?
c. If so, did it relate to the protected characteristic of disability?
d. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
e. Did the conduct have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant? (Whether conduct has this effect involves taking into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.)

Time limit / limitation issues

a. Were the Claimant's discrimination complaints presented within the time limits set out in Sections 123(1)(a) & (b) of the Equality Act 2010 ("EqA")?
b. Dealing with this issue may involve consideration of subsidiary issues Including: when the treatment complained about occurred; whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether it was not reasonably practicable for a

complaint to be presented within the primary time limit; whether time should be extended on a "just and equitable" basis; etc.

Findings of Fact

3. The claimant commenced her employment with the respondent as a Business Administrator based in Birmingham on 4th April 2016. Since 2015 the respondent has had a contract with the Department for Work and Pensions ('DWP') to assess claimants' eligibility for certain ill health and disability benefits. Healthcare professionals conduct one to one assessments with benefit claimants and deliver a report to the DWP. DWP then uses this information to determine a person's entitlement to benefits.

4. The claimant secured a transfer to Cardiff on or around 31st October 2016. In 2017 she took up the role of Health and Safety Advisor/ Business Administrator at the respondent's Pontypridd Assessment Centre. Her line manager was Matthew Reed.

5. Unfortunately on 9th May 2018 she was diagnosed with thyroid cancer and did not return to work following the diagnosis. By her account Mr Reed was sympathetic. She underwent an operation on 7th June 2018 to remove half of her thyroid. Following the results of the biopsy, which confirmed the cancer, the claimant was booked in for a second operation on 30th August 2018, this time to remove the whole thyroid. She then underwent a course of radiotherapy on 15th October 2018. Her treating consultant recommended a phased return to work on 29th October 2018. She had at that point been off work for a period of nearly six months.

6. Cancer is a 'deemed disability' under Schedule 1, paragraph 6 to the Equality Act 2010 such that the claimant was a disabled person for the purposes of the Act from the point of diagnosis onwards.

7. The claimant had a return to work meeting with Mr Reed on 1st November 2018. The respondent's notes of the meeting, which were signed by the claimant, are in the bundle at page 175. It was agreed that the claimant would return to work on a phased return pattern according to which she would work mornings and her afternoons would be recorded as sick leave. Her full-time hours would recommence on 26th November 2018. According to the form no reasonable adjustments were highlighted. In her evidence the Claimant stated that at the time she was unaware of any reasonable adjustments that she would require since she was yet unaware of how her treatment and recovery would affect her. The claimant was on good terms with Mr Reed and they sat next to each other in the office. They communicated via text message and a number of these messages are included in the bundle.

8. The respondent's Sick Pay Policy dated October 2017 states that long term absences are those lasting over 28 days. At 5.5.4 of that policy it is stated, 'should the employee's absence levels *sic* reached or exceeded the trigger points outlined in section 5.6 the employee will be required to undertake an Attendance Review Investigation Meeting (ARIM) as part of the return to work

meeting.' At paragraph 5.9.5 of the Policy the trigger points for managing absence are 8 or more working days in a rolling period. At paragraph 5.9.6 once the trigger points have been reached the line manager must hold an 'Absence Review Investigatory Meeting' ('ARIM') to discuss their absences in more detail.

9. Mr Reed considered this aspect of the policy and determined that while the claimant had exceeded the trigger points in that she had been off for 142 days in the last twelve months, owing to the nature of the absence no ARIM meeting was required. This was noted on the Return to Work form at p.177 of the bundle. Mr Reed decided that the reason for the absence was clear and so there was no investigation required. He had discussed any support the respondent could offer in the return to work meeting and so did not feel that an ARIM was necessary.

10. We accept this explanation and consider that the return to work meeting was sufficiently explorative of any adjustments so as to dispense with the need for an ARIM. At that stage no adjustments were identified. While technically we see that this was a breach of the respondent's policy, which makes the holding of an ARIM mandatory, we do not consider that it would have added anything further to the arrangements for the claimant's return to work and the effect of the failure to hold a meeting was in the claimant's favour as the triggers were not held against her.

