EMPLOYMENT TRIBUNALS

Claimant: **Miss C Robson**

Respondent: **Sussex Partnership NHS Foundation Trust**

Heard by video **On: 9-10 June 2022**
In chambers: 6 & 13 July 2022

Before: **Employment Judge Corrigan**
Ms A Williams
Ms S Slotnick

Representation
Claimant: In person
Respondent: Dr G Burke, Counsel

JUDGMENT

1. The Tribunal has found the Respondent contravened the Equality Act 2010 in respect of the claim of failure to make reasonable adjustments, but not in respect of the claim of direct disability discrimination.

2. The claim of direct disability discrimination is dismissed.

REASONS

Preliminary matters

1. The claims and issues had been clarified at two preliminary hearings as being direct disability discrimination only. The issues in respect of that complaint were listed in both case management orders and are repeated below.

2. The claimant's witness statement however still referred to a failure to make reasonable adjustments, as had the claim form and further particulars. Our impression was that the respondents' witness statements also covered whether they had made adjustments and, where relevant, their reasons for not making adjustments.

3. We therefore raised at the outset whether in reality this claim also included a claim for failure to make reasonable adjustments. The claimant confirmed she did want this to be considered. She believed that she had raised this claim at the preliminary hearing and presented as not having understood the difference between the claims, despite presenting as very articulate and having discussed the claims twice before at preliminary hearings.

4. The respondent's representative objected, although it was clear he had anticipated this point being raised and understood why the tribunal was raising the matter. Although he argued the respondent had prepared for the case on the basis it was just a direct disability discrimination claim since the preliminary hearings he accepted the witness statements did cover the relevant matters enough. He indicated that he was instructed to apply for an adjournment if the failure to make reasonable adjustments claim was allowed to proceed.

5. We considered the claimant's statement and agreed that there the two claims intertwine which is why the claimant believes she had raised the failure to make reasonable adjustments. The case being brought by the claimant was that once the respondent found out about her disability the respondent deliberately made things harder for her and adjustments that she had needed before the diagnosis were taken away. The respondent's witnesses have covered their response to that claim in their statements. We did not consider there was a need for an adjournment and this was conceded by the respondent.

6. It follows that the claimant's claims are both direct disability discrimination and failure to make reasonable adjustments.

7. As the hearing progressed it was clear that the claimant's complaint was primarily about a failure to make reasonable adjustments and follow the occupational health guidance. The respondent responded to that claim in submissions.

8. We did not question whether the claimant raised any other type of disability discrimination, such as discrimination arising from disability, as such a claim was less obvious from the pleadings and that would have been overstepping our role and crossed the line between appropriately ensuring the parties are on an equal footing and inappropriately running a party's case for them.

9. The respondent has conceded that the claimant had a disability at the relevant time, namely chronic fatigue syndrome.

Claims and issues

Direct disability discrimination

10. Did the respondent do the following things:

    10.1 5 April 2019 – remove the provision of a laptop for use by the claimant while working at home;

    10.2 8 May 2019- remove the ability of the claimant to work flexibly;

    10.3 8 May 2019- remove the ability of the claimant to work from home at short notice.

11. Was this less favourable treatment than that afforded to the claimant's comparators: Lisa Hotham, PA; Lauren Brooker, PA; and Jo Gill, PA?

12. If so, was it because of the claimant's disability?

Failure to make reasonable adjustments

13. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

14. A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

    14.1 that laptops were shared and kept at the office (PCP 1)
    14.2 that the claimant attend the office to work or call in sick if she could not attend (PCP 2)
    14.3 working from home had to be pre-planned (PCP 3)
    14.4 requiring employees to work fixed hours of 9 to 5 (PCP 4)

15. Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability?

16. Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

17. What steps could have been taken to avoid the disadvantage? The claimant suggests:

    17.1 Allowing her to have her own laptop at home (PCP 1)
    17.2 Allowing the claimant to work at home as needed (PCP 2 and 3)
    17.3 Allowing the claimant to work reduced hours as needed (PCP 4).

18. Was it reasonable for the respondent to have to take those steps and when?

19. Did the respondent fail to take those steps?

Hearing

20. The Tribunal heard evidence from the Claimant on her own behalf.

21. The Tribunal heard evidence on the Respondents' behalf from Ms Jacqueline Harris (the Claimant's Line Manager) and Ms Claire Williams (Service Manager and Line Manager of Ms Harris).

22. There was a 495 page bundle. There were some additional documents provided by the claimant.

23. The parties made oral submissions and the Respondent provided written submissions.

24. Based on the evidence heard and the documents before us we found the following facts.

Facts

25. The Claimant started working for the Respondent on 7 June 2018 as a Team PA in the Management Administration Team of the Community Adult Mental Health services teams. We accept that the job was a newly created post to add support for two existing PAs in the team and to give cover for their work where necessary, and take over their excess workload. She was also a welcoming face and the first person people, including service users, would meet when they attended the office. Her hours were 22.5 hours a week over 3 days.

