



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms R Riaz

**Respondent:** City of Bradford Metropolitan District Council

**Heard at:** Leeds On: 18, 19, 20 and 21 April 2023 (By CVP video link)

**Before:** Employment Judge Shepherd

**Members:** Ms Hiser

Mr Eales

**Appearances:**

**For the claimant:** In person

**For the respondent:** Mr Dunn, counsel

Judgment having been given on 21 April 2023 and the written judgment having been sent to the parties on 25 April 2023. Written reasons have been requested by the claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

1. The claimant represented herself and the respondent was represented by Mr Dunn.

2. The Tribunal heard evidence from:

Rahila Riaz, the claimant;  
Tahira Riaz, the claimant's sister;  
Tanya Ahmed, the claimant's daughter;  
Susan Kitson, Enablement Assistant.  
Angela Greenhough, Service Manager;  
Yusuf Alam, Apprentice Community Enablement Manager;  
Janet Lightowler, Assistant Manager in the Time Out Service.

The Tribunal also had sight of a written witness statement from Sadiqa Ahmed, the claimant's sister. This evidence is accorded less weight than evidence given in person which can be tested by questioning and the demeanour of the witness assessed.

3. The Tribunal had sight of a bundle of documents prepared by the respondent and a bundle of documents which had been provided by the claimant which had been copied

and scanned by the respondent. The claimant indicated that there were missing pages. At the start of the hearing the parties discussed the position and further documents were then provided together with a covert recording of a telephone conversation between the claimant and Yusaf Alam and the transcription of that telephone conversation. The recording and transcript appeared to be incomplete and seemed to start after the telephone conversation between the claimant and Yusaf Alam had commenced on 8 August 2022 and ended before it was completed. The Tribunal listened to the recording.

The Tribunal considered those documents to which it was referred by the parties.

4. The issues had been identified by Employment Judge O'Neill at a Preliminary Hearing on 13 December 2022 as follows:

### **“The Issues**

The issues the Tribunal will decide are set out below.

#### **1. Unfair dismissal**

1.1 Was the claimant dismissed?

1.1.1 Did the respondent do the following things:

1.1.1.1 Failed to make a reasonable adjustment under the Equality Act or generally to accommodate her disability

1.1.1.2 On Friday 9 June 2022, my manager Yousef Ali told me no decision had been made but he was not telling me the truth because on 10 June I received a letter dated 8 June with the decision. I felt I could not trust him and the Company and they were not listening to me.

1.1.1.3 In the ET3 which the Claimant received shortly after 29 July 2022 (after resignation letter but before her leaving date) Mr Ali denied having had a conversation with her about the comparative treatment of others which compounded her lack of trust and heightened her anxiety.

1.1.2 Did that breach the implied term of trust and confidence?  
The Tribunal will need to decide:

1.1.2.1 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

1.1.2.2 whether it had reasonable and proper cause for doing so.

- 1.1.3 Was the breach a fundamental one? 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.
- 1.1.4 Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.
- 1.1.5 Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.
- 1.2 If the claimant was dismissed, what was the reason or principal reason for dismissal - i.e. what was the reason for the breach of contract? The Respondent rely on the justification for the PCP below.
- 1.3 Was it a potentially fair reason?
- 1.4 Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?
- 1.5 Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

## 2. **Remedy for unfair dismissal**

- 2.1 Does the claimant wish to be reinstated to their previous employment?
- 2.2 Does the claimant wish to be re-engaged to comparable employment or other suitable employment?
- 2.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
- 2.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
- 2.5 What should the terms of the re-engagement order be?

- 2.6 If there is a compensatory award, how much should it be? The Tribunal will decide:
- 2.6.1 What financial losses has the dismissal caused the claimant?
  - 2.6.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
  - 2.6.3 If not, for what period of loss should the claimant be compensated?
  - 2.6.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
  - 2.6.5 If so, should the claimant's compensation be reduced? By how much?
  - 2.6.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
  - 2.6.7 Did the respondent or the claimant unreasonably fail to comply with it by [specify alleged breach]?
  - 2.6.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
  - 2.6.9 If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?
  - 2.6.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
  - 2.6.11 Does the statutory cap of fifty-two weeks' pay or £89493 apply?
- 2.7 What basic award is payable to the claimant, if any?
- 2.8 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

**3. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)**

- 3.1 Did the respondent accept that the claimant had a disability within the meaning of S6 Equality Act 2010 namely anxiety and depression ie a mental impairment as from on or about March 2022. What one
- 3.2 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:
- 3.2.1 To work the claimant's normal contractual shift pattern (after her phased return) without the temporary adjustment specified by the claimant and outlined above (a shift pattern of Saturday and Sunday in week 1 and Tuesday and Wednesday in week 2).