11. On 10th May 2019 the claimant submitted a Flexible Working Request on the respondent's pro forma application form (191). At page 192 of the form there was a box with the question *'Is the request made in relation to the Equality Act 2010, for example, as a reasonable adjustment for disabled employees?'.* The claimant ticked '*yes'.*

12. The claimant's application was to condense her hours so that she worked them over Monday to Thursday or Tuesday to Friday. She suggested working two ten hour shifts and two nine hour, forty five minute shifts per week. In the alternative she suggested a reduction from 37.5 hours to 35 hours per week working 9 hours and 15 minutes a day. She stated: *'I am requesting this change due to the impact that having been recently diagnosed and treated for thyroid cancer has had on me, both mentally and physically. Having had my thyroid completely removed, I am now totally dependent on medication to replace thyroxine levels in my system, which controls metabolism. Since my surgery and radiation treatment I constantly feel exhausted/fatigued despite two increases in medication. This is a common problem for people with my condition. Also, due to the diagnosis and increase in medication, I have been suffering from anxiety and low mood. I've been prescribed Sertraline at 100 mg a day and I am awaiting counselling for this. I do not feel like this new medication is helping, but it may be too soon to tell. I hide these feelings well and others would probably not notice that this is an issue for me, but it is a constant worry. I have not been given the "all clear" as yet, but will be going for another ultrasound in July to determine how well the radiation has worked and whether or not I need more treatment. However, the impact of having my thyroid removed will be life-long. I am also waiting for surgery for another long term issue and between that and the cancer treatment/follow up I feel that I am*

having to ask for lots of time off to attend appointments. I have been requesting leave up to now to help balance the issue.'

13. The claimant went on to say that she felt that the proposed pattern would allow her more time to rest, with three days' off rather than two and would reduce her travel time to work which was one hour there and one hour back, sometimes more.

14. The claimant was also asked what impact she felt the working pattern would have on colleagues and she said that there would be fewer people on the team on her days off; she wouldn't be around if a serious incident occurred on those days; it could affect the team if someone requested annual leave when she was off and that it may affect team morale.

15. The claimant and Mr Reed had an informal meeting about her application shortly after she submitted it. At that meeting Mr Reed said that he had to 'manage the claimant's expectations' at that time because the business need had to be considered. We find that the impression given at that point in time was that the business need had to be considered and there was no guarantee the request would be granted. Mr Reed passed the information about the request on to People Manager and relayed to Mr Jeff Cope, his line manager, that the claimant was suffering fatigue looking for a reduction of hours. We find that he mentioned the Claimant's commute as this was down on the application form.

16. On 14th May Mr Reed wrote to People Manager expressing that he would like to refer the claimant to occupational health in order to fully understand the reasons for her request and any possible alternative solutions that the respondent could offer the claimant should her request be rejected.

17. People Manager recommended that a formal meeting took place where the claimant was accompanied within 28 days of the date of the request but this did not happen.

18. As part of the disclosure process the respondent disclosed a draft letter from Mr Reed which is at pages 208 to 211 of the bundle. That letter was never sent to the claimant. Mr Reed's evidence was that he had not come to any final decision on the application. He had reached a provisional decision based on the needs of the business but would be subject to the OH report. However we found that the wording of the letter was fairly determinative. Further in the note to People Manager dated 21st May Mr Reed said 'overall my decision will be based on the needs of the business but an OH report could potentially provide further information to help with my decision.' Even if Mr Reed had not come to a decision at that point, that letter together with the way in which he had 'managed the claimant's expectations' at the informal meeting made us feel that he was only really considering the needs of the business and was not at that stage maintaining an open mind to the application. Indeed, in the occupational health referral which was dated 29th May, the day after the date on which the draft letter was created, Mr Reed stated that his decision was in effect a 'no' but that he thought that the referral might generate other solutions.

19. The claimant was referred to Occupational Health and a report came back dated 13th June 2019 (p.216 of the bundle). The claimant's age was erroneous and mentioned that she was 20 when in fact she was 28. The report recommended that working fewer hours would allow her the time to relax and regain energy. As such it would be beneficial to her. Effectively the report recommended a shorter week whether this took the form of condensed hours or reduced hours. The report writer, Dr Isherwood, mentioned that the business needs would have to be weighed against the recommendation.

20. Mr Reed felt that the report was inadequate. In the referral Mr Reed had specifically requested that the adviser comment on the claimant's medication as she had suggested that the increase in medication had contributed to her low mood and that her current level of medication did not seem to be helping. Mr Reed felt that the report did not answer this question.

