EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**V**	**RESPONDENT**
Ms S McMillan		**Sussex Community NHS Foundation Trust**

Heard at: London South Employment Tribunal **On:** 6, 7, 8, 9, and 10 September 2021

Before: Employment Judge Hyams-Parish
Members: Mr A Peart and Ms J Clewlow

Representation:
For the Claimant: Mr R Owen (Non-legal Adviser)
For the Respondent: Mr S Sudra (Counsel)

JUDGMENT

It is the **unanimous** Judgment of the Employment Tribunal that:

(a) The claim of failing to make reasonable adjustments, namely, allowing the Claimant to complete her extended probationary period, and facilitate provision of an Access to Work Programme (or equivalent) is well founded and succeeds.

(b) The claim of unfavourable treatment because of something arising in consequence of disability (the unfavourable treatment being her dismissal) is well founded and succeeds.

REASONS

A. CLAIMS AND ISSUES

1. By a claim form presented to the Employment Tribunal on 11 December 2019, the Claimant brings the following claims against the Respondent:

   1.1. Failing to make reasonable adjustments (s.20 EQA).

   1.2. Unfavourable treatment because of something arising in consequence of disability (s.15 EQA).

2. It was agreed that the questions which the Tribunal needed to answer in order to determine the claims are as follows:

Time limits (s.123 EQA)

2.1 What was the date of each discriminatory act?

2.2 Was the alleged conduct of the Respondent part of a continuing act ending on the date of the final act?

2.3 If so, what was that final act and when did it occur?

2.4 Whichever date at paragraphs 2.1 and 2.2 is applicable, was that claim presented within the applicable time limit?

2.5 If not, is it just and equitable to extend time?

Unfavourable treatment because of something arising in consequence of disability (s.15 EQA)

2.6 Did the Respondent treat the Claimant unfavourably?

2.7 The unfavourable treatment relied on by the Claimant is as follows:

(i) The Respondent moved the Claimant to the Patient Advice and Liaison Service ("PALS") for a temporary period. The move was done hastily, without proper discussion and due consideration of the Claimant's needs. The manager involved was Nicky Welfare.

(ii) The Claimant's dismissal.

2.8 What was the reason for the unfavourable treatment ("the something")?

The "*something*" relied on by the Claimant is as follows:

(i) The failure of the Claimant to perform her job to the required standard.

2.9 Did the "*something*" arise in consequence of the Claimant's disability?

2.10 Was the treatment a proportionate means of achieving a legitimate aim?

The legitimate aim relied on by the Respondent is:

(i) The need to maintain effective staffing and meet the specific requirements of the NHS Complaints and Patient experience department.

Failing to make reasonable adjustments

2.11 Did the Respondent apply a provision, criterion, or practice ("PCP") which put the Claimant to a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

2.12 The PCP(s) relied on by the Claimant are as follows:

(i) The Respondent's requirement for the Claimant to carry out the role of a Patient Experience Officer to an acceptable standard.

2.13 If the answer to the above is yes, did the Respondent fail to make such adjustments as were reasonable to avoid such disadvantage?

2.14 The adjustments which the Claimant says were reasonable and should have been made, but were not, are as follows:

(i) Adjust the Claimant's workload to help her manage better.

(ii) Work with the Access to Work Programme to install Dragon software that could have helped the Claimant with her fatigue.

(iii) Proceed with the Access to Work Assessment.

(iv) Provide the Claimant with support to facilitate her improved performance - support here refers to positive encouragement and constructive feedback from colleagues.

(v) Provide the Claimant with more time to show improvement following her change in medication and taking into account the recommendations of the Neurology Consultant and the referral to a clinical psychologist.

B. THE HEARING

3. This hearing was conducted using CVP, with the agreement of the parties.

4. There were no preliminary issues which the parties wished to raise prior to the hearing starting.

5. The Tribunal spent the morning of the first day reading witness statements and relevant documents in the document bundle which extended to 460 pages.

6. Witness statements were provided by the following:

(a) Sara McMillan, Claimant.

(b) Nicola Welfare, line manager of the Claimant.

(c) Mary Hammerton, line manager of Ms Welfare.

(d) Colin Edwards, line manager of Ms Hammerton.