26. She was assigned as PA to three particular professional leads and the post was intended to be office based to provide the above support to both the clinical staff and the other PAs. At the outset the claimant was told that the hours were 9-5pm, though the respondent could "be a little flexible if needed". She was told that could be discussed.

27. We accept the respondent's case that what was meant by reference to flexibility was a slight variation in hours, for example 8.30-4.30. It did not mean what the claimant decided it meant, which was complete flexibility. We accept that would not be workable and is inherently unlikely given the intention behind the creation of the post. We had to remember that this was pre-pandemic and there was a very different working culture, particularly within the NHS, which was not resourced to enable routine working from home, particularly for administrative staff. It was intended the post holder be accessible to other colleagues and the role involved printing and copying a large amount of documentation for meetings and presence at meetings to take minutes. Some meetings were ad hoc and unplanned.

28. If there was a specific reason for a PA to need to work at home, provided there was not a need to be in the office and it was agreed with those they supported, then it was agreed on an ad hoc basis (paragraph 15 of Ms Harris's statement). The claimant says she was told she could work at home as needed and had a laptop to take home to use. We find that this, if said, was a reference to the above practice by Ms Harris, not a generic agreement that the claimant could choose when she worked at home.

29. There were two shared laptops that had been recently introduced and were intended to assist with minute taking at meetings. The claimant was able to take a laptop home to work but that was not the purpose of the laptops and it remained a shared laptop.

30. As said previously, this was pre-pandemic and the respondent's technology was not ideal for working from home and staff had connectivity issues from time to time. When the pandemic hit the respondent, like the NHS generally, took some time and significant additional resources to adjust to post pandemic working as the Trust had not previously worked digitally in the main.

31. From about September 2018 the claimant was regularly absent and from about November there were issues with lateness.

32. In December 2018 the claimant had a flu-related absence and in early February had another emergency health issue.

33. The claimant first mentioned post illness fatigue on 8 February 2019.

34. There was an informal meeting on 11 February 2019 and the claimant was placed on informal monitoring with a target of no absence in 6 weeks.

35. She did not recover as expected from the flu and had ongoing symptoms and then on 21 February 2019 told her line manager that her GP had raised the possibility of ME/Chronic Fatigue Syndrome (p156).

36. The claimant increasingly requested to work at home and requested short notice changes in hours. She increasingly took a shared laptop home meaning it was unavailable to others. The claimant genuinely needed to make these requests as a result of her condition but we do not accept her evidence she had been told she could be as flexible as needed.

37. Ms Harris had tolerated the situation and sought to be supportive until 25 February 2019. Ms Harris accepts that she had been allowing the claimant to start later and work later however she says she was not sure if she should continue to do this as it was increasing in frequency and was without seeking prior agreement.

38. On that date the claimant said she was going to come late, at short notice, and make up the time the next day, because of her fatigue. The response from Ms Harris for the first time was sharp and said the claimant could not keep

swapping her working hours around. The claimant responded saying she had been told working hours were flexible as needed, which was not correct.

39. Ms Harris's view as of 25 February 2019 is recorded on p158 as she sought support from her own manager. She felt that the claimant was swapping her hours "at the drop of a hat" and felt she was being taken advantage of. She recorded the claimant had been told by another manager that she cannot/should not work from home if she was not well enough to come into office. Her own manager's response is at page 157: "I think you need to tell [the claimant] that any change in her hours needs to be pre-planned and for a particular reason…say that you cannot authorise any more flexible working as…the service needs to know when to expect her in". She said that further guidance from OH is needed to understand the additional support needed before any further adjustments to her working hours. What was relayed to the claimant (p159) was "Until we receive guidance from Occupational Health to understand the additional support you may need we cannot agree to any further adjustment to your working hours. We need to be fair to all staff and follow policy".

40. The claimant interpreted this as a removal of the flexible working she had previously enjoyed and that she was being penalised (p159) but in fact it was management seeking to manage the problem from their perspective that she had been unilaterally taking more flexibility than ever had been agreed, and without getting prior agreement.

41. As a result of the claimant pushing back in response Ms Harris reverted to being conciliatory and the claimant continued to change her hours if she felt unwell (161-162). Ms Harris did repeat the instruction that there should be no home working when she was off to ensure she rested (p162 on 1 March 2019).

42. On 6 March 2019 the claimant asked by text for a 10.30 start time for "the time being" and to work at home over the next two days. She was told she could not because the role was office based and there was particular work for her to do from one of her professional leads. There was some to and fro and then the claimant informed the respondent the GP had signed her off sick saying it was better she spoke with occupational health and a clear plan was put in place. The sick note said fibromyalgia extreme lethargy (pp165-170).