21. Mr Reed received the report by email on 14th June. The claimant received it a while later as it was posted to her. There was an initial telephone discussion between Mr Reed and the claimant about the report. Mr Reed and the claimant then met informally in person on or around 18th June once she had received her copy of the report. The contents of that discussion are recorded by Mr Reed in a contemporaneous People Manager report (p.203).

22. Mr Reed emailed Health Management (the occupational health provider) on 18th June to complain that the report had not been sent to the claimant at the same time as to him; that the claimant's age was stated as 20 when she was 28 and that the adviser had not answered his questions about medication. In addition, he referred to the discussions that he had had with the claimant about the report and that she had mentioned that she felt that it had been rushed, so he requested a further assessment that would give her the confidence that everything had been covered. His questions about the medication could also then be answered.

23. We found that it was likely that in the second discussion that Mr Reed had with the claimant he did say that the report was 'shit'. This was an informal discussion but took place in another room away from the workstation. During this discussion Mr Reed expressed his doubts about the claimant's flexible working application in our finding and again, made reference to the business needs and the claimant challenged this. This dialogue upset the claimant. The usage of the word 'shit' upset her but we found that from an objective point of view, it could not reasonably be said that it would have violated her dignity or created an intimidating, hostile, degrading, humiliating or offensive environment. The remark was directed at the quality of the report's contents and not at the claimant. In our finding, it was used as a colloquialism in the context of what had been - up until that point - an easy-going relationship between colleagues. The claimant did not think a further report was necessary as she had given the practitioner all of the information about her medication but agreed to a further referral. The report was updated on 26th June with an inserted paragraph about the claimant's medication.

24. On 26th June the claimant called in sick. She texted Mr Reed to say that she was feeling run down and that she needed to contact her GP about her medication. She then texted with a fuller explanation a few days later saying that she was struggling with anxiety and fatigue, had difficulty sleeping and that she had requested an increase of her medication. She went on to say that she was feeling very low. She said that the hours were affecting her and that she did not feel that there was much support at work because the business needs only were being taken into account. Over the course of the following weeks, the claimant supplied fit notes and was diligent in updating her line manager on her state of health. The occupational health report was amended on 27th June 2019 by Dr Isherwood. The conclusion remained that working fewer days but the same hours or a reduction of hours would be of benefit to the claimant. Dr Isherwood added the caveat that the business needs would need to be weighed against this.

25. On 2nd July 2019 the claimant obtained a letter from her mental health practitioner which requested that consideration be given to condensing her hours. At that point in time the respondent had not yet given the claimant an outcome about her flexible working request, hence the letter.

26. On 3rd July 2019 Mr Reed updated People Manager as to the claimant's reported sickness absence and text messages. He also appraised them of the updated Occupational Health report. On 4th July 2019 People Manager recommended to Mr Reed that the Occupational Health report was supportive of the claimant's flexible working application and that he may wish to discuss this issue with the claimant while she was off sick as it could facilitate a return to work. He did not have such a discussion with her.

27. On 10th July 2019 Mr Reed texted the claimant to ask her how she was and she relayed to him that her medication had been increased. On 15th July 2019 the claimant informed him that she was attending counselling.

28. On 19th July Jeff Cope, Mr Reed's line manager, found out that there was a customer service role vacancy closer to the claimant's home. He contacted the Assessment Centre Manager, Tracey Clifford, to ask whether the claimant could be considered for this role. She said that she was happy to do this and asked for her details to be passed on to the claimant so that if she was interested, she could discuss the role with her.

29. Mr Cope spoke to the claimant on 19th July to advise her of the role. The claimant's evidence was that she had expressed concerns about the public facing nature of the role as this would cause her difficulty. Mr Cope did not recall that the conversation in that way but recalled that some concerns were expressed and so he advised her to speak to Miss Clifford to get more information about the role. He passed on the Miss Clifford's details to the claimant on 22nd July 2019. On 23rd July 2019 the claimant contacted Mr Cope to say that she had discussed the role with Miss Clifford and that it seemed 'ideal' for what she needed (p.227). We find that the claimant's communications with both Mr Cope and Miss Clifford were positive at this time, which gave them the impression that she was willing to accept the offer and take the new post.

