EMPLOYMENT TRIBUNALS

Claimant: Miss K Sepczynska

Respondent: The Rowan Organisation

RECORD OF A PRELIMINARY HEARING

Heard at: Birmingham **On:** 2, 3 & 4 November 2022

Before: Employment Judge J Jones
Mr P Wilkinson
Mr A Moosa

Appearances
For the claimant: In person
For the respondent: Mr R Lassey (counsel)

JUDGMENT

1. The claim of victimisation is dismissed upon withdrawal by the claimant.
2. The claim of disability-related discrimination fails and is dismissed.
3. The claim of failure to make reasonable adjustments is well founded.

REASONS[1]

The claims and issues

1. By a claim form presented on 7 May 2020, following a period of early conciliation between 13 and 27 February 2020, the claimant brought claims of discrimination arising from disability, failure to make reasonable adjustments and victimisation. The claims followed the claimant's dismissal by the respondent on 24 January 2020 after 5 months' employment, having put in place a performance improvement plan (PIP).

[1] Issued pursuant to a request from the respondent on 18 November 2022, in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013

2. The claims were the subject of a preliminary hearing for case management purposes on 30 October 2020 when the issues were discussed, agreed and set out in the Tribunal's Order following that hearing. After the preliminary hearing, the respondent conceded that the claimant was a disabled person within the meaning of section 6 Equality Act 2010 ("EqA") because of anxiety and depression, at all material times. The respondent did not admit that it had knowledge of the claimant's disability, however.

3. The remaining issues that the Tribunal had to decide were as follows.

Discrimination arising from disability

1.1 Did the respondent treat the claimant unfavourably by:

1.1.1 Implementing a performance improvement plan?

1.2 Did the following things arise in consequence of the claimant's disability:

1.2.1 the claimant's inability to concentrate?
1.2.2 the claimant taking longer to complete work tasks?

1.3 Was the unfavourable treatment because of any of those things?

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

1.5 The Tribunal will decide in particular:

1.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

1.5.2 could something less discriminatory have been done instead;

1.5.3 how should the needs of the claimant and the respondent be balanced?

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

Reasonable Adjustments

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

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

1.8.1 the implementation of performance standards through a performance improvement plan[2].

[2] This PCP was conceded by the respondent on the first day of the hearing

1.9 Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that she was less able to perform to the respondent's standards?

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

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

1.11.1 doing a risk assessment to see how the claimant could be helped to do the job
1.11.2 reducing the claimant's workload
1.11.3 giving the claimant more time to improve.

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

1.13 Did the respondent fail to take those steps?

Victimisation (Equality Act 2010 section 27)

1.14 Did the claimant do a protected act as follows:

1.14.1 sending the respondent a "without prejudice" letter on 24 January 2020?

1.15 By dismissing her, did the respondent subject the claimant to detriment?

1.16 If so, was it because the claimant did a protected act?

1.17 Was it because the respondent believed the claimant had done, or might do, a protected act?

4. At the outset of the hearing, the claimant explained that she did not wish to waive legal privilege in the "without prejudice" letter of 24 January 2020 which she relied upon as a protected act and the foundation of her victimisation claim. She did not want the Tribunal to see the letter and it had not been included in the file of documents for use at the hearing. The respondent admitted that the letter was privileged and that it was the claimant's right to withhold it from evidence if she chose to do so. It did not seek to persuade the Tribunal to review the letter nor did it argue that the claimant had waived privilege in the letter during the proceedings to date.

5. The claimant initially suggested that she might wish to substitute another protected act in relation to her victimisation claim. The Tribunal explained that this would require an application to amend to be made and determined. In the event, the claimant was unable to identify another protected act that pre-dated the dismissal. The claimant advised the Tribunal that she wished to withdraw her

victimisation claim, and to consent to its dismissal upon withdrawal. The Tribunal was careful to ensure that the claimant understood the implications of withdrawing this claim and was assured by her unequivocally that she did. The Tribunal noted that the claimant had received legal advice in connection with the claim and that she had been given the opportunity to telephone her solicitor before making a decision about this matter.

6. The Tribunal proceeded therefore to determine the disability-related discrimination and reasonable adjustments claims only.

The evidence

7. The parties submitted a joint file of documents which was 199 pages in length. References to pages in these Reasons are references to the pages of that file, unless otherwise stated.

8. The claimant gave evidence in support of her claim. The respondent called two witnesses – Deborah Houghton, Chief Executive and Karen Smith, deputy Chief Executive.

The facts

9. Based on this evidence, the Tribunal made the following findings of fact.

    9.1 The respondent is a charity supporting independently-living older and disabled people to pay their care staff, acting essentially as a payroll provider for them. In some cases, the respondent also holds funds on behalf of its clients and makes salary payments from those funds as requested. These were referred to by the respondent as “managed accounts”. The respondent had approximately 46 employees at the time of the claimant’s employment, managing payroll for approximately 2,500 clients.

    9.2 The claimant was employed as a Payroll and Managed Accounts Administrator, commencing on 28 August 2019. Her role involved processing salary payments on behalf of the respondent’s clients, dealing with the production of payslips, reporting to HMRC and all associated administration and record-keeping. She also assisted with managed accounts.

    9.3 The terms of the claimant’s employment were set out in a contract of employment signed by her on 29 August 2019 (p78). These terms included a six month probationary period during which time the claimant’s employment could be terminated by the giving of one week’s notice, or with pay in lieu.

    9.4 After the claimant was offered employment she was requested to complete a medical questionnaire, which she did, signing it on 5 September 2019 (p86). The form included the question “Are you suffering from or have you ever suffered from: [list of conditions]…….. Any psychological problems? (e.g. nervous breakdown/depression), to

which the claimant responded by ticking the “no” box. Further, the form asked whether the claimant had “any kind of chronic health condition or disablement” and whether she believed that such a condition might bring her with the provisions of the Disability Discrimination Act 1995. The claimant again answered “no” to both questions.

9.5 In signing the form the claimant was required to certify that she had answered all the information to the best of her ability and knowledge and that she was “able to answer no to all of [the questions]”. She was further required to certify that she had no reason to believe that her health would interfere with her ability to do the job or to give good attendance. Finally, by signing the form, the claimant acknowledged that withholding information or giving incorrect information knowingly might lead to disciplinary action or dismissal.

9.6 The claimant had a history of anxiety and depression which dated back to 2013 (p53). She was treated intermittently by her GP for that condition in the years that followed and was prescribed anti-depressants, which she took when her symptoms flared up. These symptoms included low mood, lack of interest in doing things, struggling to leave the house and socialise and difficulty concentrating (p67). The last time she consulted her GP about this condition prior to taking up employment with the respondent was July 2019.

9.7 The claimant gave the following reasons for concealing her history of depression and anxiety when she filled out the medical questionnaire. She said that she was well when she started work for the respondent, that she thought she would not be able to continue in the role if she disclosed it, that it was private and confidential information and that she did not believe that her work for the respondent would be impacted in any way by her history.

9.8 The claimant commenced work and there was no evidence before the Tribunal to suggest that her employment proceeded other than smoothly for the first 3 months. She was line managed and trained by Jo Clarke who reported into Margaret Lees. Jeanette Ball was a further manager in the office, at Margaret Lees’ level of seniority. The Tribunal heard that many of the management team worked part-time and so the claimant (who worked full-time) would deal with different managers when her own line manager Jo was not in the office.

9.9 On 4 December 2019 the claimant sent an email to Margaret Lees with the subject line “help with work” (p90). In the email the claimant asked for some help with her workload because she said she had about 200 accounts to deal with, the majority of which were managed accounts. She said she was working as quickly as possible but quality could be affected and referenced her inexperience and the fact that she was still in training. At the end of the email, the claimant said that she wanted to let Margaret know that she had “personal problem” as she had separated from her partner and that “maybe that affected [her] work”.

9.10 Margaret Lees responded the same day explaining the basis on which the accounts were allocated and indicating that, based on her hours of work, the claimant should have a total caseload of 172 but in fact had only 161 accounts.

9.11 On 15 January 2020 the claimant was due to have a monthly supervision meeting. All staff were intended to have these meetings with a manager to discuss their performance, workload and well-being on a monthly basis. The claimant asked Margaret Lees if her meeting could be postponed until the following week because she still had personal problem(s) having completely separated from her partner and that her dog had died (p94). Margaret Lees replied saying that the meeting needed to go ahead (p95).

9.12 The supervision meeting on 15 January 2020 was conducted by the claimant's line manager, Jo Clarke. Ms Clarke raised a number of concerns about performance with the claimant and tabled a draft Performance Improvement Plan (PIP). Ms Clarke made manuscript notes on the draft PIP during the meeting, as the claimant responded to various points. These comments ranged from the claimant saying that she needed training, that she was not aware that certain tasks (such as incoming post) were required to be dealt with daily, that the issue had already been corrected, or that the she did not agree that a given mistake had been made (p110-1). In addition, Jo Clarke recorded that the claimant said in the meeting that she had "some personal problems and needed some flexibility with more time to improve" because of "low mood". The draft PIP was for a two week period until 29 January 2020, with a review scheduled to take place on 30 January 2020.

9.13 The manuscript notes were typed up onto the PIP and sent to the claimant the same day to sign (p96). The claimant added her own comments in manuscript on this version, noting that she disputed her line manager's rating of her as set out in the PIP. The claimant signed and returned the PIP to Jo Clarke and Margaret Lees under cover of an email (p105). In the email the claimant stated "What was not noted was that in regards to my health I said that I have personal problem and low mood, that I need flexibility. What I want to add is less stress and maybe counselling… I would like to request more time for improvement due to low mood because of personal problems".

9.14 On 16 January 2020 the claimant went home from work feeling unwell due to "stress at work and personal problem" (p114). The following day she emailed the respondent stating that she was still not well, feeling depressed and needed to see a doctor"(p114). Later on 17 January 2020, having seen her GP, the claimant sent a fit note to the respondent which said she was unfit for work until 21 January 2020 due to "Depression NOS"(p115-6).

9.15 The claimant returned to work on 22 January 2020. Following a discussion with Margaret Lees, the latter confirmed to the claimant that her PIP would take effect that day and be reviewed by Jo Clarke on 5

February 2020 in view of the claimant's intervening sickness absence. Ms Lees added that the claimant's request to change her line manager could not be accommodated (p119).

9.16 At 9.10 on Friday 24 January 2020, the claimant sent a further GP fit note to Debbie Houghton, Chief Executive of the respondent, and Tracey Gray (administrator) (p120). This fit note stated that the claimant had been assessed on 22 January 2020 and was suffering from a "Depressive disorder". The claimant was said to be fit for work but with "altered/reduced hours" and "amended duties", until 5 February 2020 (p121). The claimant could not recall whether she had been given the fit note at her GP appointment on 22 January 2020, whether that appointment had been face to face or over the telephone, or whether she was required to attend the GP surgery to collect the fit note at a later date.

9.17 Ms Houghton replied asking the claimant if she was at work or off sick, to which the claimant replied that she was at work but that the sick note was for "amended duties" (122-3).

9.18 Mr Houghton's further response (at 9.16 on 24 January 2020) read as follows (p127):

"Hi Kat,

This is a recommendation by your GP, however if we cannot accommodate amended duties then we will have to send you home. I am concerned that this is in light of the Personal Improvement Plan that we have put in place, however you will still need to meet the actions on the plan or your probationary period may not continue, I have asked Jeanette to meet with you to discuss this today."

9.19 At 10.16 that morning the claimant sent to the respondent a letter marked "without prejudice and subject to contract". As explained in the introduction to these reasons, the Tribunal did not see this letter and the respondent acknowledged both at the time, and before the Tribunal, that the letter was indeed legally privileged.

9.20 At 1.53pm that day Ms Houghton sent a letter to the claimant under cover of an email which stated:

"Please find attached my response to your Without Prejudice and Subject to Contract letter…."

However, the respondent provided the Tribunal with a copy of this letter (p137) and the claimant did not object to its inclusion in the file of documents. It was common ground that this was a letter of dismissal.

9.21 The letter set out the history of the claimant's performance improvement plan and denied that there had been any discrimination towards the claimant. Having referred to the claimant's submission of a fit note

requesting amended hours and duties that morning, and Ms Houghton's email response, it continued:

"Following receipt of that email and without meeting with Jeanette, you forwarded the Without Prejudice Letter. Although, your letter cannot be used in a tribunal proceeding, we reserve the right to use this documentation in any court of law.

In conclusion, I do not accept that we have discriminated against you due to your ill health and that we have tried to put in place a Personal Development Plan to assist you to fulfil your role to the agreed standards of the Organisation.

As you have stated in your letter that you no longer wish to work for the Organisation, I would suggest that your Probationary period comes to an end with immediate effect and that we serve you with 1 weeks' notice from Monday 27th January 2020. We do not expect you to work your notice period and you will be paid up to and including the 31st January 2020."

9.22 After sending this letter to the claimant, Ms Houghton advised Jeanette Ball that it was no longer necessary for her to arrange to meet with the claimant because she had been dismissed.

9.23 At 2.08pm the claimant replied to Ms Houghton in an email that was also before the Tribunal (p128). She objected to her dismissal at a time when she was still on a PIP with time to improve until 5 February 2020, and asked the respondent to engage with her trade union representative. In relation to her future intentions she said "I said I want to leave the business but not with immediate effect, that's not fair you are not taking my health into account and serving me notice knowing I have problem with my health".

9.24 At 2.45pm that day the claimant lodged a grievance (p140-2). In it she complained of disability discrimination and that the respondent had sought to rely on what she had said in without prejudice correspondence in order to dismiss her.

9.25 Ms Houghton replied by email to the claimant at 3.38pm (p149). She reiterated that the claimant's "probation has come to an end with immediate effect" and that "the letter of termination stands". The claimant was sent a medical consent form which she was requested to return by 28 January 2020, failing which the respondent would arrange a grievance meeting without medical evidence. Ms Houghton explained in her covering email that the grievance would be investigated once medical evidence had been obtained and whilst the claimant was no longer employed by the organisation. Ms Houghton told the Tribunal that, although the substance of any medical evidence and findings of a grievance investigation would not have altered the outcome of the claimant's employment, the respondent organisation was interested to see if there were any lessons to be learnt.

9.26 The claimant did not submit the signed medical consent form by 28 January 2020. She told the Tribunal that she had not opened the attachment to the email and seen the deadline for its return as she was preoccupied with her dismissal and was unwell. The respondent did not convene a grievance meeting. Mrs Smith explained to the claimant in a later email on 13 February 2020 (p181) that this was because the claimant was no longer an employee of the organisation. Mrs Smith told the Tribunal in evidence that the reason that the grievance investigation was not conducted was because the claimant had not returned the medical consent form on time.

9.27 At 4.30pm the claimant submitted an appeal against her dismissal (p156). The claimant did not return to work after 24 January 2020 and was paid until 31 January 2020.

9.28 The deputy Chief Executive, Mrs Karen Smith, was asked to hear the claimant's appeal against dismissal. By letter of 28 January 2020, she invited the claimant to a meeting on 4 February 2020 (later changed to 6 February 2020) which the claimant attended with her Trades Union representative, Mr Crook. It was common ground that the claimant offered up the signed medical consent form to Mrs Smith at this meeting. Mrs Smith requested that, for administrative convenience, the claimant should scan the form back to the office, which she later did on 10 February 2020 (p175).

9.29 The minutes of the appeal meeting were lengthy as it was tape-recorded (p167-174). The Tribunal accepted them as a broadly accurate version of the discussion at the meeting, whilst being mindful whilst considering particular words and expressions that English is not the claimant's first language. In the meeting, when asked by the claimant why she had not been allowed more time to improve, Mrs Smith stated that it was because the respondent had received her without prejudice letter. The claimant stated that the purpose of the letter was "not to leave her employment but to carry on". Mrs Smith referenced the contents of the letter including that the claimant had said she could "see no other option but to leave her employment". The claimant reiterated that the correspondence was without prejudice and should not have been relied upon to dismiss her. The claimant was also recorded as saying that she "wanted to continue in employment and negotiate a settlement so she could leave" which she conceded in evidence was contradictory and confusing – she could not recall what she had said precisely or meant to say at this point in the meeting.

9.30 Page 172 of the notes record a number of interactions between the claimant and Mr Crook in which it was apparent that the claimant felt that he was not acting in her interests. An example of this was "BC advised Kat that she cannot expect Rowan to ignore her letter just because it said without prejudice and she wants it to be private because that's what she wants". When discussing her desired outcome at the appeal

meeting, the claimant stated that she would be “happy to return to work but if it’s not possible, she wants to negotiate a settlement” (p172).

9.31 Mrs Smith spoke to Ms Houghton, Ms Lees and Ms Clarke after the appeal meeting but took no notes of those discussions. She wrote to the claimant dismissing her appeal on 13 February 2020 (p178).

The law

10. Having found the facts, the Tribunal went on to consider the relevant law. This is found in the EqA 2010 as follows:

15 Discrimination arising from disability
(1) A person (A) discriminates against a disabled person (B) if—

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

20 Duty to make adjustments
(1)Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2)The duty comprises the following three requirements.

(3)The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

….

21 Failure to comply with duty
(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

11. Equality Act 2010 Sch 8, Pt 3, para 20, states that an employer is not subject to a duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know, that an interested disabled person has a disability **and** *(our emphasis)* is likely to be placed at the substantial disadvantage referred to. The provision asking whether an employer could be 'reasonably expected to know' means that an employer may be under a duty to make enquiries to establish whether a person is suffering from a qualifying disability, or likely to be at a substantial disadvantage as a consequence.

12. In *Gallop v Newport City Council [2013] EWCA Civ 1358*, *[2014] IRLR 211* the Court of Appeal made it clear that the employer need only have actual or constructive knowledge of the facts that make the employee a disabled person. It is thus essential for a reasonable employer to consider whether an employee is disabled, and form their own judgment. In that case Newport City Council had relied on advice from Occupational Health that Mr Gallop was not 'covered' by the Equality Act 2010, and had then unquestioningly adopted that unreasoned opinion. Whilst ordinarily an employer will be able to rely on suitable expert advice, this cannot displace their own duty to consider whether their employee is disabled, and it is impermissible simply to rubber stamp a third party opinion.

13. EHRC Code of Practice on Employment ("the Equality Code") paragraph 6.19 states

> For disabled workers already in employment, an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.
>
> **Example:** A worker who deals with customers by phone at a call centre has depression which sometimes causes her to cry at work. She has difficulty dealing with customer enquiries when the symptoms of her depression are severe. It is likely to be reasonable for the employer to discuss with the worker whether her crying is connected to a disability and whether a reasonable adjustment could be made to her working arrangements.

14. In a section 15 case, lack of knowledge that a disability causes the "something arising" from the disability is not a potential defence – *City of York Council v Grosset [2018] EWCA 1105.*

15. It is a question of fact whether an employer could reasonably have been expected to have known of the claimant's disability according to the Employment Appeal Tribunal in *Jennings v Barts and The London NHS Trust*, *UKEAT/0056/12*.

16. Langstaff P in *Donelien v Liberata UK Ltd., UKEAT/0297/14 (16 December 2014, unreported*; affirmed by the Court of Appeal *[2018] EWCA Civ 129*, *[2018] IRLR 535*) warned that when considering whether a respondent to a claim 'could reasonably be expected to know' of a disability, it is best practice to use the statutory words rather than a shorthand such as 'constructive knowledge'. The

burden – given the way the statute is expressed – is on the employer to show it was unreasonable to have the required knowledge.

17. When assessing whether it would have been reasonable for an employer to have taken a particular step, the Tribunal must consider all the relevant circumstances. Section 6.28 of the Equality Code sets out a number of potentially relevant factors and the Tribunal consulted and considered this list, together with all the surrounding circumstances of the case.

18. The duty to make adjustments may require an employer to treat a disabled person more favourably to remove the disadvantage which is attributable to the disability - *Archibald v Fife Council*, [*2004] IRLR 651, HL*. The focus should be on the practical result of the measures that can be taken *Royal Bank of Scotland v Ashton, [2011] ICR 632, EAT*. When considering whether an adjustment is reasonable, it is sufficient for a Tribunal to find that there would be a prospect of the adjustment removing the disadvantage. There does not have to be a "good" or "real" prospect of that occurring - *Leeds Teaching Hospital NHS Trust v Foster [2011] EqLR 1075.*

Conclusions

19. Applying the law to the facts, the Tribunal reached the following conclusions on a unanimous basis.

Discrimination arising from disability

20. The Tribunal followed through the questions in the list of issues, considering first whether the respondent had treated the claimant unfavourably by the implementation of a performance improvement plan. The Tribunal was not satisfied that this did represent unfavourable treatment in the context of this case. The claimant was already subject to a probationary period during which her performance was under scrutiny. The performance improvement plan set out the tasks that the claimant was required to perform as part of her job role and clarified the respondent's expectations of her and when her performance against those objectives would be reviewed. This was not, in and of itself, unfavourable to her in the Tribunal's judgment and therefore this claim could not succeed as the claimant had put it forward.

21. For the sake of completeness, had the Tribunal decided otherwise on this issue, it would in any event have found that the implementation of a PIP was a proportionate means of achieving the legitimate aim of ensuring employee performance was satisfactory. The respondent demonstrated that it was key to its business model that work was carried out accurately and on time. It was proportionate to meet with the claimant informally during her probationary period and clarify its expectations of her performance, setting them out in writing and incorporating her own comments and feedback.

Failure to make reasonable adjustments

22. The first question here was that of knowledge. The respondent relied heavily during the hearing on its alleged lack of knowledge of the claimant's disability

and on the inaccuracy of her answers to the medical questionnaire she filled in at the beginning of her employment. Based on its findings of fact, however, the Tribunal concluded that the respondent knew or ought reasonably to have known of the claimant's disability of depression and anxiety by at least 15 January 2020 for the following reasons.

23. The claimant did not answer the medical questionnaire accurately when she commenced work. The Tribunal noted, however, that there were aspects of the requirements of that form that were not compatible with the respondent's legal duties under the EqA. It may well be that the form was out of date and in need of review and redrafting. The Tribunal noted, for example, that it referred to out of date legislation. However, requiring employees or prospective employees to certify that they do not have any of the medical conditions listed and that their attendance will not be affected by health issues on pain of discipline in the event of an inaccurate answer, may well give the impression that disabled employees will not be welcomed and their needs accommodated by way of reasonable adjustment or otherwise. It is certainly not wording that invites transparency in the Tribunal's judgment.

24. Secondly, the medical questionnaire only caught the position at a moment in time. A reasonable employer will bear in mind that a mental or physical impairment that has a more than minor or trivial impact on the employee's ability to carry out normal day to day activities can arise at any time. Such an impairment may be likely to affect an individual employee for 12 months into the future, ignoring the effects of medical treatment, and thus satisfy the test of disability even if it has only recently led to significant symptoms.

25. Thirdly, on 15 January 2020, the claimant gave the respondent the following information. She said she was suffering from "low mood" which the Tribunal accepted is a well-known symptom of depression. She said that it was linked to life events, once of which she had referred to in correspondence with the employer 6 weeks earlier on 4 December 2019. The claimant said that she wanted counselling for her symptoms and needed adjustments such as more time for the PIP, less stress and flexibility. This was sufficient to put a reasonable employer on enquiry (such as by a referral to Occupational Health) to establish whether or not there may have been a mental impairment at play which qualified as a disability and required the employer to consider its legal duties under the EqA.

26. Following the meeting, on 17 January 2020, the claimant told the respondent she was feeling depressed and needed to see her doctor following which she submitted a fit note stating that she was suffering from depression. By the morning of 24 January 2020, the claimant had submitted a further fit note stating that she had a "Depressive Disorder". In the Tribunal's view, this assertion by her GP was indicative of a condition that was not transitory but may have been of longstanding, sufficient at the very least to merit further enquiry. Further, the GP stated that the claimant was only fit to work with adjustments, thus highlighting the impact of the condition on her work.

27. The Tribunal considered separately whether the respondent also had knowledge that the (admitted) PCP of implementing performance standards through a PIP

put the claimant at a substantial disadvantage compared to someone who did not have depression and anxiety. The Tribunal concluded that it did have this knowledge, or ought reasonably to have done, again from 15 January 2020 but most certainly by 24 January 2020. On 15 January 2020, by asking for adjustments, the claimant put the respondent on notice that this was the case. A reasonable employer faced with an employee complaining of low mood would not only consider whether this might be a symptom of depression, anxiety or another mental impairment which could qualify as a disability but, in the Tribunal's judgment, would also consider whether working to a PIP with strict deadlines and an imminent review of compliance might place that person at a substantial disadvantage compared to an employee who was not suffering from a mental impairment, so as to need some adjustments.

28. The fact of the substantial disadvantage was also proved in the Tribunal's judgment. It was evidenced by the second GP fit note requesting adjustments to the claimant's work and by the medical evidence that the claimant submitted, and the respondent accepted, that the claimant's condition caused her, amongst other things, difficulty with concentration. Further, the Tribunal noted that there was no criticism of the claimant's work until approximately 3 months' into her employment which coincided with the onset of her personal problems with the break up of her longstanding relationship and the return of her symptom of low mood.

29. As the respondent accepted, the burden of proof was on it to show it was exempt from the duty to make reasonable adjustments by reason of lack of knowledge. The Tribunal concluded on the evidence that it had failed to discharge this evidential burden.

30. The Tribunal then considered what steps could have been taken to avoid the disadvantage, noting that it was not necessary for it to be satisfied that such adjustments would definitely have done so. The Tribunal considered each of the 3 adjustments put forward by the claimant – the carrying out of a risk assessment, the reduction in the claimant's workload and the provision of more time for her to complete the PIP would have been reasonable for the respondent to have taken on or about 15 January 2020. Certainly, by the morning of the 24 January 2020, on receipt of the GP Fit Note, the respondent could reasonably have considered, discussed and offered the claimant the adjustments identified in these proceedings. Indeed, the respondent did not advance an argument that those adjustments were not reasonable. What appears to the Tribunal to have happened was that Ms Houghton fell into error by viewing the contents of the claimant's Fit Note with scepticism, as her email in response to it demonstrated.

31. The receipt of without prejudice correspondence from the claimant subsequent to the duty to make reasonable adjustments arising, did not relieve the respondent in law of its duty. The claimant did not resign but was dismissed at a time when the respondent was under a legal duty to make reasonable adjustments and had, in the Tribunal's judgment, failed to comply with it. The Tribunal did not find that the claimant had decided to leave her employment regardless of any steps that the respondent might put in place to support her, but rather that her without prejudice letter was sent at a time when she believed that such steps were not going to be forthcoming.

32. In conclusion, the claim of disability-related discrimination fails and is dismissed and the claim of failure to make reasonable adjustments succeeds.

Employment Judge J Jones
15 December 2022