THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH by CVP**

BEFORE: **Employment Judge Truscott KC**
Mrs S Dengate
Ms N O'Hare

BETWEEN:

Ms A Gillespie **Claimant**

AND

Guy's and St Thomas' NHS Foundation Trust

Respondent

ON: 23 and 24 March 2023, in chambers 5 and 6 April 2023

Appearances:

For the Claimant: **Mr M Jackson of Counsel**

For the Respondent: **Ms Y Genn of Counsel**

JUDGMENT

The majority judgment of the Tribunal is:

The claim of failure to make reasonable adjustments contrary to section 20 of the Equality Act is well founded.

REASONS

PRELIMINARY

1. The Tribunal convened to address the issues set out in the note of the case management discussion on 15 November 2022. Only the Issues relating to reasonable

adjustments are dealt with in this judgment. The remaining Issues are dealt with separately.

2. Parties were agreed that no additional evidence was to be led.

FINDINGS of FACT

3. There are no additional findings of fact.

SUBMISSIONS

4. The Tribunal heard oral submissions from both parties and received written submissions from each. These are not repeated here.

LAW
Reasonable adjustments

5. The duty to make reasonable adjustments is found in section 20 of the Equality Act 2010 which provides:

> (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.

6. The PCP being complained of must be one which the alleged discriminator 'applies or would apply equally' to persons who do not have the protected characteristic in question. As Baroness Hale stated in **Rutherford v. Secretary of State for Trade and Industry** [2006] ICR 785 HL

> , "It is of the nature of such apparently neutral criteria or rules that they apply to everyone, both the advantaged and disadvantaged groups."

7. Lord Rodger said in **Archibald v. Fife Council** 2004 ICR 954 HL (SC) at para 42:

> "…Here, Mrs Archibald never swept a road after she became unfit.
> What actually happens if an employee becomes so disabled that she cannot perform the essential functions of her job is that, under her contract of employment, she is liable to be dismissed. That is the substantial disadvantage she suffers. The contractual term, whether express or implied, which provides for her dismissal in these circumstances constitutes the relevant "arrangement" for the purposes of section 6(1). That arrangement places the disabled person at a substantial disadvantage by comparison with persons who are not disabled, because she is liable to be dismissed on the ground of disability whereas they are not."

8. The guidance given in **Environment Agency v. Rowan** [2008] ICR 218 EAT is to be applied, namely, that in order to make a finding of failure to make reasonable adjustments there must be identification of:

(a) the provision, criteria or practice applied by or on behalf of an employer; or
(b) …;

(c) the identity of non-disabled comparators (where appropriate); and
(d) the nature and extent of the substantial disadvantage suffered by the claimant.

9. In **Royal Bank of Scotland v. Ashton** [2011] ICR 632 EAT, the Employment Appeal Tribunal held that in relation to the disadvantage, the tribunal has to be satisfied that there is a PCP that places the disabled person not simply at some disadvantage viewed generally, but at a disadvantage that was substantial viewed in comparison with persons who were not disabled; that focus was on the practical result of the measures that could be taken and not on the process of reasoning leading to the making or failure to make a reasonable adjustment. This case was considered by the Court of Appeal in **Griffiths v. Secretary of State for Work and Pensions** [2017] ICR 160 CA on the comparison issue. Elias LJ held that it is wrong to hold that the section 20 duty is not engaged because a policy is applied equally to everyone. The duty arises once there is evidence that the arrangements placed the disabled person at a disadvantage because of her disability.

10. The Employment Appeal Tribunal in the present case said at paragraph 11:

> "There are two main ways in which such cases have been analysed in terms of the appropriate PCP. Firstly, a PCP of being fit to undertake the duties of the job may be identified: Archibald v Fife Council [2004] ICR 954. Secondly, a PCP may be identified that results from the application of an ill health management process: Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265, [2017] ICR 160, in which Elias LJ described the PCP as "the employee must maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions". I do not accept that these are just two different ways of asserting the same PCP – they are different PCPs - although they may often both be applied in the case of an employee whose disability prevents them from fulfilling the duties of their role and may, as a result, then be absent from work. I considered the two PCPs in Yorke v Glaxosmithkline Services Unlimited EA-2019-000962-BA. The PCPs might conveniently be referred to as the Archibald and Griffiths PCPs."