From the respondent's point of view the offer and acceptance had met the claimant's requirements for fewer hours and the need to shorten the commute.

30. Mr Reed was on holiday at this time but on his return he found out about the claimant's acceptance of the new role and suggested that she came into work for a handover meeting. He sent her a number of texts but she did not respond to them. Her evidence was that she was upset about what had gone on while she was in Pontypridd. Mr Reed rang her on 5th August while she was at Tredegar in order to request her to complete a return to work form. She duly did so. Following this, she started work at the Assessment Centre in Tredegar. It was noted that she did not at that point in time raise any complaint or grievance to the respondent about Mr Reed or his handling of her flexible working application.

31. Mr Reed never sent an outcome letter to the claimant in respect of her flexible working request on the basis that he learnt that she had accepted a new role with fewer hours so from his perspective, it had in effect become superfluous. While it would have been open to Mr Reed to have concluded the process upon receipt of the second report, he did not and by 23rd July the claimant had accepted the offer of another role in any event. Having heard the evidence, however, we find that the respondent's view was decisive that the claimant could not have been accommodated on condensed or fewer hours in Pontypridd owing to its view about the business impact.

32. The claimant accepted the offer of the new role. She could have decided at that point that the role was not suitable for her and to have declined to accept it. There were options open to her over the following months had she remained dissatisfied with the respondent's management of her application and her work situation generally. She could have raised a grievance. Significantly, it was open to her to have made a complaint to the Employment Tribunal having researched her rights on the internet and we find that it is notable that she did not.

33. Between the start of her role in August and 27th November the claimant was fit for work and carried on with her new role. Her evidence was that the public facing nature of the role gave her anxiety and that she lacked confidence with it but that she continued with it in order not to lose face. The claimant reported to Julie Sargant, who assigned her a mentor to assist with her training. She held monthly meetings with the claimant to discuss her progress and welfare. She told Ms Sargant that she lacked confidence in the role and Ms Sargant assured her that this was not outwardly noticeable.

34. Between 27th November and 9th December the claimant was off sick from work. Ms Sargant conducted a return to work meeting with her. At that meeting the claimant reported that her absences were due to severe headaches and tinnitus and that she was scared that her cancer may return.

35. The claimant had had 37 days of absences on three occasions within the last twelve months and this triggered the respondent's requirement to hold an ARIM under its policy. On 18th December 2019 the claimant had a meeting with

Tracey Clifford. The meeting was adjourned so that the previous occupational health report could be obtained. It is recorded on the form that no adjustments had been made other than reduced working hours. The absences were recorded as 7 days neurological; 28 days mental health and 2 days respiratory.

36. Julie Sargant wrote to Mr Reed on 19th December requesting any decision relating to the claimant's flexible working application and the occupational health report. His response on the flexible working was that since the claimant had transferred to the customer service role there was nothing for him to put in writing as the transfer was in itself a solution. He attached the occupational health report to the email.

37. On 19th December the claimant was invited to a Formal Review Meeting. It was determined that this should be the next stage as the absences were not on the face of it related to her cancer diagnosis. Ms Sargant had reached this conclusion having consulted with People Manager.

38. The claimant attended the Formal Review Meeting at Cardiff Assessment Centre on 14th January 2020. This was conducted by Jane Hull. The meeting was adjourned as she did not have the full sickness record for the claimant from the system. In addition the claimant had referred to her flexible working application. At the meeting the claimant explained that her headaches and tinnitus had led her to worry that her cancer was returning so in effect she was having an exaggerated response to illness. The claimant also explained that she did not feel that Mr Reed had followed the process in her previous role and that this had caused her stress.

39. On 16th January Mrs Hull wrote to the claimant to advise her that no further action would be taken. The respondent would continue to allow her attendance for medical appointments in relation to her cancer diagnosis and there would be an adjustment of triggers to reflect any absences relating to the cancer diagnosis. Illnesses for other reasons would be subject to the normal triggers. It was also suggested that the claimant meet with her manager every six months so that the question of reasonable adjustments could be considered. In our finding the respondent acted reasonably in conducting this process and in arriving at the conclusion in the letter of 16th January.