7. All of the above witnesses gave evidence at the hearing.

8. The Claimant started giving evidence on the afternoon of day 1, completing her evidence at 12.50 on day 2. Ms Welfare started her evidence on day 2 at 13.50 and completed her evidence on day 3 at 10.51. Ms Hammerton started her evidence at 10.53 on day 3 and completed it at 13.07 on the same day. Mr Edwards started his evidence at 14.13 on day 3, completing it at 15.13 on the same day.

9. Both representatives gave their oral closing submissions commencing at 15.26 on day 3, ending at 16.04.

10. The Tribunal commenced their deliberations at the end of day 3, continuing into day 4.

11. An oral decision was given to the parties, with reasons at 3pm on day 4. As the parties were not ready and prepared for a remedy hearing, this was postponed to another date. At the same time the Tribunal gave directions for that hearing which were set out in a separate case management order.

12. These written reasons are provided at the request of the Claimant.

C. BACKGROUND FINDINGS OF FACT

13. The Tribunal decided all the findings of fact in this Judgment on the balance of probabilities, having considered all of the evidence given by witnesses during the hearing, together with documents referred to by them. Only those findings of fact that are necessary for the Tribunal to determine the claims have been made. It has not been necessary to determine every fact in dispute where it is not relevant to the issues between the parties.

14. The Claimant commenced her employment with the Respondent on 14 January 2019. She was employed as a Patient Experience Officer ("PEO").

15. The term "Patient Experience" is used by the Respondent to describe the joint functions of PALS, complaints, and patient experience feedback. PALS is a point of contact for service users whereby they can ask questions and raise concerns or complaints which are usually resolved informally by those working in the department, including PEOs who spend approximately 30% of their time on PALS work. Some of those complaints may be passed on to others in the department to be dealt with formally, involving a full investigation and a formal outcome. The work on formal complaints represented approximately 70% of the work of a PEO.

16. Upon being allocated a complaint, a PEO must consider the issues that need to be addressed and complete a complaint investigation toolkit which is passed to the person allocated to investigate the complaint. Once the investigation is complete, the PEO is responsible for drafting the outcome letter to the complainant. A draft outcome letter is prepared by the PEO and sent to Ms Welfare for review, who makes any comments or amendments required, before sending it back to the PEO. In some cases, that process can involve some back and forth between the PEO and Ms Welfare before the letter is complete. Once the letter is finalised, and Ms Welfare is happy with it, it is sent off for signature by a senior manager. Once signed by the senior manager, it is sent back to Ms Welfare to be sent out to the complainant.

17. It was accepted by the Respondent that the Claimant performed very well at interview and that Ms Welfare and Ms Hammond considered her a good candidate for the job, based on her performance at interview and the previous roles she had held which demonstrated that she was well

qualified for the post, albeit this post was in a completely new working environment for the Claimant.

18. At the interview the Claimant disclosed that she had Parkinson's disease. At this hearing, the Respondent conceded that the Claimant was a disabled person within the meaning of the EQA. They further conceded the requisite knowledge for the s.15 and s.20 claims. The issue of knowledge was therefore not something which the Tribunal needed to determine.

19. The Claimant was offered the role which, as stated above, commenced on 14 January 2019. Her employment contract contained a clause which stipulated that she would be subject to a probation period of six months. Her normal working hours were from 9am-5pm. The Claimant worked in a small office in close proximity to Ms Welfare and other colleagues.

20. In common with any successful candidate, the Claimant attended a pre-employment health screening. The Tribunal were shown a document dated 4 January 2019 which was completed following the screening, and which confirmed that the Claimant, "*had a well-controlled long standing health condition*". The person assessing the Claimant recommended that the Claimant could be referred to Occupational Health ("OH") at a subsequent point if required. The Tribunal accepted that the Claimant did not raise any problems or difficulties at the interview, arising from her disability, with regards performing the role for which she had applied. There was no other meeting between the Claimant and Ms Welfare, when she first started, to discuss specifically any adjustments needed for the Claimant. This is most likely because Ms Welfare and Ms Hammerton did not think that adjustments were required in light of the results of the health screening.

21. However, during the first few weeks of her employment, the Claimant's managers became concerned about the quality and standard of the Claimant's performance in her role. During her evidence, Ms Welfare said that the Claimant's letter writing was of particular concern because of the repetition of sentences, sometimes even whole paragraphs. Ms Welfare said that in some cases, sentences and paragraphs did not make sense.