11. In **Yorke**, the Employment Appeal Tribunal, set out guidance from **Archibald** at paras 39-41 which is not repeated here. At para 38, it also set out what was said in **Carreras v. United First Partners Research** UKEAT/0266/15/RN as follows:

> [30] As noted by Laing J, when putting this matter through to a Full Hearing, the ET essentially dismissed the disability discrimination claim because it found that an expectation or assumption that the Claimant should work late was not the pleaded PCP.
>
> [31] The identification of the PCP was an important aspect of the ET's task; the
> starting point for its determination of a claim of disability discrimination by way of a failure to make reasonable adjustments (see Environment Agency v Rowan [2008] IRLR 20 EAT, para 27). In approaching the statutory definition in this regard, the protective nature of the legislation means a liberal rather than an overly technical or narrow approach is to be adopted (Langstaff J, para 18 of Harvey); that is consistent with the Code, which states (para 6.10) that the phrase "provision, criterion or practice" is to be widely construed.
>
> [32] It is important to be clear, however, as to how the PCP is to be described

in any particular case (and I note the observations of Lewison LJ and Underhill LJ on this issue in Paulley). And there has to be a causative link between the PCP and the disadvantage; it is this that will inform the determination of what adjustments a Respondent was obliged to make.

12. The EAT in **Yorke** continued at para 42:

"Thus, using the language of the EqA 2010, it is clear that the requirement to undertake the duties of a job can be a PCP that can put a disabled person at a substantial disadvantage because they become incapable of performing them and so are at risk of dismissal, and that a reasonable adjustment can be moving the disabled person into an alternative role. The application of an employer's policies that place a disabled person at a significantly increased risk of dismissal in such circumstance can also be a PCP, the application of which places the disabled person at a substantial disadvantage, and may require an adjustment of moving the disabled person into another role. Similarly, if the inability of the disabled person to undertake the duties of her role results in her being absent from work, and she is dismissed as a result of the absences, but this could reasonably have been avoided by transfer into an alternative role, the dismissal is likely to be because of something arising in consequence of disability (the absence) that is not capable of justification (because a reasonable adjustment could have avoided it).

13. With reasonable adjustments, there must be a prospect that the adjustment(s) will work (**Leeds Teaching Hospital NHS Trust v. Foster** EAT/0552/10). In **South Staffordshire and Shropshire Healthcare NHS Trust v. Billingsley** EAT/0341/15 Mitting J said:

[17] Thus, the current state of the law, which seems to me to accord with the statutory language, is that it is not necessary for an employee to show that the reasonable adjustment which she proposes would be effective to avoid the disadvantage to which she was subjected. It is sufficient to raise the issue for there to be a chance that it would avoid that disadvantage or unfavourable treatment. If she does so it does not necessarily follow that the adjustment which she proposes is to be treated as reasonable under s 15(1) of the *2010 Act*. [We understood this to be a reference to section 20].

[18] It is in the end a question of judgment and evaluation for the Tribunal, taking in to account a range of factors, including but not limited to the chance. A simple example may suffice to illustrate the point. If a measure proposed by an employee as a reasonable adjustment stands a very small chance of avoiding the unfavourable treatment arising out of her disability to which she would otherwise be subjected, but it was beyond the financial capacity of her employers to provide it so a Tribunal would be entitled to conclude that it was not a reasonable adjustment. Indeed, on those facts it would be difficult to justify a conclusion that it was a reasonable adjustment. In the case of a large organisation by contrast, where a proposed adjustment would readily be implemented without imposing an unreasonable administrative or financial burden on the employer then the obligation to take it may arise notwithstanding that the chance of avoiding unfavourable treatment was very far from a certainty.

14. In **NHS Scotland v. McHugh** EATS 0010/06, the Employment Appeal Tribunal sought to identify the time at which a disabled claimant was in a position to contend that he or she had been placed at a relevant disadvantage in the context of seeking a phased return to work following a substantial period of absence caused by the disability in question. It stated that the duty is not 'triggered' — to use the EAT's own word — unless and until the claimant indicated an intention or wish to return to work. His Honour Judge McMullen observed:

> 'We agree that a managed programme of rehabilitation depends on all the circumstances of the case, but it does include a return-to-work date. And certainly, if additional management and supervision is to be required, they must be arranged in advance and not in a vacuum. Similarly, if additional costs were to be incurred by (not this case) the purchase of new equipment to counteract the effect of the environment on the disabled person, there would be no need to spend that money in advance of a clear indication that the claimant was returning. In our judgment, applying the trigger approach… it was not reasonable for the respondent to pursue the possibilities which the tribunal noted until there was some sign on the horizon that the claimant would be returning.'