40. The claimant complains that there was no recording of a reasonable adjustment and that her move to her new role was recorded as a 'variation of contract'. In law a variation of contract can be a reasonable adjustment and we did not see that however the move was labelled could have amounted to a detriment. It was agreed following the ARIM that the question of adjustments would be kept under regular review.

41. The claimant continued to go into work for the respondent following receipt of this letter until 26th February 2020 when she was signed off with depression. The claimant had weekly catch ups with Ms Sargant to update her on her welfare. She remained off sick. On 9th June Ms Sargant discussed referring her to occupational health. The claimant was due to speak to occupational health on 29th June. On 26th June the claimant contacted Ms Sargant to say that she

had been offered a new job. During the call the claimant, when asked whether she was fit for work, said that she had lodged a tribunal complaint against the respondent for denial of her flexible working request. There was a new occupational health report dated 29th June, which declared that she was not fit for work. In the opinion of the occupational health advisor the tribunal with the respondent was a barrier to her return. On 3rd July the claimant resigned with effect from 31st July. The claimant resigned to start her new job.

The Law

42. **Discrimination arising from disability (s.15 Equality Act 2010)**

(1)A person (A) discriminates against a disabled person (B) if—
(a)A treats B unfavourably because of something arising in consequence of B's disability, and
(b)A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
(2)Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

43. **Failure to make reasonable adjustments – s.21 Equality Act 2010**

20 Duty to make adjustments

(1)Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
(2)The duty comprises the following three requirements.
(3)The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

21 Failure to comply with duty

(1)A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2)A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
(3)A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

44. In **Environment Agency v Rowan [2008] IRLR 20**, Langstaff J said that an employment tribunal considering a reasonable adjustment claim must identify:

- The provision, criterion or practice applied by or on behalf of an employer, or the relevant physical feature of premises.
- The identity of non-disabled comparators, where appropriate.

- The nature and extent of the substantial disadvantage suffered by the claimant, in comparison to the non-disabled comparators

45. In **Smith v Churchill's Stairlifts plc [2006] IRLR 41**, the Court of Appeal held that the test of 'reasonableness' is objective and to be determined by the tribunal. The EHRC Code states that "ultimately the test of the 'reasonableness' of any step an employer may have to take is an objective one and will depend on the circumstances of the case" (***paragraph 6.29***).

46. ***26 Harassment***

(1)A person (A) harasses another (B) if—
(a)A engages in unwanted conduct related to a relevant protected characteristic, and
(b)the conduct has the purpose or effect of—
(i)violating B's dignity, or
(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
(2)A also harasses B if—
(a)A engages in unwanted conduct of a sexual nature, and
(b)the conduct has the purpose or effect referred to in subsection (1)(b).
(3)A also harasses B if—
(a)A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
(b)the conduct has the purpose or effect referred to in subsection (1)(b), and
(c)because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
(4)In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a)the perception of B;
(b)the other circumstances of the case;
(c)whether it is reasonable for the conduct to have that effect.

47. The task of proving a discrimination case under the EQA 2010 lies initially on the claimant. However, *section 136(2) and (3)* of the EQA 2010, which applies to any proceedings relating to a contravention of that Act, states:

"(2) If there are facts from which the court [or tribunal] 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."

48. This is often taken to mean that C must prove a 'prima facie' case against R and then burden shifts for R to prove that they did not discriminate against C.

49. There must be some facts that the Tribunal can draw inferences from to establish a prima facie case of discrimination. A prima facie case requires that "a reasonable tribunal could properly conclude from all the evidence" that there has been discrimination (**Madarassy v Nomura International plc [2007] IRLR 246 (CA***)*).

50. In reasonable adjustments cases, the burden shifts once the employee has proved that there is a PCP that puts them at a substantial disadvantage compared to a non-disabled person.

Time limits

51. The time limit for a discrimination claim to be presented to a tribunal is normally at the end of "the period of three months starting with the date of the act to which the complaint relates" (**section 123(1), EQA 2010**).

52. Acts occurring more than three months before the claim is brought may still form the basis of the claim if they are part of "conduct extended over a period", and the claim is brought within three months of the end of that period (**section 123(3)).**

53. The test for whether there are continuing act(s) is whether the employer is responsible for an "an ongoing situation or a continuing state of affairs" in which the acts of discrimination occurred, as opposed to a series of unconnected or isolated incidents (**Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686,** followed in **Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548**).