22. Ms Welfare said that she and colleagues in the team were very worried about the Claimant's cognitive ability. By way of an example, Ms Welfare said that on 28 February 2019, the Claimant sent a draft letter directly to Dr Richard Quirk, without the review process having been completed. It did not incorporate amendments that had been suggested by Ms Hammerton. Dr Quirk replied to the Claimant and Ms Hammerton, copying in Ms Welfare, on 4 March 2019, setting out his concerns about the response, which included aspects of the complaint which were not addressed, incorrect policy being set out and the final paragraph making no sense.

23. The Respondent has a complaints reporting database called Datix, upon which details of all complaints are recorded. The Claimant had difficulty retaining instructions on how to use the system, and made numerous errors inputting data, mainly omitting to include certain details about the complaints.

24. The Tribunal accepted that concerns about the Claimant's performance were raised with her at the time; indeed the review process itself meant that the Claimant received immediate feedback about her letter writing. She was provided with additional support, including mentoring by colleagues, and aide memoirs or prompts to remind her of the steps she needed to take in the process. The Tribunal was provided with a number of letters in the bundle which had been drafted by the Claimant, by way of examples of her work and to illustrate the concerns held by the Respondent. The Tribunal looked at these letters. It is fair to say that the letters contained errors and repetition; however, many amendments were also more about style. The Tribunal accepted that with some of the letters there were a number of drafts produced and therefore the version seen by the Tribunal may have been a later version and therefore not fully reflective of the problems or errors identified.

25. On 11 March 2019, Ms Welfare held a first formal supervision meeting with the Claimant. At the meeting, the Claimant said she was concerned about the difficulties she was having with recollection, and repetition in her written work. She said she was waiting for an appointment with her neurologist and thought a change in medication might help her. Ms Welfare offered to help the Claimant by contacting the Respondent's Parkinson's nurse for advice. The Claimant was very grateful for this as it enabled her to access her neurologist and get specialist advice from the nurse more quickly. At the supervision meeting, it was agreed that Ms Welfare would meet to review the Claimant's work every two weeks, compared to every six to eight weeks for other members of the team.

26. A further supervision meeting was held on 5 April 2019. At that meeting the Claimant acknowledged that she was still having difficulties with letter writing and therefore Ms Welfare offered to set up some letter writing skills training with a senior member of the team. The Claimant attended the training session, however, she struggled to retain instructions. For example, the Claimant forgot how to add cases to the system and how to use the filing system. In order to assist the Claimant, Ms Welfare printed and laminated the Complaint Management Flow Chart and placed it on the Claimant's desk as an aide memoire. Ms Welfare also suggested that the Claimant could arrive later to work and/or leave early if she was feeling tired.

27. The Claimant's three-month review took place a couple of weeks later. By this stage, Ms Welfare said in evidence that the Claimant had built up a

really good relationship with team members and was very good at speaking on the telephone to patients and families. However, the Claimant acknowledged that she was still finding a number of aspects of her work challenging.

28. The Claimant met with Ms Welfare and Ms Hammerton at a meeting held on 16 April 2019. The purpose of this meeting was to further discuss their concerns about the Claimant's performance in her role. It was an emotional and upsetting meeting for the Claimant who clearly wanted to do well in her role but was not able to achieve the required standard due to the effects of her disability. At the meeting a referral to OH was discussed. In an email following up the meeting, Ms Welfare said as follows [sic]:

> ***Both Mary and I feel your outlook is inspiringly optimistic and are keen to support you as much as possible to settle into your role. It was good to hear that you have benefitted from the support I have been able to give and from other colleagues, which I'll detail so that Occupational Health are aware of what support is already in place:-***
>
> - ***A robust induction, with shadowing of others in the same role.***
> - ***Weekly supervision and daily coaching/mentoring and checking of work***
> - ***Visual aids such as the approved complaint handling processes, Standard Operational Procedures, Induction Guides.***
> - ***One to one letter writing training with a senior team member.***
>
> ***There are many positive aspects to your work Sara, you are kind, compassionate and helpful with patients/families and other staff when meeting or speaking with them on the telephone. You have fitted in really well with the team and are well liked by your colleagues and the wider Governance Team.***

29. A referral was made to OH on 24 April 2019. In the referral form, which the Claimant signed, the following concerns were highlighted by Ms Welfare [sic]:

- Not retaining information, following frequent reminders, coaching and visual aids.
- Repetition of whole paragraphs in written work, still not realised after proof reading.
- Deviations from process and record keeping despite frequent reminders from managers and colleagues, coaching and visual aids.
- Inconsistent quality of work.