15. The reasoning in **NCH Scotland** was adopted by an employment tribunal in **Brown v. Commissioners for HM Revenue and Customs and ors** ET Case No.2510511/09, where the claimant had been absent from work for a period of three years until the termination of his employment. His absence was initially due to a physical impairment but was later extended because the claimant had developed a psychological illness. During this period the claimant's sick pay was reduced to half pay under the terms of the employer's sickness policy. In April 2009 the claimant asserted that he might be able to return to work, provided a number of major adjustments were made, and discussions between him and the employer took place regarding these. However, in August 2009 a medical report intimated that the claimant was unlikely to be able to return to his most recent job and set out a projected timeframe for his recovery of up to five years, and possibly longer. In consequence, the employer terminated the claimant's employment on capability grounds. Regarding the claim for breach of the duty to make reasonable adjustments, the tribunal pointed out that, apart from the claimant's bald statement that he might be able to return to work, there was no supportive medical evidence that he was realistically in a position to do so. On this basis, the statutory duty was not triggered. Furthermore, the employer had not waived its right to argue that the duty had not been triggered when it entered into discussions about the possibility of the claimant returning to work and about the adjustments that would be necessary to accommodate this.

16. In **Doran v. Department for Work and Pensions** EAT 0017/14, the Employment Appeal Tribunal noted that the decision in **NHS Scotland** was *obiter* so far as the trigger point for the duty to make reasonable adjustments was concerned. However, Lady Stacey nonetheless approved the observations of HHJ McMullen. In **Doran**, the claimant had gone off sick in January 2010 and was subsequently dismissed by reason of capability in May 2010 on the basis that the employer could no longer support her absence. An employment tribunal found that the employer's policy of requiring consistent attendance at work was a PCP that placed the claimant at a substantial disadvantage in comparison with a non-disabled person. The tribunal accepted the employer's evidence that it would usually consider dismissal when an employee's absence extended beyond six months. With regard to reasonable

adjustments, the claimant had raised the possibility of a return on part-time hours early on in her period of sickness absence and the employer had indicated that it would be willing to accommodate a phased return. However, at the time the employer decided to dismiss, the claimant continued to be signed off as unfit for work and had given no indication of a date when she might be fit to return to work, subject to adjustments. In these circumstances the EAT upheld the tribunal's decision that the duty to make reasonable adjustments had not been triggered. It also considered that the tribunal had been entitled to find that 'the ball was in [the claimant's] court to discuss' a possible return to work.

> On the facts found by the ET in this case, there is in my opinion no foundation for the argument that the respondent benefited by its own neglect of duty when it failed to arrange the case conference in accordance with its own procedures. Such an argument would be dependent on there having been acceptable evidence that the claiamnt or the GP would, more likely than not, have given the information to the respondent which would indicate that she was fit to return to work under reasonable adjustments. There is no evidence to that effect."

DISCUSSION and DECISION

17. The PCP relied on in this case is one based on **Archibald**, this is not the same as one based on **Griffiths**. The Tribunal sought to apply the PCP proposed by the claimant but, because of the facts of the case, found itself discussing other formulations of the PCP of the **Griffiths** type and then reminded itself that this was not what was relied on by the claimant.

18. The claimant wanted to be redeployed (although the Tribunal found she did not return the forms) and the respondent ignored the issue on 9 November 2018 [575] when Mr Kasanga wrote to the claimant inviting her to a formal sickness absence meeting to consider the termination of her employment. No reference to redeployment was made and the majority find that this omission was the date of the failure to make the reasonable adjustment. There was a complete failure on the part of the respondent to address the initial stage of the policy when the claimant raised the issue of redeployment on 14th November 2018 [638 640 643]. There was no job under consideration and no date for her to return, although the latter may have been dependant on the former.