3.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that more than two days a week at that time was exhausting as the claimant's condition was causing her broken sleep patterns and she was unable to wake.

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

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

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

The Respondent says not because the limits she was imposing such as not driving and the restricted shifts were incompatible with the rotas and the needs of the clients on temporary care packages.

3.7 Did the respondent fail to take those steps?

#### 4. **Remedy for discrimination or victimisation**

4.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

4.2 What financial losses has the discrimination caused the claimant?

4.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

4.4 If not, for what period of loss should the claimant be compensated?

4.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

4.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

4.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

4.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

- 4.9 Did the respondent or the claimant unreasonably fail to comply with it by [specify breach]?
- 4.10 If so is it just and equitable to increase or decrease any award payable to the claimant?
- 4.11 By what proportion, up to 25%?
- 4.12 Should interest be awarded? How much?"

5. It was agreed at the commencement of this hearing that those were the issues to be determined by this Tribunal.

## **6. Background/ Findings of fact**

7. Having considered all the evidence, both oral and documentary, the Tribunal makes the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings the Tribunal made from which it drew its conclusions:

8. The claimant was employed by the respondent from 6 January 2009 as a Home Care Assistant. Her job title at the material time was that of Enablement Assistant. The role involves going to the homes of service users to assist them with personal care and their medication.

9. The claimant had a very significant amount of sickness absence. Approximately 20 months between 2020 and 2022.

10. In September 2021 Yusuf Alam became the claimant's manager.

11. On 24 March 2022 the Occupational Health Advisor provided a report to Yusef Alam in respect of the claimant.

It was stated:

"... Rahila has been off work since September 2021 with symptoms relating to her mental health. Rahila advises that following commencing on a mental health medication over summer last year she became acutely unwell with severe troublesome symptoms rendering her unable to work. Since September, Rahila described having had a very turbulent time in regards to her mental health, and that in December 2021 she was admitted for inpatient mental health assessment/treatments for 3 weeks. She was discharged with support of the intensive home treatment team and since has remained under the community mental health team (CMHT)...

In my opinion, Rahila is not fit to undertake the duties and responsibilities of her role at this time. However, if her recovery continues to be positive then I am hopeful she may be fit to return to work in some capacity towards the middle/end of April. To support Rahila's return to work I advised the following support/adjustments are considered.

Firstly, I recommend you implement another 4 week phased return, ideally this would be agreed at a local level and include a gradual increase in working hours and days over that period...

Furthermore, Rahila has asked to be considered for a reduction in her working hours to 4 hours each Saturday and Sunday, this is something you would need to explore with her. From an occupational health perspective, I believe this could be helpful for Rahila as she transitions back into work and support her ongoing recovery. Ideally this would be initially for 3 months, with a review as to whether this needs to be made permanent following that..."

12. On 26 March 2022 Yusuf Alam held a welfare to call with the claimant. It was agreed that she would take two weeks annual leave and return to work on 25 April 2022. The claimant returned to work on a four week phased return to work.

13. On 14 April 2022 the claimant sent an email to Yusef Alam. She stated:

"Request for reasonable adjustments at work.

As you are aware I am a disabled person and this causes me issues at work. I have been reviewed by Occupational Health who have recommended changes which needed to remove the issues caused by my disability. The adjustments they have recommended are: – reduction in working hours to 4 hours each Saturday and Sunday, initially for 3 months.

I have previously requested these adjustments are made but they have not been.

Under Equalities Act s20 you are obliged to make this adjustment for me. Failure to do so would be considered discrimination under the Act. Accordingly I request that you confirmed to me that you will put these adjustments in place as soon as possible. I reserve the right to bring proceedings in the Employment Tribunal should you fail to do so."

14. On 20 April 2022 Yusuf Alam sent an email to the claimant stating that he understood that this had been recommended but it was not something they could accommodate. The recommendations were not mandatory if they could not accommodate them based on service needs. He also stated that he would need to know why the claimant would not be able to work between Monday and Friday to see if any reasonable adjustments could be made to support the claimant.

15. On 22 April 2022 the claimant sent an email to Yusuf Alam stating that:

"At the moment working weekends would cause minimal stress than working between Monday to Friday."

16. On 9 May 2022 the claimant sent an email to Yusuf Alam stating that she would like to reduce her working days to 2 days a week after her phased return work ended.

17. On 27 May 2022 the claimant met with Yusuf Alam in order to discuss the claimant's flexible working request. The claimant stated that she wanted a decision in writing and did not want another meeting arranging.

18. On 8 June 2022 Yusuf Alam wrote to the claimant providing the decision in respect of her flexible working/reasonable adjustments request. The letter set out the claimant's request to work four hours a day, two days a week over a two-week pattern, Tuesdays and Wednesdays on one week and Saturday and Sunday on the other week. It was stated:

"Your request would mean that we have a gap on the Monday of week 1, and on Thursday and Friday of week 2. This would leave a gap in the rota which wouldn't be covered by the current staff in the role, as they would have their own workload. Offering overtime cannot guarantee shifts are covered. As a service this would have a detrimental effect on the ability to meet customers' needs.

There would be a detrimental impact on performance as current staff members are rostered to complete tasks within the time they have been given, where extra work is put on them this would affect their performance as they will not have enough time to complete calls.

Meeting customer demand would be compromised as we wouldn't be able to support our service users with their morning calls for the days you are not in, and will also have to change times on their calls. Some service users may require a specific call time due to medication, for example, and we wouldn't be able to accommodate this on the days you are off.

As a service we would always look to make adjustments or agree to flexible working requests on the basis we can accommodate them. As you have put forward to work for 2 days a week we would find it difficult as most of our packages cover between a 5 to 7-day period. On the odd chance that we take on a package for 2 days this wouldn't always fall on the same days and would be very rare. Therefore, there would be a gap in the rota and the extra calls would need covering."

19. On 13 June 2022 the claimant presented a claim to the Employment Tribunal. She brought a claim of Disability discrimination. She was later allowed to amend her claim to include a claim of constructive unfair dismissal.

20. On 27 June 2022 the claimant sent written resignation to Angela Greenhough, Service Manager. She stated:

"It greatly saddens me to send you this letter of resignation. Effective from the 8th August 2022, I will no longer be working for the Bradford Enablement Support Team.

Recently upon my return to work after a period of sickness, I requested flexible working (on a temporary basis only), so that I am able to stay in work and keep my job. My request was refused due to not being able to accommodate the changes as a service. At the moment working the current numbers of days would just increase the levels of stress and anxiety which could trigger panic attacks thus having a negative impact on my health.



There seems to be quite a few discrepancies to the way my sickness, my return to work and flexible working request have been dealt with.

I spoke with Yusef who had told me that a decision hadn't been made with regards to my flexible working and that he was still waiting to hear back from HR regarding this. I then receive a letter with the decision a day later showing the date two days prior to me speaking with him. During my sickness my sister Sadiqa emailed Bryony to update her on my sickness and explained how bad my mental health was. Bryony responded saying thank you for letting me know. Then Bryony called my other sister the day after asking her for an update, why would Bryony call my other sister for an update when she had already received it in writing.

My work gave me great satisfaction, and I never will forget the last 13 years of incredible friends and colleagues that I have gained. Apart from certain issues I have had with management over the past, I have enjoyed working for the Bradford Enablement Support Team.”

21. On 8 July 2022 Angela Greenhough wrote to the claimant in response to her resignation suggesting a meeting to discuss exploring whether there was anything further that could be done to support her.

22. A meeting was arranged and on 26 July 2022 a telephone conversation took place between Angela Greenhough and the claimant in which it was suggested that the claimant's hours could be reduced from a four hour shift to a three hour shift in the short term.

23. On 8 August 2022 the claimant rang Yusuf Alam. He said that there was a discussion about the possibility of the claimant working three hour shifts instead of four. Yusuf Alam said that he spoke to colleagues and tried to ring the claimant on numerous occasions without success.

24. On 18 August 2022 Yusuf Alam sent a letter to the claimant asking to call him and stating if she did not respond by 26 August 2022 her leaver's form would be completed.

25. On 26 August 2022 the claimant rang Yusuf Alam. The Tribunal listened to a recording of telephone conversation and had sight of the transcript. In that telephone conversation the claimant put it to Yusuf Alam that he had said that other employees had or would question why the claimant had been allowed the changed hours. Mr Alam denied that and replied to the effect that they would look at the claimant's case differently to that of other members of staff and also consider the business needs.

## **The Law**

### **Disability**

26. Section 6 of the Equality Act 2010 states:

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) The impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

Schedule 1 provides:

Long-term effects

- (1) The effect of an impairment is long-term if—
  - (a) It has lasted for at least 12 months,
  - (b) It is likely to last for at least 12 months, or
  - (c) It is likely to last for the rest of the life of the person affected.
- (2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.
- (3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

Section 212 provides that “substantial” means more than minor or trivial.

27. It is accepted by the respondent that the claimant was a disabled person at the material time by reason of her mental health.

### **Duty to Make Reasonable Adjustments**

28. Section 20 of the Equality Act 2010 states:

“(1) Where this Act imposes a duty to make reasonable adjustments of 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 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 take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature 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.

(5) The third requirement is a requirement, where the disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.”

29. Paragraph 20 (1) of Schedule 8 provides:

“ 20 (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;

(b) In any other case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.”

30. Under sections 20 and 21, discrimination by reason of a failure to comply with an obligation to make reasonable adjustments, the approach to be adopted by the Tribunal was as set out in **Environment Agency v Rowan [2008] ICR 218**, where it was indicated that an Employment Tribunal must identify the provision, criterion or practice (“PCP”) applied by or on behalf of the respondent and also the non-disabled comparator/s where appropriate, and must then go on to identify the nature and extent of the substantial disadvantage suffered by the claimant. Only then would it be in a position to know if any proposed adjustment would be reasonable.

31. Consulting an employee or arranging for an Occupational Health or other assessment of his or her needs is not in itself a reasonable adjustment because such steps do not remove any disadvantage: **Tarbuck v Sainsbury’s Supermarkets Ltd [2006] IRLR 664, EAT; Project Management Institute v Latif [2007] IRLR 579, EAT.**

### **Burden of Proof**

32. Section 136 of the Equality Act 2010 states:

“(1) This Section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But sub-Section (2) does not apply if (A) shows that (A) did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or Rule.

(5) This Section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to –

(a) An Employment Tribunal.”

33. Guidance has been given to Tribunals in a number of cases. In **Igen v Wong [2005 ] IRLR 258** and approved again in **Madarassy v Normura International plc [2007] EWCA 33**.
34. To summarise, the claimant must prove, on the balance of probabilities, facts from which a Tribunal could conclude, in the absence of an adequate explanation that the respondent had discriminated against her. If the claimant does this, then the respondent must prove that it did not commit the act. This is known as the shifting burden of proof. Once the claimant has established a prima facie case (which will require the Tribunal to hear evidence from the claimant and the respondent, to see what proper inferences may be drawn), the burden of proof shifts to the respondent to disprove the allegations. This will require consideration of the subjective reasons that caused the employer to act as he did. The respondent will have to show a non-discriminatory reason for the difference in treatment. In the case of **Madarassy** the Court of Appeal made it clear that the bare facts of a difference in status and a difference in treatment indicate only a possibility of discrimination: "They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".
35. In the case of **Strathclyde Regional Council v Zafar [1998] IRLR 36** the House of Lords held that mere unreasonable treatment by the employer "casts no light whatsoever" to the question of whether he has treated the employee "unfavourably".
36. In **Law Society and others v Bahl [2003] IRLR 640** the EAT agreed that mere unreasonableness is not enough. Elias J commented that  

"all unlawful discriminatory treatment is unreasonable, but not all unreasonable treatment is discriminatory, and it is not shown to be so merely because the victim is either a woman or of a minority race or colour ... Simply to say that the conduct was unreasonable tells nothing about the grounds for acting in that way ... The significance of the fact that the treatment is unreasonable is that a tribunal will more readily in practice reject the explanation given for it than it would if the treatment were reasonable."
37. A Tribunal must also take into consideration all potentially relevant non-discriminatory factors that might realistically explain the conduct of the alleged discriminator.
38. In **Project Management Institute v Latif (2007) IRLR 579** The EAT gave guidance as to how Tribunals should approach the burden of proof in failure to make reasonable adjustments claims. The burden of proof only shifts once the claimant has established not only that the duty to make reasonable adjustments has arisen, but also that there are facts from which it could reasonably be inferred, in the absence of an explanation, that it has been breached. It was noted that the respondent is in the best position to say whether any apparently reasonable amendment is in fact reasonable given its own particular circumstances. Therefore, the burden is reversed only once a potential reasonable adjustment has been identified. It will not be in every case that the

claimant would have to provide the detailed adjustment that would have to be made before the burden shifted, but “it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not”. The proposed adjustment might well not be identified until after the alleged failure to implement it, and in exceptional cases, not even until the Tribunal hearing.

39. In **Romec v Rudham (2007) All ER 206** the EAT held that if the adjustment sought would have had no prospect of removing the substantial disadvantage then it could not amount to a reasonable adjustment. However, if there was a real prospect of removing the disadvantage it may be reasonable. In **Cumbria Probation Board v Collingwood (2008) All ER 04** the EAT stated “it is not a requirement in a reasonable adjustment case that the claimant prove that the suggestion made will remove the substantial disadvantage” the finding of a failure to make a reasonable adjustment which effectively gave the claimant a chance of getting better through a return to work was upheld.
40. In **Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10/JOJ** the EAT held that 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.
41. In **Noor v Foreign and Commonwealth Office 2011 ICR 695** Richardson J stated “Although the purpose of a reasonable adjustment is to prevent a disabled person from being at a substantial disadvantage, it is certainly not the law that an adjustment will only be reasonable if it is completely effective”

### **Constructive dismissal**

42. Section 95(1)(c) of the Employment Rights Act defines constructive dismissal as arising when “the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate without notice by reason of the employer’s conduct”. The conduct must amount to a breach of an express or implied term of the contract of employment which is of sufficient gravity to entitle the employee to terminate the contract in response to the breach. In this case, the breach of contract relied upon by the claimant is a breach or breaches of the implied term of trust and confidence.

43. That is expanded upon in a well known passage from the judgment of the EAT in **Woods v WM Car Services (Peterborough) Limited [1981] IRLR page 347:-**

“It is clearly established that there is implied in the contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Any breach of this implied term is a fundamental breach amounting to a repudiation of the contract since it necessarily goes to the root of the contract. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract. The employment tribunal’s function is

to look at the employer's conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it".

44. Mr Dunn provided a skeleton argument and oral submissions on behalf of the respondent. The claimant provided oral submissions. These submissions are not set out in detail but both parties can be assured that the Tribunal has considered all the points made and any authorities referred to even where no specific reference is made to them.

## **Conclusions**

45. This is a case of determining whether it has been established that the claimant was placed at a substantial disadvantage by the PCP of requiring the claimant to work her normal contractual shift pattern.

46. It is accepted by the respondent that the claimant was a disabled person and that the respondent had knowledge of her disability at the material time.

47. Mr Dunn, on behalf of the respondent, submitted that the claimant's normal contractual shift pattern applied to her only and did not have actual or potential applicability to any other employees and, in those circumstances, it was not a PCP.

48. Also, the claimant was not required to work those shift patterns. There had been a change to the claimant's shift patterns in 2019 where it was agreed that her normal hours would be reduced.

49. The Tribunal is satisfied that there was a PCP that had potential general applicability. It was a requirement that the respondent's employees had to comply with their contractual shift patterns. Merely because there had been an adjustment to the claimant's individual shift patterns did not prevent it being a PCP. It was sufficient to be identifiable, precise and generally applicable. It does have the element of repetition and the claimant had to comply with it together with other employees in respect of their shift patterns.

50. There was a requirement for the claimant to work those shift patterns and the Tribunal has gone on to consider whether that placed the claimant at a substantial disadvantage.

51. There was no medical evidence that the claimant was placed at a substantial disadvantage by the PCP as a result of her disability.

52. There was no evidence as to why the claimant could not work on certain days or how her shift pattern placed her at a substantial disadvantage. She did indicate that working week days was difficult and there was minimal stress working weekends however, the proposed adjustment included working week days.

53. The report from the occupational health advisor dated 24 March 2022 states that the claimant had asked to be considered for a reduction in her working hours each Saturday and Sunday and this would be helpful as she transitioned back into work. Ideally it would be initially for three months. The claimant's request for flexible working and reasonable

adjustments was to work a two week pattern consisting of – week 1 – Tuesday and Wednesday 8 – 12 and week 2 – Saturday and Sunday 8 – 12.

54. The claimant had struggled during her gradual phased return to work during which she had not been able to attend some shifts and had taken a further period of annual leave.

55. There was no evidence to establish that the suggested adjustment would have ameliorated any disadvantage to the claimant or had the potential to remove or reduce any such disadvantage.

56. The respondent did consider other potential adjustments for the claimant. At the meeting to discuss her flexible working request the claimant indicated that she wanted to be provided with a written decision and no further meetings. This made it difficult to have further considerations or negotiations that could have led to agreement of different adjustments for the claimant's requests.

57. There were clear reasons why the proposed adjustment would have not been reasonable. It presented the respondent with practical difficulties. Yusuf Alam made enquiries of the resource planner and duty manager and established that it was not practicable to make the requested changes to the claimant's shift pattern even for three months. It would cause substantial problems with the rotas and for the respondent in providing the required services to meet the respondent's statutory obligations and needs of the service users.

58. The claimant presented a claim for disability discrimination to the Tribunal shortly after she had received the outcome of her request for flexible working and reasonable adjustments.

59. The Tribunal has considerable sympathy with the claimant. She had suffered from devastating mental illness which had led to very large amount of sustained absences. The claimant said that she loved her job and the Tribunal is of the view that further discussions may have helped the relationship to continue.

60. It was indicated that the respondent did not want to lose the claimant and there were attempts to arrange further discussions even after the claimant had resigned but they did not prove possible.

61. Mr Dunn submitted that it was crucial to note, that the phased return to work ended in mid-June 2022, and any duty could not have been triggered until then. However, by this point:

“i. C had already contacted ACAS for the purposes of bringing an ET claim, despite the phased RTW still being ongoing;

ii. C had already indicated that after the meeting on 27<sup>th</sup> May 2022, she did not wish for any further meetings with R. This is clear in the notes, and C's denial of this was unconvincing;

iii This limited R's opportunities to undertake further discussions. AG (Angela Greenhough) was clear in evidence that compromise on another adjustment might have been reached. For example, C rejected other

alternatives, such as indoor residential work. However, C had contacted ACAS and issued a claim before her phased RTW had even ended. C also declined to even appeal the flexible working outcome, or issue a grievance.”

62. The Tribunal is satisfied that the requested adjustment would create significant practical difficulties for the respondent and its ability to provide the required services for its service users.

63. It was not established that there was a failure to make reasonable adjustments.

64. With regard to the claim of constructive unfair dismissal, the Tribunal is not satisfied that the claimant resigned in response to a repudiatory breach of contract by the respondent. The claimant claims that there was a breach of implied term of mutual trust and confidence.

65. The breaches alleged were failure to make reasonable adjustments. The Tribunal has found that it was not established that there had been a failure to make reasonable adjustments.

66. The claimant also alleged that Yusuf Alam had lied and she could no longer trust him and the respondent as they were not listening to her.

67. It was clear from the evidence before the Tribunal that that Mr Alam had not been shown to have lied to the claimant and this was agreed by the claimant when she was cross-examined.

68. The transcript and covert recording of the discussion between the claimant and Yusuf Alam did not establish any inconsistency or that he had lied to the claimant.

69. The Tribunal is not satisfied that claimant resigned in response to repudiatory of contract by the respondent. In those circumstances there was no constructive dismissal.

70. In all the circumstances, the Tribunal finds that the claims are not well-founded and are dismissed in their entirety.

**Employment Judge Shepherd**

**Date: 15 May 2023**