43. The occupational health report was obtained on 12 March 2019 which confirmed a recent diagnosis of ME/chronic fatigue and that the claimant had been referred to a specialist. The suggested adjustments were that for 6 weeks she had reduced hours of 5 hours per day over the three days a week. It was suggested that they included a late start. It was suggested it be reviewed after 6 weeks. It was suggested that there be flexibility for the claimant to work from home which would eliminate her journey and extend the working day. It said future sickness absence was likely, but that the adjustments would be likely to assist her to remain at work (p173).

44. Just as she was due to return to work she hurt her arm and so the sick leave was extended. She proposed working from home but was told not to do so. There was a concern that she could not type if she had hurt her arm.

45. There is a supervision record of Ms Harris's supervision on 15 March which records a discussion about the claimant including the occupational health assessment and that HR advised formal absence management and that there was to be no home working as it was not appropriate to her role except for very specific tasks.

46. On 18 March 2019 the claimant was invited to a formal stage 1 meeting. It recorded that the target set on 11 February 2019 of no absences in 6 weeks had been breached and she was warned the meeting could lead to a formal caution (p184).

47. The claimant's reaction was to extend her sickness absence as the upset worsened her symptoms (p186).

48. She was due to come in for a meeting. The respondent said it would be 1 hour. The claimant requested that it be 2 hours but the respondent insisted it would be 1 hour. The meeting was only intended to discuss her sickness absence and not her return to work or the occupational health report.

49. The meeting ultimately took place on 15 April 2019. The claimant took notes and the respondent recorded it in a letter. The meeting was difficult and acrimonious with the HR manager saying at the outset she had not seen the OH report and the claimant asking a number of questions, some of which were valid, but the style of questioning upset Ms Harris and led to an intervention by the HR manager. The two managers left the room together more than once. The HR manager questioned the GP qualification for making the diagnosis (p234).

50. During this meeting the claimant raised the possibility that her condition was a disability and she was covered by disability legislation There was to be no formal outcome and a further meeting to discuss the support plan was arranged. The claimant had wanted everything to be discussed together at one meeting but the respondent had refused to do so.

51. The claimant had also been asked to bring in the work laptop so that others could use it whilst she was not at work.

52. The claimants' return to work plan was discussed between Ms Harris and Ms Williams on 8 May 2019. The decision was that home working could be agreed for specific pieces of work in exceptional circumstances such as writing up minutes. This would always need to be pre-planned and agreed with the line manager. Ad hoc last minute homeworking due to health related symptoms was not considered appropriate. The view was that if the claimant was not well enough to come to work then she should take the time to recover and be on sick leave. They reiterated that the role required her presence. Ms Harris said in her statement that the professional leads had stated that it was difficult not

knowing when the claimant would be working and not having her on site and that this did not provide them with the expected support of a PA. A phased return over 6 weeks was set out building up to a return to her hours after 6 weeks and increasing above the 15 hours recommended by OH from week 5.

53. There were text messages on 15 May 2019 between the claimant and Ms Harris in which the claimant asked if she was doing the 5 hours a day for the foreseeable future as recommended by OH. Ms Harris replied with the hours she had discussed with her own manager (as described above), with a review meeting after week 3.

54. The return to work plan was then discussed with the claimant on 24 May 2019. The claimant returned to work for three days and then was absent due to a slipped disc.

55. The respondent referred the claimant back to occupational health requesting a face to face appointment saying the claimant had not sustained the hours in the support plan and that HR had requested a further consultation to consider whether she was likely to be fit for work in the foreseeable future.

56. On 1 July 2019 Ms Harris wrote to the claimant raising the fact that her absence was uncertified since 25 May 2019 and chasing a response in regard to the occupational health referral. The claimant texted Ms Harris saying she would be getting a response to this letter and amended the occupational health referral as per pp 289 and 290.

57. The claimant then obtained the certificates which said both fatigue and slipped discs.

58. On 25 July 2019 she was invited to a long term sickness formal review meeting on 22 August 2019 and was told that "the purpose of the meeting is to discuss the [OH] assessment, the prognosis, the anticipated date of return and to set out for you the stages the Trust shall follow in trying to enable you to return to work i.e. adjustment of role and redeployment and if this is not possible the possible outcomes" (p297).

59. Emails and texts about the claimant's return reflect the relationship breaking down between Ms Harris and the claimant although with Ms Harris seeking to facilitate the return. The claimant still did not return in August 2019 and her emails started to say her mental health was not good.

60. Occupational health reported on 6 August 2019 (pp311-312). The report stated:

" the essential point would appear to be a level of sickness absence that is causing commercial harm and [the claimant] feels she is unsupported and she knows that she has a chronic illness that is causing her difficulties….

The labelling of Chronic Fatigue Syndrome is relatively new….she clearly has a Chronic Autoimmune Condition which is quite likely to produce a number of

medical problems which she presents with." The report mentioned a number of other diagnoses, and that some were potentially connected to her chronic pain and chronic medical condition. She said there was some diagnostic uncertainty but the claimant was clearly covered by disability legislation and adjustments did need to be considered.