19. The majority of the Tribunal considered that the respondent applied a PCP of being fit to undertake the duties of her job. At the point the claimant was enquiring about redeployment, the respondent should have applied the redeployment policy. This would have been standard for any employee in comparable circumstances but the respondent failed in this respect. The application of this PCP placed the claimant at a substantial disadvantage because she was unable to carry out her normal duties because of her disability and unless redeployed she might have been dismissed. It would have been a reasonable adjustment to apply the redeployment policy. The majority of the Tribunal addressed the PCP contended for by the claimant and found that it was applied to the claimant to her comparative disadvantage and would have been ameliorated by an application of the redeployment policy.

20. At 2a, on the list of issues, it is said "The Claimant asserts that the Respondent ought to have commenced the redeployment process and offered alternative roles *as well as, or instead of*, starting a final stage capability process."

21. The majority did not agree with the component of the assertion that included "and offered alternative roles" as whether there were any such roles was not known at the time of the failure to apply the policy. This is addressed in the remedy judgment. The majority found itself in disagreement with the use of the words "as well as, or instead of" and considered "before" was more apposite to the facts. The majority found the failure to apply the redeployment policy to be a failure to make a reasonable adjustment which constitutes a contravention of section 20 of the Equality Act without the added words "and offered alternative roles".

22. The employment judge took a different view. The PCP contended for would apply throughout the claimant's employment. This would encompass the period after she became disabled when she was unable to work but received income. At the very least, at this stage, the claimant relied on the sickness policy to retain her in employment with an income. Thereafter her income ceased but she was retained in employment. This may have placed her at a substantial disadvantage if the prospect of dismissal becomes proximate.

23. The respondent's capability, sickness and redeployment policy was described in the earlier judgment and the Tribunal had concluded that the although the redeployment policy itself was not contractual, the respondent is obliged to address the issue at the appropriate time. The history of the application of the policy to the claimant (paraphrasing the findings in the earlier judgment) indicates a number of unimpressive actions or inaction on the respondent's part. The Tribunal also described the claimant as angry and confrontational [para 98] during the process. The result was substantial delay in the timescales envisaged by the procedure.

24. The identification of the **Archibald** PCP seemed unhelpful because it is in such general terms whereas there should have been a focus on the complaint by the claimant which was the failure to apply the redeployment policy. This is what she said in her ET1. For these purposes, the claimant is not complaining about the general application of the identified PCP by the employer or indeed any aspect of the sickness policy. The focussed complaint is identified by way of an assertion of a reasonable adjustment of seeking the application of the redeployment policy.

25. Whilst noting what was said in **NCH Scotland** and **Doran**, the employment judge sought to identify when the application of the sickness policy might bring the claimant closer to disadvantage. Another way of looking at it is to identify the causative link referred to in paragraph 32 of **Carreras** between the PCP and the disadvantage. This was the point at which the respondent ignored the issue on 9 November 2018 as set out in para 18 above.

26. What caused the dismissal was that failure of the respondent to apply the initial stage of the redeployment policy. The application of the policy would have meant a process of redeployment might have been successful and to her advantage or unsuccessful which would have been to her disadvantage. There was no job under

consideration and no date for her to return, although the latter may have been dependent on the former.

27. At the point of relevance, the application of the sickness policy did not place the claimant at a disadvantage, the failure to apply a component of it did and that caused the claimant to resign. As the Employment Appeal Tribunal said at para 42 of **Yorke**:

> Similarly, if the inability of the disabled person to undertake the duties of her role results in her being absent from work, and she is dismissed as a result of the absences, but this could reasonably have been avoided by transfer into an alternative role, the dismissal is likely to be because of something arising in consequence of disability (the absence) that is not capable of justification (because a reasonable adjustment could have avoided it).

28. The employment judge considered that a correct identification of the PCP could not have been of the **Griffiths** variety any more than of the **Archibald** variety because what was sought was not an adjustment to the policy, it was the application of the policy. Whilst the PCP should be given a broad definition, the employment judge considered the adjustment could not be the same as the PCP. The employment judge considered that the dismissal was because of a failure to apply an applicable policy and likely to be contrary to section 15 of the Equality Act. This was not the claim set out in the Issues.

29. The reasonable adjustment claim is upheld by a majority. Remedy issues will be dealt with separately.

Employment Judge Truscott KC

Date 17 April 2023