30. A report was prepared by the OH dated 27 April 2019. It said as follows [sic]:

> ***Sara was assessed in the occupational health department following receipt of your management referral. As you are aware she has a long term medical condition of Parkinson's disease. The disability provisions of the Equality Act 2010 are in my view likely to apply and reasonable adjustments are recommended. She is under the care of the neurologist and I have suggested that she enquires of her GP whether she can access additional support form a Parkinson specialist nurse if this available to her.***
>
> ***I understand from Sara that you have been very supportive in assisting her with strategies and time to learn new skills necessary for her employment. Unfortunately I understand from your referral that she is not achieving the standard you would both wish her to achieve. In my view the problems you have both described are likely to be a result of her Parkinson's and further time to achieve these skills is in my view likely to be necessary. In addition Sara did have an "Access to work" assessment in her previous employment and was provided with voice activated software. In my view this software would be helpful to Sara and if the shared office environment is problematic in using this equipment then screens or a quieter work area may need to be considered. Sara has agreed to find original report and if she is unable to find this then I suggest that she contacts them for further advice.***
>
> ***In addition I have discussed with Sara her working hours as she has medication that needs to be effective to ensure she is able to function. I therefore suggest that she works form 9:30 am and uses TOIL to reduce her hours temporarily and if effective then this could be a permanent adjustment to ensure she has an equal opportunity to full fill the full duties of her role. I have also reiterated the need for her to pace her work and not become over tired***
>
> ***In answer to your specific questions Sara is in my view fit to be at work with work modifications as mentioned above in addition to the learning support you are currently providing. I suggest that her probation is extended if this can be accommodated because with adaptations Sara's work performance is in my view likely to improve. Obviously the anxiety of not achieving your and her own expectations is likely to affect her ability to meet set goals and therefore your supervision and support are likely to remain necessary.***
>
> ***I have not arranged for Sara to be reviewed but I am happy to do so if this is felt to be helpful. Please also do not hesitate to contact me if you have any queries at the above address.***

31. During the hearing, Ms Hammerton was asked whether the OH report was discussed with the Claimant. She said that it *would have been* discussed, but when pressed on this during questioning by the Tribunal, conceded that she herself had not discussed the report with the Claimant, and could not give specific details about when it was discussed with her.

32. Having read the OH report, the Tribunal did not find it particularly informative or helpful. It did not provide any detail or reasons for conclusions reached, such as what behaviours were related to Parkinson's disease. It also suggested Dragon software without explaining why it would be helpful and what it was about the difficulties the Claimant faced due to her disability that would be assisted by Dragon. Ms Welfare said that she spoke to the author of the OH report but there was no record of this conversation in the bundle or in her witness statement.

33. In any event, Ms Welfare concluded that she did not think Dragon software would assist the Claimant. Both she and Ms Hammerton appear to have reached this conclusion having spoken to a Health and Safety Manager about the software, despite him knowing very little about the Claimant's disability, the difficulties she faced performing her role, or the particular adjustments required. In her evidence, the Claimant appeared to know little about the Dragon software; she had not used it and could not properly assess whether it would be of benefit to her.

34. The Claimant did not find the adjustment to her working hours to be particularly helpful due to the timing of her taking medication. She preferred to attend work at the normal time.

35. At the beginning of May 2019, Ms Welfare and Ms Hammerton decided to relieve the Claimant of her complaints handling responsibilities by requiring her to perform PALS duties. The Tribunal finds as fact that the Claimant was not consulted about the change. That said, the Tribunal concluded that it was done with genuine motives, namely, to give the Claimant a break from her normal duties and to enable her to do something which Ms Welfare and Ms Hammerton considered she would thrive at. The Claimant did not complain about this reallocation of duties; it was something she did well because she had an excellent manner when dealing with service users on the telephone. A note of a supervision meeting with the Claimant dated 13 May 2019 recorded the Claimant as saying that she was enjoying the PALS role and her confidence had increased.