61. She said one of the difficulties was that the claimant worked for three people giving ambiguity and uncertainty to who she worked for when and meaning she had very busy periods that cause her to become "work unstable". Redeployment or reappointment to more consistent work was a suggested adjustment and the opportunity to work from home on occasions was key. The report asked whether it was reasonable and possible in the respondent's business model that emails and report writing be done at home in her own time. She also suggested the respondent consider sickness absence triggers and how the claimant was given work.

62. The meeting to discuss this in the event took place on 29 August and was recorded in the letter dated 30 August 2019 (pp336-337). The claimant had requested a different HR representative which was accommodated. The OH health report was discussed and the phased return hours were to be recommenced, as before, increasing to above 15 hours by week 5 and returning to full time hours by week 7. This time though the claimant was to fund part of the phased return using her annual leave.

63. They discussed reduced hours over more days but the letter says she confirmed she wanted to continue on 3 days a week. The letter suggests that she wanted to continue to work 9-5pm but this is not correct as the claimant wanted reduced hours as needed. It was to be reviewed at the end of the phased return. Ms Harris was to meet with the claimant fortnightly as a supportive measure. They said they would look at job responsibilities in response to the occupational health comments. It was agreed she could work form home one day a week on a fortnightly basis in order to prepare minutes. It stated that following the phased return she was expected to pick up all the meetings in respect of her job role. All home working was required to be pre-planned and should she not be well enough to come into work this would be classed as sick leave.

64. Ms Harris says she "believes" that during this meeting the possibility of the claimant moving to Worthing was considered as it was closer to her home but rejected by the claimant because she liked her current role. She also said the claimant would not consider another job role. There is no reference to either proposal in the contemporaneous documentation. She said these options were considered along with the possibility of extending hours over four days which was recorded in the letter along with the claimant's rejection and that it would be reviewed. The claimant has no recollection of mention of Worthing and did not, if it was mentioned, understand that it would be a different role. She said in evidence she would be intrigued to know what it was. She did say she would have struggled with a completely new role due to "brain fog". The respondent had not identified a particular role. We find if it was mentioned it was only in passing and was not a proper consideration of redeployment to another

workplace or role. We find any discussion like that would have been recorded along side the record of the discussion of a change in hours. Ms Williams also says that she was aware it was discussed at some point but not exactly when and also was not herself directly involved. We find therefore that discussion of the adjustment of the role and redeployment were not discussed in any detail despite having been flagged up in the letter inviting the claimant to the meeting as set out at paragraph 58 above.

65. Ms Harris in her evidence says the role has peaks and troughs in work and it was a requirement of the role that the claimant support three professional leads and required a physical presence in the office. It's not clear that the respondent ever came back to the claimant having looked at the job responsibilities as set out in the letter dated 30 August.

66. The claimant was told that if her absence continued she would be required to attend a final formal sickness review in 6 weeks (the end of the phased return).

67. She replied on 5 September 2019 to say she was still feeling quite unsupported following the letter and she did not think she should return until some things were clarified (p339).

68. The claimant then made a statutory request for flexible working. She said the letter of 30 August 2019 had not reflected her understanding of what had been discussed.

69. She explained that the issue with ME was the unpredictability of symptoms. She explained that some days it was the combination of travel and work that was difficult. She said that the option of home working had been possible until her diagnosis when it was withdrawn. She requested flexitime as needed. She said she did not suggest that it should interfere with meetings but that if needed when struggling the option would be supportive. She felt the suggestion that instead she call in sick was setting her up to fail. She said the respondent had gone against the advice of occupational health on both occasions. She said "it very much feels like a box ticking exercise so it looks like you have done things "right"".

70. The next supervision record between Ms Harris and Ms Williams records that the claimant "wants a more flexible approach to homeworking in unplanned way" and HR was drafting a response to say "no".

71. On 3 October 2019 (p 355) the reply was sent to the claimant that:

"At the meeting we agreed that there were particular tasks that could be undertaken at home and we felt this would be an adjustment that would enable you to plan your working week and hopefully have a positive impact on your health. However, there are times when the tasks you need to undertake as part of your role require your physical presence in the work place and unfortunately the demand for this work is unpredictable. Therefore in order to support your requirement to work from home and the needs of the service this can be best

accommodated if it is planned. In addition it may impact negatively on your health if you work from home while feeling unwell". The letter repeated the hours of the phased return.

72. The claimant replied with a lengthy letter dated 14 October 2019 reiterating her points and explaining how she felt.

73. Ms Harris referred the claimant to the Employee Assistance Programme.

74. The claimant's certificate dated 30 October 2019 began to include depression. In the supervision session of Ms Harris the claimant was recorded as remaining on sick leave and unauthorised absence (which was not true).

75. On 1st November 2019 the respondent provided a response again reiterating the respondent's position and stating "quite often the work is unpredictable and requires you to be present in the workplace, eg photocopying and preparing documents for managers, sometimes at short notice. If you are undertaking pre-planned work from home then I can ensure there is sufficient cover in the office to undertake the other work and it is distributed fairly among all staff". It suggested a further meeting.