54. In deciding whether it is just and equitable to extend time to permit an out-of-time discrimination claim to proceed, the Tribunal is entitled to take into account anything that it deems to be relevant (**Hutchinson v Westward Television Ltd [1977] IRLR 69**).

The Parties' Closing Submissions

Respondent's submissions

55. On behalf of the respondent Mr Crawford submitted that Mr Reed had a meeting with the claimant informally where he discussed her flexible working request. She perceived him to be negative about the request but he was making her aware of the business interests and had not reached any conclusions at that stage. They agreed to seek a further OH referral. The questions Mr Reed put to the OH advisor illustrated that he was seeking to understand the claimant's circumstances and condition further and had not closed his mind. If, for example, the new medication was contributing to the fatigue or the effects were not likely to be long term then it was possible for some flexibility in the short term. This was all overtaken in any event by the intervention and assistance of Mr Cope. He was aware of the claimant's fatigue and knew of a vacancy. He made contact with Ms Philpott directly as Mr Reed was on holiday. Having spoken to the claimant he directed her to speak to Tracey Clifford who would be able to tell her more about the role. She then got back to him and said that she had spoken to Tracey and that the role sounded 'ideal'. The claimant made an informed decision about whether to change her role. There were no protestations made to Mr Cope. The resolution to the issues regarding the working pattern was a change of role and this was signed off on 9th August. The claimant then worked uninterrupted. No grievance was raised. No concerns

were raised that any adjustment was unreasonable. Owing to her conduct the respondent was of the impression that what they had done was reasonable. The change in job was a reasonable adjustment. The change in hours focused on the claimant's fatigue and put her close to home to save on commuting time. The occupational health issues had been addressed. At the ARIM meeting it was agreed by the claimant that her responses to illness were exaggerated and down to her prior cancer diagnosis. It was noted that there were no adjustments in place other than reduced hours. At that meeting it was a reasonable opportunity for her to voice concerns about the role causing her difficulties but she did not. If the tribunal are of the impression that the handling of the claimant's flexible working request was inadequate, the change of role brings that sequence of events to a conclusion and it cannot be said that there is a continuing act of discrimination. The fact is, the claimant chose to change roles but later regretted it but such decision making cannot be laid at the door of the respondent. As concerns credibility, the claimant committed an act of deception by leaving the respondent whilst off sick to work for her new employer on 27th July. As of 26th June the claimant knew that she had a job at that point in time and the reason for her asking for a shorter notice was to start her job on 27th July. As for the time points, the claimant would have had the wherewithal to seek advice when she was unhappy about the handling of the flexible working request. She states that on 14th January, when she learnt of the variation of contract that was the 'hook'. That does not bear scrutiny as what had been recorded was a variation of contract and a variation of contract can be a reasonable adjustment. If she had wanted to complain about matters in July she could have done so before this point in time. She was looking for work in February so she had the vigour to do that. The claims that she relies on are substantially out of time. There is no continuing act. It is not just and equitable to extend time. The time limit for the reasonable adjustments claim would have expired on 18th October 2019 which was three months after her conversation with Mr Cope.

Claimant's submissions

56. The claimant submitted that Mr Reed had not followed the respondent's procedure and held an ARIM on her return to work in July albeit she had hit the company's long term sickness absence trigger. The time off for appointments was not recorded as a reasonable adjustment. After submitting her flexible working request there was a delay in the referral to occupational health. While Mr Reed was aware of the written process he decided himself not to follow it. The draft outcome letter indicates that he had decided to refuse the flexible working request before seeking a referral from occupational health. The occupational health recommendation was contrary to Mr Reed's letter as drafted as it recommended fewer hours. It also stated that the claimant loved her job and wanted to stay within the role. Mr Reed may have wanted the full picture with regards to the medication that the claimant was on but was it fair for occupational health to be able to predict the future and how the claimant would respond? It was open to Mr Reed to have trialled a working pattern and then to review the business impact thereafter. Mr Reed's evidence was that he had already rejected two flexible working requests. The reasons were not the same. When Mr Reed and the claimant had a conversation about the flexible

