Case number: 1404361/2020

EMPLOYMENT TRIBUNALS

Claimant: **Diane Coppell**

Respondents: **Dr Jennie Want & Dr Sunitha Jinka**

Heard at: **Bristol** **On:** **11-14 April 2022**

Before: **Employment Judge Oliver**
Mr N Cross
Mr G Crowe

Representation
Claimant: Dr Stephen Coppell
Respondent: Ms G Duffy

RESERVED JUDGMENT

The claims for unfair dismissal and disability discrimination fail and are dismissed.

REASONS

1. This is a claim for unfair constructive dismissal and disability discrimination (failure to make reasonable adjustments).

2. The hearing was conducted by the parties attending in by video conference (VHS). It was held in public with the Tribunal sitting in open court in accordance with the Employment Tribunal Rules. It was conducted in that manner because the parties had consented to such a hearing and it was in accordance with rule 46, the *Presidential Guidance on remote hearings and open justice* and the overriding objective to do so.

Issues

3. There was a Case Management Preliminary Hearing on 12 May 2021. The issues were clarified and agreed hearing, and some amendments were made by

the claimant shortly afterwards which the Tribunal accepted. The final list of issues relating to liability was discussed with the parties at the start of the hearing and agreed to be as follows:

4. ***Constructive unfair dismissal***

4.1 The claimant claims that the respondent acted in fundamental breach of contract in respect of the implied term of the contract relating to mutual trust and confidence. The breaches were as follows, as taken from the additional document served with the claim form:

4.1.1 The Practice has not ensured that the claimant's working environment was safe in that it failed to carry out any risk assessment in respect of the claimant's employment.

4.1.2 The Practice has not provided the support the claimant needed to perform her job, particularly following her absence since June 2019 with mental health problems in that it failed to propose a solution for the pressure the claimant felt under due to her workload.

4.1.3 The Practice required the claimant to carry out her own risk assessment as a precondition of returning to work on anything other than normal hours.

4.1.4 The Practice failed to adequately resource the medical secretary role or understand the changes to her workload resulting from changing national requirements.

4.1.5 Mr. Emery failed to create or put into place a return to work plan.

4.1.6 Mr. Emery failed to respond to emails from the claimant being those of:

4.1.6.1 10 June 2019
4.1.6.2 21 June 2019
4.1.6.3 18 July 2019
4.1.6.4 31 July 2019
4.1.6.5 13 August 2019
4.1.6.6 16 September 2019
4.1.6.7 23 September 2019
4.1.6.8 21 October 2019
4.1.6.9 24 December 2019
4.1.6.10 12 January 2020
4.1.6.11 13 January 2020 (confirming that the claimant had posted written consent to the practice)
4.1.6.12 15 January 2020

4.1.7 There was a failure to adopt good practice by:

4.1.7.1 Keeping in contact with the claimant while she was absent.

4.1.7.2 Failing to refer the claimant to an occupational health physician.

4.1.8 By the date of the claimant's resignation the Practice had not completed its investigation into her formal grievance of 4th February 2020 and had not followed ACAS guidance in that it took too long to resolve the grievance.

4.1.9 The Practice discriminated against the claimant on the grounds

of her disability as set out below.

4.2 The Tribunal will need to decide:

4.2.1 Whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and
4.2.2 Whether it had reasonable and proper cause for doing so.

4.3 Did the claimant resign because of the breach? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end. The respondent is not asserting that there was a different reason for the resignation.

4.4 Did the claimant tarry before resigning and affirm the contract? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

5. ***Disability*** - At the material times, the respondent accepts that the claimant was disabled by reason of depression, stress and anxiety.

6. ***Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)***

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

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

6.2.1 That she carry out her normal work activities, in particular: fulfilling the constant, multiple, complex, and competing workloads and deadlines arising from the claimant's dual Medical Secretary/general secretary role.

6.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that because of her depression and anxiety she could not cope with these things?

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

6.5 What steps (the 'adjustments') could have been taken to avoid the disadvantage? The claimant suggests:

6.5.1 Paying the claimant in full whilst off sick.
6.5.2 Allowing the claimant to work shorter, adjusted, flexible hours of work.
6.5.3 Offering the claimant a phased return to work.
6.5.4 Reducing distractions and interruptions in the working environment.
6.5.5 Moving the claimant's desk to a place where she would not be interrupted by colleagues.

6.5.6 Reallocating some of the claimant's duties and splitting Med Sec and General Sec duties.
6.5.7 Putting in place regular supervision issues.

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

6.7 Did the respondent fail to take those steps?

7. We also agreed that the following issues relating to adjustments in compensation would be decided in the first part of the hearing – any increase or decrease for failure to follow an applicable Acas Code; any decrease for contributory fault by the claimant; any decrease for the chance the claimant would have been dismissed fairly in any event.

Evidence

8. We had an agreed bundle of documents running to over 600 pages. We have read the documents referred to by the parties in their suggested reading list, in witness statements, and in written submissions.

9. We read the witness statements. For the claimant, we heard evidence from her, and from her brother/representative Dr Stephen Coppell. For the respondent we heard evidence from both respondents (Dr Want and Dr Jinka), and from Selina Bone, Operations Manager for the respondents.

10. We had written submissions and supporting documents from both parties, and heard oral submissions.

Facts

11. We have considered all the evidence and submissions, and find the facts necessary to decide the issues in the case.

12. The claimant was employed by the respondents as a medical secretary. She started work on 29 May 2018 and resigned with effect from 3 July 2020. She left work on 10 June 2019 and was signed off sick with stress and anxiety, and later depression as well. She did not return to work prior to her resignation.

13. The respondents are a partnership GP practice at East Cowes Surgery (the "Practice"). At the time of the relevant events, Dr Jennie Want and Dr Sunitha Jinka were the two GP partners. The Practice employed Mr Nick Emery as Practice Manager. He dealt with operational matters relating to employment and line management of administrative and secretarial staff. He left in October 2020 and was not a witness in this case.

14. The claimant was given initial training when she started this role by Ms Selina Bone, who at the time was the Clinical Governance Administrator. The previous medical secretary had already left. The claimant's role was 25 hours per week, worked over 5 days. The previous medical secretary had also worked 25 hours per week in the medical secretary role, plus 5 hours as an administration assistant (although the vacancy had been incorrectly advertised as 30 hours per

week). There was also an audio typist/secretary, Ms Hanson, who worked 16 hours a week.

15. The claimant's role involved two areas. Her medical secretary work was primarily dealing with clinical referrals. She also carried out administrative/secretarial work, which covered matters such as dealing with data subject access requests, insurance and other medical reports, preparing for and taking minutes of meetings, and dealing with cash payments and invoicing. The most time critical part of her work was "two week wait" referrals for suspected cancer, which must be actioned within 24 hours. Other referrals did not have specific deadlines, but might be either urgent or routine. There were longer deadlines for some of the administrative work, such as data subject access requests.

16. A new electronic system for referrals – known as ERS, or "choose and book" – was due to be fully implemented instead of paper referrals by September 2018. The move to ERS increased the claimant's workload to some extent. Her evidence was that the process was more time-consuming than paper referrals, requiring medical secretaries to book appointments online with the relevant specialists, and check on progress. The respondents say that this change had been taking place over a number of years. We accept the claimant's evidence that the full move to ERS increased her workload.

17. The claimant worked in a back office with up to three other employees. This was at a corridor junction. It had a door that could be closed, and sometimes the employees would close the door. The claimant says she was told by Mr Emery that Ms Bone was suspicious about why staff were closing the door. Ms Bone denies having said this.

18. The claimant was concerned about the volume of her work. She agreed to work 8 hours of additional overtime between July and November 2018.

19. Ms Hanson resigned in December 2018. The claimant raised concerns about workload and quality of dictation equipment in an email to Mr Emery and the respondents on 18 December, and suggested a new medical secretary role of 24 hours.

20. Dr Jinka replied the same day. Her email says, "*I always support staff to work efficiently, but we need to work as a team and move to future changes*". She comments on reviewing dictaphone machines, use of "choose and book", staff appraisals and staff levels, and that staff should not be pushed to do more than what they can. She says they should advertise and take feedback from all partners.

21. The claimant sent an email headed "I hope you will understand" to Ms Bone, copied to Dr Want and Mr Emery, on 20 December 2018. This explained that, "*I need to step entirely away from the stress and anxiety which has built up at work"*. The email explains that the claimant was already feeling exposed, and has found out that Ms Hanson was signed off and would not be returning, which had tipped the balance. She said she hoped to be back at work on 27 and 28 December. In fact, the claimant was signed off with anxiety and stress on 24 December 2018 until 6 January 2019. The claimant says that Mr Emery told her

to “take it easy” on her return.

22. The respondents put locum cover in place during the claimant’s absence, and kept this in place when she returned to work. They recruited a new medical secretary for 20 hours a week (an increase from the 16 hours worked by Ms Hanson). The new secretary started on 18 February 2019, and locum cover was retained while she got used to the role. They also gave the secretaries the opportunity to visit another practice in January to compare best practices and ways of working efficiently.

23. Dr Want says that she was not aware at this point that the claimant had a mental health condition. She knew that the claimant was stressed, as she had told them this. The claimant had returned to work and did not raise any concerns about her wellbeing after that. The respondents did not think a risk assessment was necessary at this time.

24. The claimant did raise further issues about her workload. She sent an email to Mr Emery on 5 February about referrals and general workload, and a further email on 11 February with suggestions about the medical secretary role. Dr Jinka emailed Mr Emery on 6 February asking him to let the claimant know they are listening and have actioned a few things, and suggested that Dr Townsend (their GP supporter) may be able to help. Mr Emery replied that he’d had a quick chat to the claimant and he had encouraged the secretaries to speak honestly to Dr Townsend.

25. The respondents also asked Dr Townsend (their GP supporter) to review the secretarial roles. He recommended upgrading dictaphones and reviewing the secretarial teams working hours/patterns. These recommendations were actioned. This included a new electronic dictation system. There were two provider demos in March 2019, but both systems were too complex. Another system was demonstrated on 11 June, and subsequently purchased. This was after the claimant had left work. In May 2019 the respondents also invited a neighbouring practice manager to support Mr Emery and look into secretary working patterns.

26. The claimant became very unwell at work on 10 June 2019. In her own words, she says she felt like she was going to die. She immediately left work without explanation. Mr Emery attempted to call her, but she was not well enough to speak to him. She emailed Mr Emery on 10 June, to explain her sudden departure from work and make some observations about workload. She sent another email to Mr Emery and Ms Bone on 21 June to say she was not yet fit for work, her condition was more severe than at Christmas, she may well remain at risk unless we do things different and better, and referred to the HSE website. Mr Emery did not reply directly to these emails. It appears from the documents that Mr Emery did speak to her at some point - although the claimant could not remember this – because she emailed Mr Emery on 18 July saying thank you for your call earlier this week, and attaching some background HSE information and links.