76. On 23 November 2019 the claimant was invited to a further meeting dated 12 December 2019. The claimant in reply resigned by letter dated 25 November 2019 saying she was disappointed with the respondent's reply and that they were going around in circles. The claimant responded on 28 November 2019 stating nothing can be achieved from a discussion; you've made your position clear which leaves me no choice but to resign (p373).

77. The respondent has a flexible working policy and a home working policy.

78. The claimant said she had never heard of a position in Worthing until it was mentioned during proceedings and she would be intrigued to know what it was. She said it would cut out the journey but she might struggle without support to do a completely different job with "brain fog".

79. In evidence Ms Harris said that at the current time home working was not considered part of the PAs role and only certain duties could be done at home. The claimant asked whether that would change when factoring in a disability that would benefit working from home on occasions. Ms Harris responded that it "probably would have once the 6 week support plan [was] followed and then at that point [was] reviewed to see what else we could do". She said they would have looked at the "big picture". They may have been able to offer another role still in Hove that did not involve so much liaison. She said they would have considered that had the support plan been tried. She suggested that would not have been discussed until after the claimant had carried out the six weeks at reduced hours as only then they would not be able to make a judgment as to how much she was able to do and how much she needed flexibility to work at home. She suggested that at least 4 of the phased return weeks needed to have been carried out before other adjustments could be considered. She said that the Trust does encourage redeployment of staff.

Relevant law

Failure to make reasonable adjustments

80. s20 Equality Act requires "…where a provision, criterion or practice of [the employer] puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled" [the employer]… "to take such steps as it is reasonable to have to take to avoid the disadvantage."

81. *RBS v Ashton* [2011] ICR 632, in particular paragraphs 13 and 24, provides that:

"it is irrelevant…what an employer may or may not have thought in the process of coming to a decision as to whatever adjustment might or might not be made. It does not matter what process the employer may have adopted to reach that conclusion. What does matter is the practical effect of the measures concerned….It is an adjustment which objectively is reasonable, not one for the making of which, or the failure to make which, the employer had (or did not have) good reasons."

82. The Tribunal does need to consider how effective the adjustment would be in removing or reducing the particular disadvantage, and a prospect of it doing so may make an adjustment reasonable (*Romec Ltd v Rudham* EAT 0069/07 and *Leeds Teaching Hospital NHS Trust v Foster* EAT 0552/10).

83. Whether an adjustment is reasonable depends on the particular circumstances of the case. It could, on appropriate facts, include transferring, without the necessity for competitive interviews, a disabled employee from a post she can no longer do to one that she can, and for which she is qualified and suitable, even if that post is a slightly higher grade than her own (*Archibald v Fife County Council* [2004] IRLR 651). A tribunal is not precluded from holding that it would be a reasonable adjustment to create a new job for a disabled employee, or to swap posts, if the particular facts support such a finding (*Chief Constable of South Yorkshire Police v Jelic* UKEAT/0491/09/CEA).

84. An employer cannot use his lack of knowledge that would have resulted from a consultation to defend a claim that he has not made reasonable adjustments (*Tarbuck v Sainsbury's Supermarket Ltd* [2006] IRLR 664). A similar premise applies to a failure to make proper enquiries in respect to what would alleviate a substantial disadvantage (*Southampton City College v Randall* UKEAT/0372/05/D).

Direct disability Discrimination

85. Section 13 Equality Act 2010 states that a person (A) discriminates against another (B) if, because of a protected characteristic (including disability) A treats B less favourably than A treats or would treat others.

86. Section 23 Equality Act 2010 provides that on a comparison for the purpose of section 13 there must be no material difference between the circumstances of the Claimant's case and any comparator's case.

87. The burden of proof is set out at section 136 Equality Act. This states that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that s 13 has been contravened by A then it must hold the contravention occurred unless A shows that it did not contravene the provision.

Conclusions

Direct disability discrimination

Did the respondent do the following thing:

5 April 2019 – remove the provision of a laptop for use by the claimant while working at home

88. Although the claimant had taken the laptop home and worked at home using it, the laptop was never provided to the claimant for that purpose. It was a recent development that laptops were provided for the purpose of taking minutes at meetings. The laptops were shared and other staff required access. The claimant was asked to bring it back to work more than once, so that it could be used by others. When she needed it again she was able to use it again and there is no suggestion that her ability to use it when at work was prevented by the respondent. The claimant did not return to work consistently after 5 April 2019 before her resignation.

89. The question of whether or not the claimant should be provided with a designated laptop so she could work at home was never discussed as that was not the only barrier to working from home from the respondent's perspective. Whether or not the claimant should have been provided with such a laptop is addressed below.

8 May 2019 – remove the ability of the claimant to work flexibly

90. There was never an agreement in place that the claimant could work flexibly in the sense she means of being able to call up or contact the respondent at short notice and choose to come in late or work at home whenever she needed. The suggestion at the outset of the employment that the hours were flexible was

limited to a slight variation of working hours, which the claimant never pursued, and so her hours were 9-5pm.

91. Ms Harris did exercise flexibility and accommodate staff's ad hoc needs on an occasional basis. The claimant made use of this as did the other PA staff listed as comparators. The claimant due to her health issues was making more and more use of this and initially this was accommodated in the same way as for her colleagues. However the frequency of the claimant's requests and the fact they were not agreed in advance was becoming a problem for the service and Ms Harris felt that the claimant was swapping her hours "at the drop of a hat" and felt taken advantage of.

92. The respondent took action to manage that situation. This coincided with the respondent learning of the claimant's diagnosis. The claimant was told that there could be no further adjustment to her working hours, as in no more ad hoc adjustments, until advice had been received from occupational health (25 February 2019). However the Claimant "pushed back" at this and Ms Harris also became more conciliatory again so some ad hoc flexibility in fact continued until the claimant was absent due to sickness when her request to work at home was turned down on 6 March 2019.

93. On 8 May 2019, following receipt of OH advice on12 March 2019, the respondent decided (as recorded in Ms Harris's supervision of that date) that the 6 week phased return be put in place. This did have reduced hours, though not as reduced as recommended by occupational health. The hours exceeded those recommended by occupational health from week five and returning to full hours at the end. This was to be reviewed and the claimant in fact never returned to work long enough for that review to take place.

94. We find there was, coinciding with the claimant's diagnosis, an attempt to manage the situation that the claimant was frequently requesting flexibility without advance agreement. This was then overtaken by the hours in the phased return.

8 May 2019 – remove the ability of the claimant to work at home at short notice

95. The claimant had been working at home from time to time and then the respondent did take the view that the claimant was not to work from home if absent to make sure she rested (1 March 2019). On 6 March 2019 a specific request to work at home was turned down on the basis her role was office based and one of her leads had work for her to do.

96. The claimant was then absent most of the period from that date.

97. On 15 March 2019 in a discussion between Ms Harris and her own manager it was agreed that home working was not appropriate for the role. In Ms Harris's supervision with Ms Williams on 8 May 2019 the following was decided: Home working can be agreed for specific pieces of work in exceptional circumstances such as writing up minutes. This would always need to be pre-planned and

agreed with the line manager. Ad hoc last minute homeworking due to health related symptoms is not considered appropriate. If she is not well enough to come to work then she should take the time to recover and be on sick leave. They reiterated that the role required her presence.

98. In the meeting of 30 August It was agreed she could work from home one day a week on a fortnightly basis in order to prepare minutes. All home working was required to be pre-planned and should she not be well enough to come into work this would be classed as sick leave.

99. It is not the case that the respondent removed a prior agreement to work at home at short notice. The claimant had been doing it, and it had been tolerated. This decision was drawing a line under the previous practice and seeking to both clarify and formalise what the respondent could accommodate.

Was this less favourable treatment than that afforded to the claimant's comparators: Lisa Hotham, PA; Lauren Brooker, PA; and Jo Gill, PA?

100. The claimant had had the same ad hoc flexibility as afforded her colleagues but she required more. This did lead to a removal of the ad hoc flexibility she had previously enjoyed, both in respect of the hours of work and working at home, but we find that the respondent would have eventually done this in respect of any of her colleagues who needed this degree of ad hoc flexibility without advance agreement. The circumstances of the named comparators were materially different. The hypothetical comparator who needed the same amount of flexibility as the claimant, was not getting advance agreement, and was impinging on the job in the same way, would have been treated the same as the claimant.

If so, was it because of the claimant's disability?

101. The reason for the removal of the ad hoc flexibility the claimant had previously had was the frequency she was using it without getting prior agreement and the disruption this caused to the service along with Ms Harris's sense that she was being taken advantage of. The reason was not the claimant's disability as such. Once the occupational health advice was received and the respondent was aware of the disability the respondent was seeking to consider adjustments. However they did not consider they could allow short notice working at home without prior agreement due to the needs of the service.

102. We note the claimant did not bring the claim on the basis of discrimination arising from disability, namely alleged unfavourable treatment because of something arising in consequence of her disability, and so we did not consider such a claim.

Failure to make reasonable adjustments

Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

103. The respondent was aware of the possibility of the claimant having the disability from 21 February 2019 when she told her line manager that her GP had raised the possibility of ME/Chronic Fatigue Syndrome (p156). On 25 February 2019 the respondent was aware of the need for an occupational health referral and the possibility of additional support. Indeed the claimant was told: "Until we receive guidance from Occupational Health to understand the additional support you may need we cannot agree to any further adjustment to your working hours" (p159).

104. The diagnosis was then confirmed on 12 March 2019 and that the impact on the claimant was severe fatigue. The respondent's representative suggests that the requisite knowledge did not eventuate until August 2019. We disagree. By 12 March 2019 the respondent had the requisite knowledge of an underlying condition with severe impact on the claimant's everyday activities. The report of 12 March 2019 refers to absences back to June 2018 and describes the current symptoms as an ongoing state of affairs without any suggestion that they might ease. It confirms that future absences are likely. We find the respondent had the requisite knowledge then, but if they did not then they ought to have had. Although the report on 20 August 2019 is more detailed it refers to medical history which predated March 2019 and states that it is clear that disability legislation applies to the claimant. It is not the case that anything changed between those two reports in terms of whether the disability legislation was likely to have applied to the claimant in March 2019. The claimant herself also raised the question of whether she had a disability and was covered by the legislation in the meeting of 15 April 2019.

A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

that laptops were shared and kept at the office (PCP 1)

105. We have found that the laptops were shared and the intention was that they were kept at the office, although the claimant did take it home regularly until she was asked to bring it back.

That the claimant attend the office to work or call in sick if she could not attend (PCP 2)

106. The respondent does require PAs like the claimant to work at the office and from about 1 March 2019 the claimant was told she had to stay off sick if she was not well enough to attend the office.

working from home had to be pre-planned (PCP 3)

107. The respondent did adopt the practice that working from home had to be pre-planned. This may be better viewed as an adjustment to PCP 2 as essentially PAs like the claimant were required to work in the office.

requiring employees to work fixed hours of 9 to 5 (PCP 4)

106. The claimant's working hours were 9-5pm and we were told there was a little flexibility to 8.30-4.30pm but otherwise they were the working hours.

Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability?

PCP 1:

107. It was not the policy on the laptop that put the claimant at a substantial disadvantage but the requirement that she attend the office. When she needed the laptop for the intended purpose of attending a meeting and taking minutes she was able to have it.

PCP 2:

108. The claimant was struggling with severe fatigue and was finding it difficult to get up in the morning and to attend the office every working day in part because of the travel. The requirement that she attend work did put her at a substantial disadvantage as she could not always do so.

109. The requirement that if she was not well enough to come in that she had to call in sick rather than work at home did put her in a position where though she might have been well enough to do work from home if she excluded the travel or started late, she had to take absence. This all or nothing approach did prevent the claimant from doing what work she was able to do and did put her at a substantial disadvantage.

PCP 3:

110. PCP 3 is better viewed as an adjustment made to PCP 2. We have not addressed it as a separate PCP.

PCP 4:

111. For the same reasons as PCP 2 the requirement to work 9-5 hours did place the claimant at a substantial disadvantage as there were days when she could do some work for example with a late start but could not manage the whole day.

Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

112. The respondent was aware that the claimant had been using ad hoc flexibility more and more frequently. The claimant increasingly requested to work at home and requested short notice changes in hours. She usually explained the reason and on a number of occasions said it was due to fatigue – see for example paragraph 38 above. The respondent was also aware that she wanted to be able to work at home on days when she could not manage to come into the office. That she had difficulties with fatigue and getting up in the morning/ doing a whole day with the travel were confirmed in the first occupational health report. From that report the respondent could reasonably be expected to know that the claimant was placed at the disadvantage.

113. The claimant herself made it clear on 30 August 2019 in her flexible working request. She explained that the issue with ME was the unpredictability of symptoms. She explained that some days it was the combination of travel and work that was difficult. She said that the option of home working had been possible until her diagnosis when it was withdrawn. She requested flexitime as needed. She said she did not suggest that it should interfere with meetings but that if needed when struggling the option would be supportive. She felt the suggestion that instead she call in sick was setting her up to fail.

What steps could have been taken to avoid the disadvantage? The claimant suggests:

Allowing her to have her own laptop at home (PCP 1)
Allowing the claimant to work at home as needed (PCP 2 and 3)
Allowing the claimant to work reduced hours as needed (PCP 4).

114. Some form of flexibility around home working might have avoided the disadvantage and enabled the claimant to remain in work. However we note that the claimant was absent the entire period from 18 March 2019 save for 3 days. It was not the case that the claimant was only absent on certain days that were “bad days”. However the claimant’s GP had signed her off until a clear agreement was in place (6 March 2019) and a contributory factor to the absence continuing in March 2019 was the upset caused to the claimant by the respondent holding an absence management meeting around 18 March 2019 (paragraph 47). In addition, both Occupational Health reports suggested flexibility around home working might assist attendance and the claimant was saying she wanted the adjustments in place before she returned, so the fact she did not have assurance that the adjustments were in place was inhibiting her return (paragraph 339 around 5 September 2019).

115. We conclude it is possible that short notice flexibility with both hours and working at home would have enabled a return to work. This would have required the access to the laptop at home.

116. However there is also a significant possibility that the claimant would not have managed a return to work even in those circumstances as the claimant only managed three days of the return to work plan, when she was working short hours. This can be addressed at remedy stage.

Was it reasonable for the respondent to have to take those steps and when?