working request she had asked about why some people had had a change of hours in their working pattern but it was not to undermine him. During that meeting he referred to the occupational health report as 'shit'. There was no formal meeting, which ought to have taken place under the policy. The claimant was upset by this comment. Mr Reed said that everything was fine afterwards but the claimant left the building. The claimant was not sure how he had not noticed that she was upset as other people had noticed this. Mr Cope contacted the claimant when she was off sick with fatigue, stress and anxiety. He had not had the benefit of reading the occupational health report so did not have the full picture. The claimant expressed concerns about taking a public facing role but felt that she had no other option to take the role. The comment about the role being 'ideal' was in reference to the reduced hours. The claimant did not respond to Mr Reed's text message because of how she felt about what had gone on regarding the flexible working request. While the claimant was aggrieved she did not raise a grievance. She found confrontation difficult and felt that she had already drawn attention to herself. The claimant did mention how she felt to Julie and Tracey subsequently.

Conclusions

57. Mr Reed's view as expressed to People Manager prior to the referral to occupational health on 29th May was that claimant's flexible working request would be rejected and this position was reflected in the draft unsent response dated on 28th May. In our conclusion Mr Reed's mind was closed to the claimant's request prior to the referral having been made. The process was not followed in that there ought to have been a formal meeting where the claimant was accompanied as recommended by the respondent's own HR advisors, People Manager. People Manager also recommended that Mr Reed discussed the second report on 3rd July while the claimant was off sick so that the issues could be explored. This did not happen. From the outset the claimant was given a fairly strong indication by Mr Reed that the application was unlikely to succeed and we find that this did upset her. We explored in evidence with the respondent the likelihood of whether the claimant's request could have been accommodated so as to satisfy operational requirements. A rationale was given that the claimant's post was required to be full time in case any serious incidents happened. However we heard that there had only ever been two and that if she was not present Mr Reed would have taken on her responsibility for administering health and safety. The respondent had not enquired whether assistance might be available from other regions, for example. In addition, the respondent had managed to spread the claimant's role around while she was off sick so arguably could have come to some solution in terms of re-allocation of workload.

58. In our conclusion therefore by closing his mind to the possibility of the business accommodating the claimant's request and not holding a formal meeting to explore matters openly the respondent had not given the claimant's flexible working request proper consideration. This was unfavourable treatment. The flexible working request was something arising from the claimant's disability. She suffered fatigue which prompted her to make the application to reduce her

hours. We do not find that the respondent advanced any justification for not keeping an open mind about how the business could accommodate the request or for not holding a meeting. To that end, we find that the claimant's claim under s.15 is in substance well founded.

59. However we note that the complaint is some six months' out of time and that any complaint to the tribunal ought to have been presented by around 11th October of that year. This is because the respondent ought to have spoken to her about the application and report recommendation by around 10th July in accordance with the recommendation by People Manager.

60. The claimant was well enough to commence her new role in August, so would have been well enough to lodge a complaint. She was upset about what had gone on but neither lodged a grievance with the respondent nor a complaint to the tribunal. Instead we find the offer of the new job presented itself to her as a solution in itself to what had happened before. We find that she accepted this as a resolution of her workplace issues at the time. We reach this conclusion as she informed the respondent after speaking with Julie Clifford that the new role was 'ideal' and commenced it without protest. We did not find that there was anything unreasonable in the respondent's handling of her ill health in December or January by holding an ARIM meeting and making enquiries of her previous sickness absence. Once the claimant had ceased being line managed by Mr Reed in August 2019 in our finding there was nothing worthy of complaint that happened. Therefore there was no continuing act of discrimination.

61. In conclusion, therefore, while the claimant's claim under s.15 was substantively well-founded we find that it was presented outside the relevant time limit and that it was not just and equitable to extend time under s.123 Equality Act 2010.

62. We do not find that the claimant was managed out of her role. The new role as a customer service representative was offered as a means of meeting her request to work fewer hours. While Mr Cope did not have the full picture in terms of the report he was alive to the claimant's request to work fewer hours and to her desire to reduce her commuting time. To that end, he contacted her to make her the offer of the customer service role as a solution. The claimant was not under any obligation to accept it. She accepted the offer having discussed it with Ms Clifford.