36. At a probationary review meeting held on 12 June 2019, conducted by Ms Hammerton and a representative from HR, Roberta Lines, the Claimant was informed that she would need to resume her normal duties so that she could continue to be monitored in that role as the end of her probationary period was approaching. In a letter to the Claimant from Ms Hammerton following up this meeting, she wrote [sic]:

> ***In order to see if there is an improvement we will need to reinstate the full range of duties, so we have a direct comparison, including complaint handling, letter writing and if required travelling independently to other locations for related duties.***

> ***We will need to meet again prior to the end of the probationary period. This further meeting will be to determine if you are able to fulfil your role and to establish if there is the improvement we all hope for.***

37. At the end of the letter, Ms Hammerton summarised her conclusions as follows [sic]:

> ***We remain concerned***
>
> - ***From 13 June 2019 I would like you to take on the full range of your duties, including complaint handling, letter writing and independent travel if required.***
> - ***We will meet again before 14 July to have a further meeting with two possible outcomes 1) We will consider extending your probationary period or 2) We may not be able to confirm you in post and your employment will be terminated with one week's notice.***
> - ***We would like you to tell us if you feel you are having a bad day or finding things difficult as this will enable us to support you.***
> - ***A further meeting is planned for Friday 5 July 2019 at 2pm***

38. A further probationary review meeting was held on 10 July 2019, a few days later than originally planned. This meeting was again attended by Ms Hammerton and Ms Lines. At that meeting, it was decided to extend the Claimant's probationary period. By that stage, the Claimant had seen the neurologist, who had changed her medication. The Claimant said at that meeting that she was feeling much better, her medication had settled, and that she had started neurotherapy for one hour per month.

39. In a letter following up this meeting, Ms Hammerton said the following [sic]:

> ***Therefore I advised you that your probationary period will be extended for a further two months. This will be the final extension and after this time we will either confirm you in post or provide you with one weeks' notice. If during this two month period we feel your work is not improving or deteriorating we reserve the right to hold a meeting before the end of the two month period. This will give us the opportunity to assess if you can fulfil the full range of duties to the standard we expect. You shared you were pleased with this decision. During this time we will continue to support and coach you.***

40. On 17 July 2019, Ms Welfare was alerted to the fact that the Claimant had sent the wrong patient information to TB (West Area Head of Nursing and Governance). It was reported as an Information Governance ("IG") breach.

41. Ms Welfare spoke to the Claimant, who was upset and distressed about the breach. In an attempt to comfort the Claimant, Ms Welfare reassured the Claimant by telling her that it was not a "*sackable offence*".

42. Despite the above reassurance given to the Claimant, Ms Welfare spoke to Ms Hammerton about the matter, during which they discussed the Claimant's dismissal. It was agreed that Ms Welfare would do a spot check of the Claimant's work. That spot check involved consideration of errors inputting information into the Datix complaints database, an incorrect completion of a complaint investigation toolkit, and an unsatisfactory draft of a letter.

43. Ms Welfare discussed the spot check with Ms Hammerton later in the day on 17 July 2019. As a result of that discussion, they decided that the Claimant should have her probation extension cut short and be dismissed.

44. Ms Hammerton met with the Claimant on 18 July 2019 to inform her that she would be required to attend a meeting on 22 July 2019 when she would likely be dismissed.

45. As Ms Hammerton did not have the authority to dismiss the Claimant, she needed to seek that authority from her line manager, Mr Edwards. She completed a form detailing her reasons for recommending that the Claimant should be dismissed. That report contained the following extract [sic]:

> ***Sarah had a week of leave booked and on her return she had her 6 month probationary review meeting with myself and HR. As As improvements were initially noted it was agreed that her probationary period would be extended for up to 2 months, with a clear caveat that should there be a noticeable decline in performance she would be given notice and her employment, under the probationary period, terminated. It had been shared with Sara at this point that 30% of her records had errors. She was given the opportunity to correct these and supported with methods to ensure she could check her own work.***
>
> ***On 17 July 2019 it came to light that Sara had sent the wrong information to an Area Nurse, who complained about the IG breach. A spot check of Sara's recording were made and there continued to be mistakes. Her line manger reviewed a complaint response letter and there was repetition and mistake. A complaint toolkit she had drafted was unclear and not to the expected standard. A template acknowledgement letter had the incorrect year, wrong address and there was a mistake in the service name.***

46. In their evidence, both Ms Welfare and Ms Hammerton said that the reason for deciding to recommend dismissal of the Claimant was a combination of the IG breach, together with the poor performance highlighted by the spot check. However, when it was pointed out to them by the Tribunal that the Datix errors were known when the probationary period was extended (indeed they were discussed at the probationary review) and the Complaints toolkit was completed before the probationary period was extended, leaving only the letter as an example of the Claimant's work *after* the extension, both appeared to elevate the importance of the IG breach

and Ms Welfare attempted to suggest there were other examples of poor performance post the extension despite there being no evidence of this in the bundle or in her witness statement.

47. On 18 July 2019, Ms Hammerton wrote to Mr Edwards as follows:

> ***Dear Colin***
>
> ***I need to ask for your authorisation to dismiss Sara McMillan on Monday at 12.15 with Roberta Lines from HR. I have had a chat with her this afternoon and she is aware that she is likely to be dismissed on Monday due to continued poor performance and IG breach yesterday. HR are fully aware and supportive of the recommendation. Our documentation is very robust.***
>
> ***There are no surprises for her as we have been upfront and open with her all the way — she is also aware that she has not met the clear expectations upon on her.***
>
> ***This is a very sad situation for all concerned and I will focus on providing the right support to my team.***

48. On 19 July 2019, Mr Edwards responded to Ms Hammerton as follows:

> ***Morning Mary,***
>
> ***Sorry to see this has now reached this position, fully understand and authorise you to dismiss on Monday at 12.15 with Roberta HR Adviser.***
>
> ***I agree we have been exceedingly supportive over the last few months as soon as this reached our attention and note that Sara McMillian has not met the clear expectations of the role.***
>
> ***I am also grateful your team have been able to provide Sara with support particularly as a result of yesterday's meeting until you meet next Monday.***

49. In his evidence to the Tribunal, Mr Edwards suggested that he met with Ms Hammerton on either the 17th or 18th July 2019 (he was not sure) when the decision to dismiss (subject to advice being sought) was discussed and decided. Given the above email exchange, which makes no reference to this discussion, the Tribunal concluded that it was unlikely that such a discussion took place. The Tribunal concluded it was more likely that the email exchange represented the only discussion (post the probationary extension) about the matter. The Tribunal further concluded that Mr Edwards simply relied on what he was told by Ms Hammerton and did not enquire further into the issues. For example, he clearly did not know, or it had not occurred to him, that the results of the spot check (apart from the letter at page 270 of the bundle) did not identify errors which had been made by the Claimant after the extension of the probationary period. They were not new matters. On any reading of the letter extending the

probationary period, it anticipated that only those errors or deteriorating performance arising *after* the extension of the probationary period would result in a further review and possible action. When this was put to Mr Edwards in questioning by the Tribunal, he, like Ms Hammerton and Ms Welfare, reverted to placing more importance on the IG breach. The Tribunal concluded that this was somewhat disingenuous given the reassurances provided by Ms Welfare about the IG breach. It is as though someone had simply changed their mind about the extending the probationary period.

50. On 22 July 2019, only 8 working days after the Claimant's probationary period was extended, the Claimant attended a meeting with Ms Hammerton at which she was given one week's notice of termination. Her employment therefore ended on 29 July 2019.

51. The Claimant subsequently appealed against her dismissal, but this was not successful.

D. LEGAL PRINCIPLES

Failing to make reasonable adjustments (s.20 EQA)

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

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

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

54. Section 21 of the EQA states as follows:

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

55. The duty to make adjustments therefore arises where a provision, criterion, or practice, any physical feature of work premises or the absence of an auxiliary aid, puts a disabled person at a substantial disadvantage compared with people who are not disabled.

56. The EQA says that a substantial disadvantage is one which is more than minor or trivial. Whether such a disadvantage exists in a particular case is a question of fact, applying the evidence adduced during a case, and is assessed on an objective basis.

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

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

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

59. The burden is on the Claimant to prove facts from which this Tribunal could, in the absence of hearing from the Respondent, conclude that the Respondent has failed in that duty. So here, the Claimant has to prove that a PCP was applied to her, and it placed her at a substantial disadvantage compared to someone who is not disabled. The Claimant must also provide evidence, at least in very broad terms, of an apparently reasonable adjustment that could have been made. Having done so, the burden then shifts to the employer to show that the disadvantage would not have been eliminated or reduced by the proposed adjustment and/or that the adjustment was not a reasonable one to make.

60. It is a defence available to an employer to say "*I did not know and I could not reasonably have been expected to know*" of the substantial disadvantage complained of by the Claimant.

Unfavourable treatment arising in consequence of disability (s.15 EQA)

61. Section 15 EQA provides as follows:

> ***(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.

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.

62. Section 15 EQA therefore requires an investigation into two distinct causative issues: (i) did the Respondent treat the Claimant unfavourably because of an (identified) 'something'?; and (ii) did that something arise in consequence of the Claimant's disability? The first issue involves an examination of the state of mind of the relevant person within the Respondent ("A"), to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant 'something'. The second issue is an objective matter, whether there is a causative link between the Claimant's disability and the relevant 'something'. The causal connection required for the purposes of s.15 EQA between the 'something' and the underlying disability, allows for a broader approach than might normally be the case. The connection may involve several links; just because the disability is not the immediate cause of the 'something' does not mean to say that the requirement is not met. It is also clear from case law that it is only necessary for the Respondent to have knowledge (actual or constructive) of the underlying disability; there is no added requirement that the Respondent have knowledge of the causal link between the 'something' and the disability.

63. If section 15(1)(a) EQA is resolved in the Claimant's favour, then the Tribunal must go on to consider whether the Respondent has proved that the unfavourable treatment is a proportionate means of achieving a legitimate aim. As stated expressly in the EAT judgment in ***City of York Council v Grosset UKEAT/0015/16*** the test of justification "*is an objective one to be applied by the tribunal; therefore while keeping the respondent's 'workplace practices and business considerations' firmly at the centre of its reasoning, the ET was nevertheless acting permissibly in reaching a different conclusion to the respondent, taking into account medical evidence available for the first time before the ET"*. The Court of Appeal in ***Grosset [2018] EWCA Civ 1105***, upheld this reasoning, underlining that the test under s 15(1)(b) EQA is an objective one according to which the Tribunal must make its own assessment.

64. In terms of the burden of proof, it is for the Claimant to prove that she has been treated unfavourably by the Respondent. It is also for the Claimant to show that 'something' arose as a consequence of her disability and that there are facts from which it could be inferred that this 'something' was the reason for the unfavourable treatment. Where a prima facie case has been established, the employer will have three possible means of showing that it did not commit the act of discrimination. First, it can rely on s.15(2) and prove that it did not know that the claimant was disabled. Secondly, the employer can prove that the reason for the unfavourable treatment was

not the 'something' alleged by the claimant. Lastly, it can show that the treatment was a proportionate means of achieving a legitimate aim.

E. ANALYSIS, CONCLUSIONS AND ASSOCIATED FINDINGS OF FACT

Unfavourable treatment (s.15 EQA)

65. There are two s.15 claims: the first is the temporary move to PALS in May 2019; the second is the dismissal.

66. The Tribunal considered whether the assignment of PALS duties could be considered to be unfavourable treatment and concluded that it could not. The Tribunal accepted that PALS is not a separate team or department; it was part of the Claimant's role to perform PALS duties for part of her time. The Tribunal accepted Ms Welfare's evidence that PALS duties accounted for 30% of the time of a PEO. To increase the Claimant's PALS responsibilities from 30-100% on a temporary basis in circumstances where the Claimant did not complain about the change and told Ms Welfare that she was enjoying the PALS work, cannot reasonably be considered to be *"unfavourable treatment"* or a detriment. That claim therefore fails.

67. Given that conclusion, the Tribunal did not need to consider whether this claim was brought within the permitted time limit, and if not, whether to extend time.

68. Turning to the Claimant's dismissal, the Tribunal concluded that the reason the Claimant was dismissed was due to her underperformance in her role, and that the reasons for the underperformance arose in consequence of the Claimant's disability. These reasons were those identified by the Respondent about the Claimant's performance at paragraph 29 above. As time went on, the stress and anxiety no doubt also contributed to the problems.

69. The Tribunal then went on to consider whether the Respondent's defence of justification should succeed and concluded that it should not. Whilst the Tribunal accepted that the Respondent had a legitimate aim, the Tribunal concluded that dismissal was a disproportionate response. The IG breach was not of itself worthy of dismissal, as was reflected in the comment made by Ms Welfare to the Claimant that it was not a "*sackable*" matter. Ms Hammerton could also not confirm in her evidence that it was worthy of dismissal. In addition, the Respondent relied on a draft letter which contained the same sort of errors that had been identified prior to the extension. To dismiss the Claimant without allowing more time to investigate adjustments and provide her with support, when considered against those errors which had arisen since the extension, was not proportionate.