116. We accept that the job as it was not suited to working from home on a long-term basis due to the requirement to be available to support the other PAs and the three professional leads and to prepare for meetings. The respondent would have needed to adjust the role, for example redistributing the work amongst the three PAs.

117. Alternatively the claimant would have needed to be redeployed to a job that could accommodate short notice home working.

118. On the evidence before us we consider that there was a real prospect of both adjusting the role and/or redeploying the role to enable home working to the degree the claimant needed. Ms Harris suggested that both of these were possibilities that the respondent would have looked at after the 6 week return was completed. She said the possibility of redeployment to Worthing was mentioned fleetingly. She confirmed there is a redeployment policy and we noted the respondent is a large employer with a home working policy that provides for necessary IT equipment to be provided. It would have been reasonable for the respondent to consider these options with the claimant from March 2019, or at the latest following receipt of the OH report of 20 August 2019, once it was clear that the claimant required an adjustment that could not be accommodated in her own post as it was. We note this is what had been envisaged in the invitation letter at page 297 (paragraph 58).

119. It would have been reasonable to provide the claimant with a laptop to facilitate working from home.

120. It would also have been reasonable to look at flexibility around the claimant's hours to facilitate a late start as required as recommended by occupational health on 12 March 2019. This was done to a degree and we have heard no reason why it would not have been reasonable for the respondent to do it fully.

121. Although there is some uncertainty as to whether these adjustments would have been successful in alleviating the disadvantage there is sufficient chance that these adjustments would have done so, and kept the claimant in work, that it was reasonable for the respondent, a large employer with the relevant policies, to have to take those steps.

122. We note that once in a role that could accommodate it it was a reasonable adjustment to allow the claimant to work at home on a day that she did not feel

well enough to manage the commute and come into the office, or to come in later if she felt she needed to. We understand the respondent's approach to absences and discouraging staff to work if unwell but this should have been adjusted once the respondent was aware of the claimant's chronic condition and OH advice, to enable the claimant to do what work she could on a given day.

Did the respondent fail to take those steps?

122. The respondent partially took the above steps. The respondent did reduce the hours following the occupational health report on 12 March 2019, however not for the recommended 6 week period. Instead the respondent appears to have confused that advice with a phased return. A phased return after sickness absence does involve a gradual increase in hours with the aim of resuming the full contractual hours at the end of the 6 week period. That was not what was recommended here. Here occupational health recommended a 6 week period of reduced hours for example 15 hours a week for the full 6 week period, to then be reviewed. As the claimant's difficulties were likely to continue, it was unnecessary pressure to build the phased return back up to the full hours by weeks 5-7.

123. With respect to allowing short notice home working the respondent did not put this in place. On 8 May 2019 the decision was that home working could be agreed for specific pieces of work in exceptional circumstances such as writing up minutes. This would always need to be pre-planned and agreed with the line manager. Ad hoc last minute homeworking due to health related symptoms was not considered appropriate. Later this became an offer of one day planned home working once a fortnight. These proposals fell short of what the claimant needed and missed the point that she needed to be able to respond at short notice to the effects of her condition. We accept that what the claimant needed could not be accommodated in her existing position. The respondent should have moved much more quickly to considering alternatives to enable the claimant to return. There was no consideration of a vacancy list. No consideration was given to redistribution of duties to enable the claimant to work at home as needed. To the degree that the claimant had to complete the phased return before this was considered, this placed an unnecessary hurdle in the way of the consideration of reasonable adjustments. If such a 6 week period was considered necessary then the respondent could have considered allowing the home working required temporarily in the current position to facilitate this.

124. We note that the respondent was prioritising the management of the claimant's absences over real engagement with her need for adjustments. It was legitimate to take the view that home working could not be accommodated long term in that role but then the focus should have turned to looking for where it could be accommodated to keep the claimant in work. Instead the respondent put the onus on the claimant to try the respondent's proposal for a certain number of weeks when both the claimant and OH said she needed more flexibility than that proposal accommodated.

125. Finally we note that the claimant did not bring a case about the respondent's approach to managing her absence and the formal processes being followed and therefore we have not considered whether that approach was in breach of disability legislation.

Remedy

125. The matter will now be listed for remedy. At the remedy the tribunal will consider the chance that the adjustments would not have enabled the claimant to remain in work and that she might have resigned any way. This will include consideration of whether the claimant would have been well enough to sustain a return to work; but also how the claimant might have reacted to being informed that the only home working prospect was an adjusted or redeployed role. We acknowledge there is a possibility that she would have disagreed with this and continued to press for full flexibility in her existing role and resigned if that was not agreed. There is also the possibility that she would not have wanted to try a new role due to the effects of her disability.

126. We also have had in mind that the respondent attended at the outset intending to defend a direct discrimination case. We will allow further evidence from the respondent in respect of what might have happened in respect of accommodating home working in a modified role or redeployed role, if that had been considered at the appropriate time.

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Employment Judge Corrigan
29 July 2022