63. As concerns the claimant's claim for reasonable adjustments. We do find that the respondent had a requirement for staff to work full time in the Health and Safety Business Administrator role and that this put the claimant at a substantial disadvantage in comparison to those who were not disabled. Certainly by the time of the second report on 27th June the respondent would have had full knowledge of the claimant's substantial disadvantage. The requirement put the claimant at a substantial disadvantage in comparison with those who were not disabled because the claimant's disability meant that she suffered from fatigue and the duty to adjust arose. In our finding the respondent fulfilled the duty by offering the claimant another role. There was several weeks before this was done. We take into account that the claimant was off sick. The claimant agreed

to the role and at the relevant time it was a reasonable adjustment as it addressed the need for fewer hours.

64. We do not find that there was a practice of not recording and/or progressing flexible working requests in a timely manner; and/or not undertaking and/or recording a proper assessment of adjustments needed following ill health, in a timely manner. The respondent's policy sets things out clearly. Managers are advised by People Manager. There is no evidence that the failure on the part of Mr Reed to respond to People Manager or to follow the policy was going to happen on another occasion such for it to be a 'practice' within the definition. Moreover, as stated above, once the second occupational health report was in existence the adjustment – in terms of the role change – took place within a matter of weeks, while the claimant was off sick. This was not an unreasonable delay.

65. The respondent operated a provision, criterion or practice of requiring employees to maintain a certain level of attendance or face formal attendance management procedures. This would have put the claimant at a substantial disadvantage in comparison to others who were not disabled as she was likely to have a greater need for time off work for treatment and to attend appointments.

66. Mr Reed did not proceed with the ARIM following the claimant's long-term absence so in effect did adjust the policy by not taking her sickness absence as a trigger. When it came to the claimant's ARIM carried out by Mrs Hull we find that following investigation, the claimant's level of absence triggers was adjusted such that her cancer related absences would not trigger the operation of the policy. She was allowed time off for appointments. The ARIM was triggered because on the face of it the claimant's absences were not related to her cancer. There was reference to neurological, respiratory and mental health conditions. It was only upon enquiry by the respondent that the claimant disclosed that her cancer diagnosis brought about an exaggerated psychological response to illness that had an impact on her sickness absence. The respondent took this on board. No further action was taken against her, it agreed to hold reviews of adjustments every six months and triggers for cancer related absences would not be taken into account.

67. For the reasons we have given in our findings of fact above we do not find that there was harassment arising out of the description of the report as 'shit'. We have had regard to the test in **Richmond Pharmacology v Dhaliwal [2009] UKEAT 0458** and while we find that the claimant was genuinely upset by the use of this word it was not something which objectively violated dignity or would have the objective effect of creating a intimidating, hostile, degrading, humiliating or offensive environment. The word was used in order to describe the quality of the contents of the report and was not related to the claimant's disability.

68. In terms of the claimant's constructive dismissal, we remind ourselves that we are to take into account the test in **Western Excavating v Sharp [1978] ICR**

221 that the claimant must establish a fundamental breach of contract; that she resigned in response and that she did not delay in so doing.

69. We do not find that the respondent's recording of her change of role as a variation of contract as opposed to a reasonable adjustment was conduct which was likely to breach the implied term of trust and confidence, such as was set out in **Malik v BCCI [1997] UKHL 23**. That recording was accurate: there was in fact a variation of contract in terms of the change to her role. There was no evidence before us to suggest that the recording evidenced some deliberate intent to mislead the new manager. In any event the respondent's subsequent conduct in not taking any further action against the claimant for her sickness absence in December; in agreeing not to take into account her cancer related absence as contributing to a trigger point in the sickness policy and in agreeing to hold six monthly reviews of adjustments was reasonable. The claimant continued to work for the respondent until February following the disclosure of the variation of contract recording on 14th January. After she went off sick she remained in the respondent's employ until July.

70. We find that she did not resign in response to any breach of contract and we found that there was nothing that was done or not done leading up to her resignation that could be construed as a breach of the implied term of trust and confidence. There was no identification of a 'last straw'. The claimant's line manager held regular meetings with her to enquire about her welfare while she was off sick. The claimant resigned because she had found another job and not because of any breach of contract. The fact that she was unhappy in her role was not a breach of contract but more to do with her feeling that it was not something that she enjoyed, having given it a try for a number of months. We do not find that she was dismissed.

71. For all the reasons given above we find that the claimant's complaints do stand dismissed.

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Employment Judge A Frazer
Dated: 25th June 2021

SENT TO THE PARTIES ON 28 June 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche