**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 8000008/2023**

**Final Hearing held**
**In Edinburgh on 30, 31 October and**
**1, 2, 3 November 2023 and**
**deliberations 10 November 2023**

**Employment Judge A Jones**
**Tribunal Member A Matheson**
**Tribunal Member N Elliot**

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| **Ms A Dickson** | **Claimant**<br>**In person** |
| **Department for Work and Pensions** | **Respondent**<br>**Represented by:**<br>**Ms S Monan, solicitor** |

**JUDGMENT**

**1.** It is the unanimous judgment of the Tribunal that:

a. The respondent failed in its duty to make reasonable adjustment in terms of section 20 Equality Act 2010 by failing to facilitate the claimant's return to work in September 2020 by offering her part time of job share opportunities, but that the Tribunal does not have jurisdiction to determine the matter as the claim was not lodged within the statutory period and it is not just and equitable to extend that jurisdiction.

b. The respondent did not at any other time fail in a duty to make reasonable adjustments in relation to the claimant.

c. The respondent did not victimise the claimant in terms of section 27 Equality Act 2010.

2. The claimant's claims therefore fall to be dismissed.

## REASONS

### INTRODUCTION

1. The claimant was employed by the respondent in a Senior Executive Officer Grade following her transfer from City of Edinburgh Council in 2014 having had continuous service since 1989. Her employment was terminated on 14 September 2020 and her claim form was lodged on 4 January 2023, a Certificate having been issued by ACAS on 7 December and the claimant having initiated early conciliation on 27 October 2022.

2. There have been a number of preliminary hearings in this case and amendments have been made to the claimant's original claim. It was determined that the issue of jurisdiction of the Tribunal in term of time bar was interlinked with the facts of the case and therefore would be addressed at the final hearing. The respondent conceded that the claimant was a disabled person for the purposes of section Equality Act 2010 ('EA') at all material times.

3. At the final hearing, the claimant gave evidence on her own account and called Mr West her Trade Union representative. The respondent led evidence from Ms Bruce who had been the claimant's line manager, Ms Campbell who had made the decision to dismiss the claimant, Ms Savage who had dealt with the claimant's appeal against dismissal and Ms Squires who had been involved in an application for the review of the decision-making process in relation to the claimant's dismissal through the Employment Support Group. A joint bundle of documents was produced and both parties made submissions at the conclusion of the evidence.

**Findings in fact**

4. Having considered the evidence heard, the documents to which reference was made and the submissions of the parties, the Tribunal made the following findings in fact.

5. The claimant's employment transferred from City of Edinburgh in a TUPE type transfer in 2014. She was employed latterly at a Senior Executive Officer grade on the Civil Service grading system. She worked in the area of Counter Fraud and Compliance and was employed on a full-time basis.

6. The claimant found the working environment post transfer very stressful. She was seconded for a time in 2018 to work in policy. That secondment was due to come to an end in March 2019. Although the claimant was based in Edinburgh, she had previously worked from Alloa.

7. The claimant was absent on grounds of sickness from 22 February 2019 and did not ever return to work. At the time of her absence, her line manager was a Ms Martin.

8. The claimant was referred to Occupational Health and a telephone consultation was conducted on 12 March 2019. The report which was produced indicated that the claimant suffered from dysthymia and stated "it is too early in the recuperation process to accurately assess what job roles Aileen would be capable of undertaking moving forward. However, it would appear that a role with less travel/commute would be beneficial". A further review was recommended in four weeks.

9. The claimant asked her line manager whether it would be an option to go part time on 21 March. Ms Martin indicated she would speak to HR about this.

10. A further occupational health assessment took place on 8 April. The report indicated "I would recommend that management arrange a meeting with Aileen at their earliest convenience to discuss the options for her return to work, in regards to her role and hours and to address and resolve any perceived work-related concerns." The report also indicated that the

claimant had a long-term mental health condition and that reoccurrences were likely in the future.

11. Ms Martin contacted the claimant by phone on 23 April. The claimant said she "was still wanting to know if Andrew has made a decision on the role that you will be returning to. Until you know that it is difficult to prepare her return."

12. Ms Martin contacted the claimant again on 2 May and indicated that Andrew "still had not made a decision on what roles were available to Aileen, he was going to speak with Gemma and get back to me."

13. There was further contact on 24 May when the claimant is recorded as saying that she didn't feel she could plan her return until a decision was made on what role she will be returning to. She also asked that Ms Martin explore what options were open in terms of ill health retirement or exit packages with compensation.

14. At a further contact on 30 May, the claimant asked again if a decision had been made on what roles were available to her, but Ms Martin said she was not able to answer and indicated she would organise a meeting with Andrew Dunbar and HR to discuss. The note of the discussion also indicated that Ms Martin was now aware that the claimant may be covered under the Equality Act "which would give her priority in terms of potential moves, although we did discuss how this may affect her LA terms and conditions."

15. At the next discussion on 7 June, the claimant was informed that the role she would be returning to would be her previous role. The claimant asked if this could be done on a part time basis. Ms Martin advised the claimant that this would have to be discussed with Ms Bruce once she became her line manager.

16. Ms Bruce took over line management of the claimant thereafter and had a call with her on 10 June 2019. The claimant was informed that the role available for her to return to was her previous role. The claimant asked if this could be done within 3 days. A further OH referral was arranged to ask

about the claimant's suitability for ill health retiral; for the SEO post being offered; whether the claimant was covered by the Equality Act and if the part time medical grounds return advice was the same.