70. As the dismissal occurred on 29 July 2019, this claim was brought within the permitted time limits and there is no need to consider whether to extend time.

71. To the above extent only, the claim brought pursuant to s.15 EQA 2010 is well founded and succeeds.

Failing to make reasonable adjustments

72. The Tribunal accepted that a PCP was applied to the Claimant which placed her at a substantial disadvantage compared to a non-disabled person. Indeed, Ms Welfare made a comparison in her evidence to the number of complaints dealt with by a new colleague within a six month period, which was double the complaints that the Claimant dealt with. There can be no doubt that she was placed at a substantial disadvantage because of her disability compared with a non-disabled person.

73. The Tribunal then considered each of the reasonable adjustments the Claimant alleges ought to have been made. It concluded that those alleged failures relating to the provision of support to facilitate an improvement in performance, and the failure to adjust workload, should fail. It is quite clear that the Claimant's workload was adjusted and adapted. It is also clear that the Claimant was provided with support, guidance, and feedback by her managers.

74. The Tribunal concluded that there was a misunderstanding on the part of the Respondent as to the extent, or type, of support available from an Access to Work Programme. There was a suggestion by the Respondent witnesses that it was limited to support for physical adjustments, whereas the Claimant suggested that the support available was wider than that. The Tribunal concluded that the failure to facilitate, or explore, access to such a programme, or other alternative, was a failure to make a reasonable adjustment. The Tribunal believes this would have provided useful information to the Respondent about the benefits of Dragon software to the Claimant, as well as other practical guidance and support to enable her to succeed in her role. The Tribunal noted, with regards the Dragon software, that no one on the Respondent's side appeared to know enough about it to make an informed decision whether it would have assisted the Claimant or not. The enquiries it did make (namely to the Health and Safety manager) were inadequate and were not specific to the Claimant's needs.

75. The Tribunal took on board that an Access to Work programme required the Claimant to co-operate, even take the lead, in accessing that kind of support. However, whether it was Access to Work or an equivalent, the Respondent needed to take the lead in identifying what support was needed, specifically to mitigate the disadvantages of her disability, to

enable the Claimant to succeed in her role, and here the Tribunal concluded that the Respondent failed.

76. Related to this, the Tribunal concluded that it was a reasonable adjustment to allow the Claimant the additional time to improve her performance, in the form of an extension to her probationary period, notwithstanding the IG breach and errors identified in one letter (explained above). This would have allowed the Access to Work Programme to be explored, obtain the support recommended or provided under the programme, and would have allowed further time for the Claimant to adjust to her medication. It is also worth noting that with the six weeks spent in PALS, she did not even have a full six months performing the part of her job which represented 70% of her role.

77. Of course, it is not certain that the above adjustments would have been effective at avoiding the disadvantage and improving the Claimant's performance to the standard needed for her to be retained in her role at the end of the extended probationary period. The Tribunal concluded, however, that there was a sufficient chance of improvement to justify the adjustments, particularly in view of the fact that there was little or no cost or hardship to the Respondent in allowing the Claimant the additional time needed, and to explore the Access to Work Programme. The Tribunal took into account the size of the Respondent and the resources available to it when reaching its conclusions.

78. Turning to the issue of time limits, the Tribunal concluded that any acts or omissions occurring before 19 July 2019 would be out of time and necessitate consideration of whether it is just and equitable to extend time.

79. Regarding the failure to provide the benefit of an extended probationary period, that omission crystallised on 22 July 2019, when the Claimant was informed that the extended probationary period, and her employment, would be brought to an end.

80. Regarding the failure to provide an Access to Work Programme (or equivalent support) identifying the date of the omission is more difficult because there was no express refusal. The Tribunal must therefore consider the date of the act which was inconsistent with provision of Access to Work support, which the Tribunal concluded was notice of dismissal. Accordingly, the date of the omission is 22 July 2019.

81. This means that both reasonable adjustment claims were brought within the permitted time limits and there is no need to consider whether time limits should be extended.

82. To the above extent only, the claims of failing to make reasonable adjustments succeed.

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Employment Judge Hyams-Parish
22 September 2021

SENT TO THE PARTIES ON
10 February 2022

FOR THE TRIBUNAL OFFICE