27. Mr Emery invited the claimant to attend an informal review meeting on 29 July. This was rearranged at the claimant’s request to 7 August. The purpose of this meeting was to discuss her welfare. On 31 July the claimant emailed Mr

Emery a statement in advance of the meeting. He did not reply to this email.

28. The claimant attended a welfare meeting on 8 August 2019, supported by her brother, Dr Stephen Coppell. The respondents had engaged an external consultant to run this meeting - Mr Robert Reddin, HR consultant from Peninsula. Mr Emery also attended. We have seen a transcript of this meeting, and a written statement that the claimant submitted in advance of the meeting. The transcript shows a relatively lengthy discussion with the claimant about what the practice could do to help her back to work. Mr Reddin said that an occupational health report would not give a complete picture without information from the claimant's GP. The claimant did not agree at this point to a GP report.

29. On 8 August after the meeting, Mr Emery emailed details of the employee assistance programme to the claimant.

30. The claimant emailed Mr Emery on 13 August 2019, setting out suggestions that would help her to return to work. She suggested separating core admin tasks from deadline-driven medical secretary duties, with a reduction to 16 hours a week, plus a phased return.

31. On 2 September the claimant emailed Mr Emery asking for an update, and letting him know she was signed off until 23 September. Mr Emery replied saying that they were awaiting a written report from Peninsula for the partners to consider.

32. The claimant emailed Mr Emery on 16 September to thank him for a call and offer to take part in dictation equipment training, and said the delay in the outcome from the welfare meeting was troubling. Mr Emery did not reply. On 23 September Dr Coppell wrote to Mr Emery complaining about the long wait for the report, and reminding him of the claimant's proposals for reduced hours and removing the medical secretary role. Mr Emery did not reply to Dr Coppell.

33. The welfare meeting case report was finally received by the Practice on 9 October 2019. It is dated 14 August 2019. It was sent with an email from Mr Reddin which said, "*My sincere apologies for the late delivery of my report, which I mistakenly thought I had sent to you previously*." It appears that there was an error, and Mr Reddin thought he had sent the report before.

34. Unfortunately, we have no information about what, if anything Mr Emery did to chase up the report during this period. Dr Want and Dr Jinka both say that they had not dealt with this type of issue before, and did not know what to expect or how long the report would take. They had delegated it to Mr Emery to deal with in his role as Practice Manager. Dr Want's evidence was that if she had realised the delay was unusual, she would have chased it herself. She said she was sorry for the delay, it was frustrating, and it was quite embarrassing that it looks like the report was not chased up at the time.

35. The report recommended:

"*a) The Practice provides DC with details of the Employee Assistance Programme;*

b) *The Practice reviews the design of DC's current job function to see if it is reasonably practicable to separate the medical secretary and administrative roles;*

c) *If it is reasonably practicable to separate the medical secretary and administrative roles, to conduct a risk assessment for each role to assess workloads and working conditions and ways of reducing or avoiding any risks that are disclosed;*

d) *Following completion of this exercise to hold a further welfare meeting with DC if she has not already returned to work, at which meeting might also be discussed any separation of job roles that the Practice considers to be reasonably practicable*."

36. Mr Emery sent the claimant an email on 11 October 2019. This was in response to an email from the claimant on 9 October titled "disappointing", which complained about the continued delay and that this was exacerbating her anxiety and stress, and referred to seeking legal advice. He attached the report. The email says the Practice has received a report from the welfare meeting and is working closely with Peninsula to action the recommendations. He says they had previously asked whether they could approach a medical professional to identify ways to assist her at work, but she declined the request at the welfare meeting. He says the suggestions regarding possible adjustments to her job role from her email of 13 August have been discussed with GP partners and Peninsula.

37. The email goes on to say the following –

> "*Without the benefit of the medical report or any specifics on the sick notes from the GP, we have decided a stress risk assessment is the best starting point. I enclose a form for you to complete and return.*
>
> *If you wish to come back to work before the assessment is done, you are very welcome. We understand the financial burden of being off sick and are keen to help aid and support your return.*
>
> *If you decide to come back to work without the benefit of any suggestions from your GP and before the assessment is finalised, this will be on your current hours*."

38. The workplace stress assessment form attached to this email states "*This form should be used to assess an individual who is suspected of suffering from workplace stress*". It contains two pages of tick boxes for hazards to be assessed as high, medium or low risk, and a concluding page on precautions in place and actions required.

39. The claimant replied saying that her recollection of the discussion with the GP was different, and she requested and was provided with a transcript of the meeting.

40. On 16 October 2019, Mr Emery sent the claimant an invitation to the Practice's Christmas meal on 7 December. He sent the claimant the transcript of the meeting on 18 October.

41. On 21 October 2019 the claimant emailed Mr Emery, copying Dr Want, to give her feedback on the report. She says she has made a subject access request for her medical records and will share these, and says she is also willing for them to request a report from her GP. By this point she was suffering from depression as well as anxiety. We have not seen any reply to this email. Mr Emery was absent between 27 November and 16 December.

42. On 27 November 2019 the claimant emailed Dr Want to say she had obtained copies of her medical records and could get duplicates if she wished to see them, and she had been assessed as having moderate to severe anxiety and depression. Dr Want replied on 28 November, saying "*I am going to find out a bit more personally about the situation as it stands over the next few days, and then contact you again to arrange the next steps in how we can facilitate a safe return to work for you*."

43. Dr Want emailed the claimant again on 6 December. She says she thinks the next step is to arrange an informal meeting with management team/partners, to negotiate and agree what a safe and effective return to work could look like. She says she understands they both need to look at the work stress assessment prior to the meeting. She asks the claimant to look at the areas mentioned and tick the boxes, with a bit of detail if she wishes, and when they meet they would fill in the grid on the last page with her input. She says she has spoken with current staff, but it would be helpful to have the claimant's personal viewpoint. The email goes on to say, *"I understand that you wish to return on reduced hours, which we should be able to accommodate, and we need to meet and see if we can agree on a revised role as you have suggested, which protects you but also fits with the needs of the surgery*". She asks for the claimant's thoughts and when she might be available to meet.

44. Dr Want's evidence is that the Practice had considered splitting the medical secretary role and concluded it might be unrealistic, as this could create one more pressured role dealing with all the activities with deadlines. However, they were still willing to consider this as a solution for the claimant. They were following the advice of the welfare report to conduct a risk assessment, and thought this would be useful before meeting her. They did not consider an occupational health report at this stage as they were following the recommendations in the report.

45. The claimant replied on 13 December setting out concerns about delays and lack of communication. She said she was struggling to see what completing the form would add to what the Practice already knew about the reasons for her absence. She said she was open to an informal meeting in the new year. The claimant's evidence is that she had lost trust in the Practice by this point, her health condition was deteriorating, and she felt they were going round in circles after 6 months.

46. Mr Emery emailed the claimant on 18 December explaining they had taken advice they needed to complete a stress risk assessment, but they were happy to meet at her earliest convenience. He also said, "*we are happy to discuss the reduced hours and any suggestions that you may have for your return and hope that we can come to an arrangement*".

47. Dr Coppell emailed Mr Emery and Dr Want on 24 December 2019, on the claimant's behalf. The email sets out a number of concerns about the claimant's treatment. He asks that all communications are sent to him, due to the state of her health. He says the claimant is open to a meeting in the new year, but wants a clear indication as to the purpose of the meeting and desired outcome for her.

48. Dr Want explained in her evidence that they needed to be sure the claimant gave consent for them to correspond with Dr Coppell on her behalf. Mr Emery drafted an email to the claimant explaining this and asked Dr Coppell to confirm he could send it to her. He sent a consent letter and stamped return envelope. The claimant says this was sent second class on 8 January, it arrived on 11 January, and she immediately sent it back in the second class stamped envelope.

49. Dr Coppell sent an email to Mr Emery on 12 January giving his view that the claimant would never be well enough to return, and asking about the option of early retirement on health grounds. This says the email had not been shown to the claimant. Mr Emery replied on 13 January saying they were unable to discuss the matter as they had not yet received consent. Dr Coppell replied saying the consent was posted on Saturday, and asking him to confirm when it arrives. He asked on 15 January to be told by return if the consent had not been received.

50. Dr Coppell also sent a freedom of information request on 15 January 2020, and there was various ongoing correspondence about this.

51. The claimant submitted a written grievance on 4 February 2020, after speaking with Acas. The grievance summary is that, over many months, Mr Emery has failed to discharge his responsibilities as Practice Manager to put in place, manage and implement effective measures and arrangements for ensuring her safe return to work. It says that Acas has suggested there are now only three possible outcomes – she terminates employment and alleges constructive dismissal; the Practice terminates employment on grounds of medical capability and supports and application for early retirement on ill health grounds; and the Practice makes an acceptable settlement offer. The claimant's evidence is that she was setting out what Acas had advised. She says that she did also see the grievance as her final "slender hope" that she could have a fair examination of her concerns, and she still held out some hope that she could return to work.

52. Dr Want acknowledged the grievance on 11 February and said they were awaiting the claimant's written consent. She also wrote directly to the claimant. On 14 February the claimant provided a letter confirming her consent for Dr Coppell to act on her behalf. We do not know what happened to the previous consent letter that the claimant returned.

53. The grievance was heard by Mr Dean Yeomans, HR consultant from Peninsula. After some attempts to arrange a meeting, it was agreed this would be dealt with using written representations. This happened on 24 February 2020.

54. The grievance was then investigated by Mr Yeomans. This took some time. He required information from the Practice. Dr Want explained that he asked

them for information, and also sent a list of 26 questions for them to respond to. Mr Emery helped to gather the information, and then it was the partners' responsibility to check it all before sending it off. This all happened at the start of the COVID-19 pandemic. Dr Want explained that this was a very difficult time for the Practice – staff were limited due to the need to protect the vulnerable, there were constantly changing government guidelines, all holiday was cancelled, there was no part-time working and everyone was working very long hours. This all caused a delay in responding to the grievance. Mr Yeomans did provide some updates to the claimant about progress, but the claimant said they had to chase for updates. Although the claimant accepts some delays due to the pandemic, she does not find a 4 month delay reasonable. There was also a period of 11 days during which there were some settlement discussions.

55. The claimant resigned on 8 June 2020, giving one month's notice. She set out a list of reasons, including the failure to complete the investigation into the formal grievance. She said there was a breach of trust and confidence, and disability discrimination by failing to make reasonable adjustments.

56. The grievance outcome report was dated 9 May 2020. It was actually sent to the respondent on 9 June, and sent to the claimant on 15 June 2020. Dr Want wrote to the claimant on 15 June 2020 with the grievance outcome decision, which did not uphold her grievance. She also asked if the claimant wanted to reconsider her decision to resign. The claimant appealed on 22 June 2020. The appeal was heard by another consultant, and was not upheld. We have not considered the grievance outcome and appeal in any detail as these events happened after the claimant's resignation.

57. The respondent continues to operate with two medical secretaries working the same hours as when the claimant left (45 in total), and the current medical secretaries do not struggle with their workload. Neither has the same mental health disabilities as the claimant.

58. The claimant was paid while she was off sick in accordance with the respondents' usual sick pay policy – 4 weeks full pay and 8 weeks of half pay for staff with 13 months of previous continuous service.

Applicable law

59. ***Unfair dismissal.*** The definition of a dismissal includes circumstances where an employee is entitled to terminate their employment contract without notice by reason of the employer's conduct (Section 95(1)(c) of the Employment Rights Act 1996). This requires a significant breach going to the root of the contract, or something that shows the employer no longer intends to be bound by one or more essential terms of the contract (***Western Excavating (ECC) Ltd v Sharp*** [1978] ICR 221, CA). This is an objective test. It is not a range of reasonable responses test, and the employer cannot "cure" a breach with later conduct ((***Buckland v Bournemouth University Higher Education Corporation*** [2011] EWCA Civ 131, CA).

60. In ***Kaur v Leeds Teaching Hospitals NHS Trust*** [2018] EWCA Civ 978, the Court of Appeal listed five questions to be asked in order to determine whether an employee was constructively dismissed:

- What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, their resignation?
- Has the employee affirmed the contract since that act?
- If not, was that act (or omission) by itself a repudiatory breach of contract?
- If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence?
- Did the employee resign in response (or partly in response) to that breach?

61. This fundamental breach can be a breach of the mutual duty of trust and confidence, which is an implied term of all employment contracts. The test is whether the employer acted without reasonable or proper cause in a way that was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties (***Mahmud and Malik v BCCI*** [1997] ICR 606, HL).

62. A course of conduct by an employer which amounts to a breach can include a "last straw", which must contribute to the breach in some way but need not necessarily be a fundamental breach in itself. In addition, the employee must resign in response to the breach. The resignation needs to be at least in part due to the breach, but the breach does not need to be the significant or the only reason for resignation.

63. An employee cannot delay too long or they may be found to have waived the breach or affirmed the contract. An individual can explain a delay in resigning, but continued performance of the contract would generally indicate an affirmation. This is applied less strictly in employment cases compared to other cases, and the Tribunal should consider the facts carefully before deciding that the employee has affirmed the contract (***Buckland***, above). The fact that an employee is on sick leave is relevant to assessing the effect of delay (***Chindove v William Morrisons Supermarket plc*** UKEAT/0201/13, EAT).

64. ***Reasonable adjustments.*** The claims for disability discrimination are made under the Equality Act 2010 ("EA"). A claim for a failure to make reasonable adjustments is made under Section 23. The duty arises where a provision, criterion or practice ("PCP") applied by an employer places a disabled person at a substantial disadvantage in comparison with persons who are not disabled. "Substantial" for these purposes means "more than minor or trivial", as defined in Section 212.

65. Under Schedule 8 paragraph 20 EA, the respondent is not subject to a duty to make reasonable adjustments if it does not know and could not reasonably be expected to know that the claimant has a disability, and does not know and could not reasonably be expected to know that the claimant is likely to be placed at the relevant substantial disadvantage. The duty only arises if the respondent has or could reasonably be expected to have knowledge of both of these elements (***Secretary of State for the Department for Work and Pensions v Alam*** UKEAT/0242/09, EAT).

66. It may not be reasonable for an employer to make an adjustment until an employee is in a position to benefit from it, for example where there is no prognosis about a return to work date (***Home Office v Collins*** [2005] EWCA Civ 598, CA; and ***NCH Scotland v McHugh*** UKEATS/0010/06, EAT, which held the duty to accommodate a phased return to work was not "triggered" until the claimant indicated they wished to return to work).

67. In ***Cosgrove v Caesar and Howie*** [2001] IRLR 653, the EAT held that it was principally for the employer to explore the possibility of reasonable adjustments, not for the employee to suggest them. However, the EHRC Statutory Code of Practice says that it is good practice for the employer to ask the disabled employee about possible adjustments.

Conclusions

68. ***Constructive unfair dismissal.*** We make the following findings on each of the breaches alleged by the claimant.

69. ***The Practice has not ensured that the claimant's working environment was safe in that it failed to carry out any risk assessment in respect of the claimant's employment***. We find that the respondents did not carry out a risk assessment in respect of the claimant's employment. We accept the respondents' evidence that they did not believe a risk assessment was necessary after the claimant's first absence from work, as she had been away for a short period of time, she did not raise any welfare concerns on her return, and they were taking steps to address the workload issues she had raised. We do not find that the respondents had not ensured the working environment was safe, as we accept the respondent's position that they had taken other steps after the claimant's first absence. A risk assessment was appropriate after the claimant left work in June 2019, and this was recommended in the welfare report. The respondents started the process by asking the claimant to complete a risk assessment form. We note the claimant's position that this should have been done earlier, and that it was the employer's responsibility. However, we accept the respondents' evidence that they thought they were acting appropriately by asking for the claimant's input into the risk assessment process.

70. ***The Practice has not provided the support the claimant needed to perform her job, particularly following her absence since June 2019 with mental health problems in that it failed to propose a solution for the pressure the claimant felt under due to her workload***. The respondents did take steps to assist with the medical secretaries' workload and equipment from January 2019, including increasing the hours of the second medical secretary and retaining locum cover. We note that an improved dictation system did not arrive until after the claimant had left. From June 2019, the respondents were waiting for the welfare report, and then took steps to action its recommendations. This included being willing to discuss splitting the claimant's role. The respondents did not propose a final solution to the claimant, but were taking steps to discuss and agree a solution with her. Regrettably this was delayed - largely due to the delay in receipt of the welfare report, and then the need to obtain written consent to deal with Dr Coppell.

71. ***The Practice required the claimant to carry out her own risk***

assessment as a precondition of returning to work on anything other than normal hours. The claimant maintains that this was a precondition to her returning to work. It appears from the documents that this is partially correct, in that the respondents wanted to follow the welfare report recommendations and start with a risk assessment before meeting the claimant to discuss solutions. As explained by Dr Want in her email of 6 December this was not requiring the claimant to complete the entire assessment herself, but they wanted her input on the form before completing the assessment with her. Mr Emery did say in his email of 11 October that any return to work without GP information and the risk assessment would be on her current hours. This was in the context of her being welcome to come back due to the financial burden of being off sick. Mr Emery's email of 18 December then said they could meet without the assessment being done first, so any precondition was removed..

72. ***The Practice failed to adequately resource the medical secretary role or understand the changes to her workload resulting from changing national requirements.*** We do not find that this was the case. We accept the claimant's evidence that she had struggled with the workload herself. As already noted, the respondents did take steps to assist with the medical secretaries' workload and equipment from January 2019, including increasing the hours of the second medical secretary and retaining locum cover, and they obtained advice from Dr Townsend. We have accepted the claimant's evidence that the full move to ERS increased her workload, and it may be that the respondents did not fully understand the effect of this change.

73. ***Mr. Emery failed to create or put into place a return to work plan.*** It is correct that no final return to work plan was put in place. However, the respondents were taking steps to do so. They held the welfare meeting, obtained the welfare report, and attempted to action its recommendations. The failure to create a final plan was largely caused by the delay in obtaining the welfare report, which was due to the error made by their external consultant. The respondents bear some responsibility for this as it appears the report was not chased up by Mr Emery.

74. ***Mr. Emery failed to respond to emails from the claimant.*** We note the respondents' position that they say they have not been able to access all of Mr Emery's emails, so we make these findings based on the available evidence. The emails are as follows:

75.1 10 June 2019 – the claimant's initial email when she leaves work unwell. There is no emailed reply from Mr Emery, but he did try to call the claimant after she left work.

75.2 21 June 2019 – an update email from the claimant on her situation, which refers to HSE advice. There is no emailed reply from Mr Emery. We note from the claimant's email of 18 July that he appears to have called her at some point before then.

75.3 18 July 2019 – an email from the claimant thanking Mr Emery for a call and providing HSE information. There is no specific reply to this email, but the welfare meeting was then arranged.

75.4 31 July 2019 – the claimant sends her statement for the welfare meeting statement. There is no specific reply to this email, but the welfare meeting takes place the following week.

75.5 13 August 2019 – the claimant emails her proposals after meeting. There is no reply from Mr Emery.

75.6 16 September 2019 – an email from the claimant which refers to a call with Mr Emery about dictation, and says she is troubled about the delay with the welfare report. There is no reply to this email, but we note it appears they had a call beforehand.

75.7 23 September 2019 – an email from Dr Coppell. There is no reply direct to Dr Coppell, but the welfare report is provided on 11 October.

75.8 21 October 2019 – the claimant's emailed response to the welfare report. There is no immediate reply. Mr Emery is off sick later the next month, and Dr Want takes over the correspondence.

75.9 24 December 2019 – an email from Dr Coppell. There is no detailed reply, but the respondents start the process of obtaining consent to deal with him on the claimant's behalf.

75.10 12 January 2020 – an email from Dr Coppell, there is no reply but the respondents did not yet have the claimant's consent.

75.11 13 January 2020 – an email from Dr Coppell confirming that the claimant had posted written consent to the practice. There is no reply, although we note this also references a freedom of information request and there is other correspondence about that issue.

75.12 15 January 2020 – an email from Dr Coppell asking Mr Emery to let him know by return if the consent has not arrived. There is no reply to the consent question, but again this also references a freedom of information request and there is other correspondence about that issue.

75. ***There was a failure to adopt good practice by:***

76.1 ***Keeping in contact with the claimant while she was absent.*** This overlaps with the issues considered above about replies to emails. Some emails from the claimant and Dr Coppell were not answered. There were some calls between the claimant and Mr Emery during this period, as well as some emails from Mr Emery. These included invitations to training on new dictation equipment and to the Christmas party. The claimant feels that there should have been more contact from Mr Emery, and that it was inappropriate to send her invitations when she was so unwell. The respondents did stay in some contact with the claimant throughout this time, firstly through Mr Emery, and then through emails from Dr Want in late 2019. There were some gaps in contact, particularly while awaiting the welfare report.

76.2 ***Failing to refer the claimant to an occupational health physician.*** The claimant was never referred for an occupational health report. The consultant dealing with the welfare meeting did not feel this was appropriate without medical information from the claimant's GP first. We find that a referral may still have been possible, as often occupational health professionals will obtain medical information directly from an employee's GP if the individual consents. We accept Dr Want's evidence that they may have obtained a report after discussing the welfare report recommendations and a changed role with the claimant.

76. ***By the date of the claimant's resignation the Practice had not completed its investigation into her formal grievance of 4th February 2020 and had not followed ACAS guidance in that it took too long to resolve the grievance.*** This is correct – the grievance outcome was not provided by Dr Want until 15 June 2020, and the report itself was not provided to the respondents until 8 June. The Acas Code on Disciplinary and Grievance Procedures refers to "unreasonable" delay. We note that often a delay of 4 months in dealing with a grievance would be unreasonable. However, the respondents were operating under extremely difficult and exceptional circumstances at the start of the COVID-19 pandemic. We accept their evidence that this caused a genuine delay in their ability to provide information to the grievance investigator. The claimant says that 4 months was too long. In the exceptional circumstances of the awful times at the start of the pandemic, particularly for the NHS, we find that this delay was not unreasonable.

77. ***The Practice discriminated against the claimant on the grounds of her disability as set out below.*** For the reasons explained below, we find there was no disability discrimination.

78. ***Did the respondent behave in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent?*** The claimant's case is not that this was calculated or deliberate. She says that the effect of the behaviour was to breach trust and confidence. As set out in paragraphs 70 to 78, we have found that some of the events alleged to be breaches did occur wholly or in part as described by the claimant, while others did not.

79. Following the guidance in ***Kaur***, we have considered whether the delay in the grievance outcome, which caused or triggered the claimant's resignation, was by itself a repudiatory breach of contract. We find that it was not, as explained in paragraph 76 above, because in the exceptional circumstances of the pandemic this was not an unreasonable delay. We do not find that any of the events which occurred prior to this are individually sufficiently serious to amount to a breach of trust and confidence by the respondents. We have therefore gone on to consider whether there was a course of conduct which cumulatively amounted to a repudiatory breach of the implied term of trust and confidence.

80. In making this assessment we have considered the claimant's overall case - that there was a pattern of the respondents failing to deliver on promises, communicate with the claimant, or take any steps to help the claimant to return safely to work.

81. We have not found that the respondents failed to adequately resource the claimant's role before she went off sick in June 2019. We have therefore focused on the issue of delays and lack of communication after this date, where there were some mistakes by the respondent. The most significant issue is the delay in the welfare report. The respondents took an appropriate first step by arranging the welfare meeting, and by outsourcing this to an expert consultant. Regrettably, the mistake by this consultant in failing to send the report caused a considerable delay. Mr Emery and the respondents also made a mistake by not chasing this up. There were also some gaps in communication over this period and Mr Emery did not respond to all of the claimant's emails – although, as

analysed in paragraph 75, there was not an absence of communication to the extent alleged by the claimant. It may have been helpful to refer the claimant for an occupational health report without information from her GP first, although we note the claimant did not consent to release of GP information at the welfare meeting. This was followed by a disagreement about whether the claimant should complete a risk assessment form, and delays caused by the need to obtain written consent from the claimant for the Practice to deal with Dr Coppell. It is unclear what happened with the original consent form. Mr Emery could have been more proactive at chasing this up, although we note there was other correspondence about freedom of information issues at this time. The ultimate issue, that a return to work plan was never reached with the claimant, was caused by this combination of delays and the fact a follow-up meeting after receipt of the welfare report never happened.

82. We have considered this matter carefully. Looked at overall, we do not find that there was a breach of the implied term of trust and confidence by the respondents. Some mistakes were made. We also accept that the claimant was genuinely upset and unwell, and that she felt she had lost trust in the respondent by the point when Dr Want was asking for her input for a risk assessment and attempting to arrange a meeting with her. We do not doubt that the claimant was very unwell by the end of 2019. However, our task is to assess the respondent's conduct objectively. We do not agree with the claimant that the respondent acted wrongly by asking for input for a risk assessment, attempting to arrange a further meeting to discuss adjustments to her role, seeking consent to deal with Dr Coppell, and delaying a response to the investigation due to the pandemic. We find that the earlier mistakes, delays and gaps in communication were unfortunate, and could have been handled better by Mr Emery. However, not all errors made by an employer will amount to a repudiatory breach of contract. Assessed objectively, the errors in this case do not reach the threshold of a breach of the duty of trust and confidence by the respondents.

83. As we have found there was no breach of trust and confidence, we do not need to consider the remaining issues. The claimant was not constructively dismissed by the respondents. The claim for unfair dismissal does not succeed.

84. ***Disability*** – ***Reasonable Adjustments***. We have considered the relevant issues in turn.

85. ***Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?*** The claimant says they should have been aware when she first went off sick in December 2018. The respondents concede that they were aware the claimant had a disability following the welfare meeting in August. A respondent does not need to know that an employee meets the legal definition of disability, but does need to be aware (or ought to be aware) that there is a sufficiently serious health issue. We accept that the respondents did not believe the claimant had a serious mental health issue in December 2018. We also do not find they could reasonably have been expected to know that the claimant had a disability at this point – she was only signed off for 2 weeks with anxiety and stress, they were not aware of any pre-existing illness, and she did not raise further health issues with the respondents after her return to work. We find that the respondents did know, and could reasonably have been expected to know, that the claimant had a

disability at the time of the welfare meeting, when the claimant provided them with detailed information about her health. The welfare meeting was on 7 August 2019.

86. ***Did the respondent have the following PCPs: That she carry out her normal work activities, in particular: fulfilling the constant, multiple, complex, and competing workloads and deadlines arising from the claimant's dual Medical Secretary/general secretary role***. We agree that this PCP was applied to the claimant. She was required to carry out a medical secretary role which had two aspects to it – medical secretary work, and administrative/general secretary work. This did involve multiple workloads and various deadlines, including the 24-hour deadline for cancer referrals.

87. ***Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that because of her depression and anxiety she could not cope with these things?*** We find that it did. We accept the claimant's position that her depression and anxiety meant she could not cope with the job as it was, it caused her stress and she became unwell. This did put her at a disadvantage compared to someone without her disability, because we have heard evidence that other medical secretaries who did not suffer from anxiety and depression have been able to cope with the workload.

88. ***Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?*** We find that the respondents did know that the claimant was likely to be placed at this disadvantage at the time of the welfare meeting. The claimant made it clear in her written statement for the meeting, and at the meeting itself. She explained the problems she had experienced with her workload and the fact she felt unable to cope with her current job.

89. ***What steps (the 'adjustments') could have been taken to avoid the disadvantage? The claimant suggests:***

86.1 Paying the claimant in full whilst off sick. Full payment would generally not be regarded as a reasonable adjustment. In this case, full payment would not have avoided the disadvantage to the claimant. It would not have affected her ability to cope with the demands of her job, or helped her to return to work.

86.2 Allowing the claimant to work shorter, adjusted, flexible hours of work. This is an adjustment that would potentially have helped the claimant to cope with her role.

86.3 Offering the claimant a phased return to work. This is an adjustment that would potentially have helped the claimant to cope with her role.

86.4 Reducing distractions and interruptions in the working environment. The claimant says this would have helped her to cope with her role, although it was not raised with the respondents.

86.5 Moving the claimant's desk to a place where she would not be interrupted by colleagues. The claimant says this would have helped her to cope with her role, although it was not raised with the respondents.

86.6 Reallocating some of the claimant's duties and splitting Med Sec and General Sec duties. This is an adjustment that would potentially have helped the claimant to cope with her role.

86.7 Putting in place regular supervision issues. The claimant says this would have helped her to cope with her role, although it was not raised with the respondents.

90. ***Was it reasonable for the respondent to have to take those steps and when?*** Some of these adjustments would have been reasonable steps for the respondent to take if the claimant returned to work. It appears that adjusted hours and a phased return would have been both reasonable and possible. Reducing interruptions and moving the claimant's desk may also have been possible, although we note these were not raised with the respondents. Dr Want confirmed in evidence that regular supervision sounded sensible and reasonable, and they had accommodated phased returns before for other staff. The respondents had some reservations about splitting the claimant's role and reallocating duties, as they were concerned that this may create one more pressurised role, but they were still willing to consider this option.

91. The key issue is when the respondent should have taken these steps. We have found that they were not aware of the claimant's disability, and the disadvantage that this caused, until the welfare meeting in August 2019. We have also found that they were not reasonably expected to know these things before then. This means that any duty to make reasonable adjustments was not triggered until then. The claimant was signed off sick by this point, and there was no indication of when she would be fit to return. The claimant's case is that the respondent should have gone ahead and made these adjustments during her absence. We do not agree.

92. In relation to reducing distractions and interruptions, moving the claimant's desk, and introducing regular supervision, these issues had not been raised by the claimant as possible adjustments. It is not always necessary for an employee to suggest adjustments – the employer has a responsibility to consider and implement appropriate adjustments. However, in this case, the duty to make these adjustments could not arise if the respondents simply did not know that they would assist the claimant. They were aware that the claimant could not cope with her workload. This is why they were considering adjusting her role and hours of work. However, they were not aware that these were specific other things which might help her.

93. The adjustments to the claimant's role, hours and a phased return to work were all things the respondents were aware may assist the claimant to cope with her role, as they had been raised by the claimant. However, we do not find that the point had been reached where these steps actually needed to be taken by the respondent. The claimant was off sick with no date for her return. The respondents were following the advice from the welfare meeting, and wanted to discuss options with the claimant before any actual adjustments were made to the role. The emails to the claimant of 6 and 18 December made it clear that the respondents were considering reduced hours and a revised role. Dr Want's evidence is that they needed to negotiate and agree the working arrangements and hours with the claimant, and it was not their place to simply make the arrangements without her input. The claimant had not told them which role she

would prefer. She felt it would not be right to create a new role without discussing it with the claimant, especially if she was anxious and unwell. She quoted a health and social care mantra, "no decision about me without me". We also note that Dr Want's email of 6 December had already said they should be able to accommodate a return on reduced hours.

94. Again, it is unfortunate that the delays in the process – particularly with the welfare report – meant that the respondents had not got to the point of finalising these adjustments with the claimant any earlier. The confusion about the risk assessment form delayed matters further - although the respondents did say later that they could meet without the form being completed, and we note the claimant said she would not be able to meet before the new year anyway. Having considered this carefully, we accept the respondents' position that they could not actually take these steps without the claimant's input. The respondents had not ruled out any of the adjustments requested by the claimant, and were in fact actively considering them. But, they were not in a position to finalise and implement the adjustments. We do not find that it would have been reasonable for the respondents to actually take the steps of making these adjustments before the claimant resigned on 8 June 2020.

95. As we have found it was not reasonable for the respondent to have taken these steps before the claimant resigned, we do not need to consider the remaining issues. The claim for disability discrimination does not succeed.

96. Overall, it is clear that the claimant was unwell and was genuinely upset by what she perceived to be unfair treatment by the respondents. She provided us with truthful evidence about what happened and how she felt about it. However, our role is to apply the law to the facts we have found. Having done so, the claims do not succeed.

97. The remedy hearing provisionally listed for 11 October 2022 will no longer go ahead. We note that the claimant had intended to make a costs application. If she still wishes to do so after receiving this decision, she can make a written application.

Employment Judge Oliver
Date: 15 April 2022 (amended 27 October 2022)

Amended Judgment and Reasons sent to the Parties: 28 October 2022

FOR THE TRIBUNAL OFFICE