17. The claimant was assessed by occupational health on 26 June. The report indicated that it was likely that the claimant was covered by the Equality Act. It also indicated that the claimant perceived that it may be too stressful to return to her previous role and would like part time hours and if that role was not available part time, then an alternate role could be considered. The opinion was that the claimant could return to work with adjustments.

18. Ms Bruce then wrote to the claimant on 28 June asking to meet with her. The letter indicated that "My aim is to help you meet the attendance standard expected of you and I will continue to give you help and support to enable you to achieve this. However I must remind you that your employment with the Department could be affected if your sickness absence can no longer be supported."

19. A meeting took place on 15 July 2019 and the claimant was accompanied by her trade union representative at the meeting. The claimant asked if she could return to her previous job on a part time basis. Ms Bruce indicated "The post is full time but we would have to look at how we could accommodate a request for part time such as job share from within CFCD or wider DWP. There are limitations in CFCD at present as we don't have any part time SEOs available to job share. I attend Workforce Planning meetings and could raise this issue to see if anyone from another part of the business could job share." There was no discussion of the employer's duties in terms of the Equality Act.

20. Ms Bruce sent an email to colleagues asking if they could identify anyone who could job share with the claimant. At this time there was a recruitment freeze in the department and therefore any member of staff who was identified as suitable would not be replaced. Line managers at this time were for those reasons very reluctant to move any staff. Ms Bruce did not ask what colleagues would do to identify anyone suitable and did not seek

to find out what steps, if any, were taken. There was no advertisement of the role. None of the colleagues contacted reverted to Ms Bruce with any suggestions of anyone who might be able to job share. Ms Bruce did not follow this up with her colleagues.

21. A further meeting was arranged between the claimant and Ms Bruce on 20 August. The claimant was informed that no one had been identified to job share with her. The claimant asked if there could be an advertisement for the job share role, but Ms Bruce indicated that there was no recruitment at that time, although she would go away and check the position.

22. The claimant's Trade Union representative, Mr West raised the possibility of job carving for the claimant. Ms Bruce was not aware of this concept and Mr West sent the policy document to her after the meeting.

23. A further occupational health referral took place on 25 September. The advice was that there were no specific workplace adjustments considered likely to affect an early return to work in any capacity at that stage.

24. A further attendance management meeting took place on 8 October. The claimant said she could visualise herself coming back to work now although could not give a specific date. She asked again if she could return part time and if the job could be done on a job share basis. Ms Bruce indicated that there were no matches for job share. There had been no efforts made by Ms Bruce since the email she had sent colleagues to identify a job share partner for the claimant. There was also discussion regarding job carving at this meeting. It was said that this was not suitable as the claimant could do all the duties but would be too tired to do so. There was no discussion as to how the job could be divided by for instance region or area.

25. An attendance management meeting took place on 19 November. The claimant's fit note expired on 1 January 2020 at this time. The claimant asked what would happen if she could return to work part time but there were no vacancies. The note of the meeting records that "Jane advised that if she is fit to return but doesn't due to no part time post being available then the barrier to Aileen returning was not her health and they would need to

review this. She advised Aileen to register with Civil Service jobs to keep an eye on Civil Service jobs which may suit. Jane said that she will also continue to look out for any suitable opportunities and checks with the priority mover list also." The claimant indicated that if her job was not available part time she would apply for ill health retirement. Mr West asked what would happen if the claimant had a fit note with a date of return and Ms Bruce indicated that reasonable adjustments would be tailored to Aileen's needs where possible as discussed previously. No specifics were provided.

26. The claimant was reviewed again by Occupational Health on 6 December at which it was suggested that ill health retirement should be considered. The report also indicted that if the business wanted any further reviews, any referral should be made after the claimant had completed the counselling sessions which were planned.

27. At an attendance management meeting on 8 January, the claimant explained that she had started counselling sessions which had been arranged. Ms Bruce advised that there was still no recruitment but that 'vacancies will be available through natural wastage'. There was also discussion regarding the referral of the claimant for ill health retirement which had happened on 27 December.

28. On 12 February at an attendance management meeting the claimant asked whether there was still a recruitment freeze and no vacancies and Ms Bruce confirmed that this was the case. Ms Bruce indicated that that they should wait the outcome of the IHR referral and take matters from there.

29. By letter dated 25 February, the claimant was informed that her application for IHR had been refused. In the refusal letter, the doctor indicated that the claimant was likely to satisfy the definition of disability contained in the Equality Act and that there was no indication that the claimant's psychiatrist foresaw long term absence from work at this point.

30. On 30 April Ms Bruce sent Ms Campbell papers to consider whether the claimant should be dismissed. The respondent's attendance management

policy stated at paragraph 62 that "Dismissal is lawful when it is a reasonable outcome arrived at through a fair process. It must be a last resort because the consequences of any dismissal on an employee and their family are potentially very significant. Dismissal may be considered if the individual circumstances justify it and;" The policy then goes on to set out eight conditions which includes at paragraph 62(e) "Up to date Occupational Health advice has been received (-this must be within the last three months)." Ms Bruce did not obtain any up-to-date Occupational Health advice before referring consideration of dismissal to Ms Campbell. This was a breach of the respondent's procedures.

31. A meeting took place between Ms Campbell and the claimant who was accompanied by her trade union representative on 23 July. At that meeting the claimant indicated that she had started to feel that there was an improvement in her condition and that since her IT kit had been set up she could access work email and the DWP intranet which had helped. The claimant indicated that she felt that in a couple of months she might be able to return to work 2-3 days a week. The notes also recorded that she said that this decision was based on the fact that there was so much more home working.

32. Ms Campbell sent an email to Ms Bruce later that day asking for an update on whether there were any suitable SEOs to job share with the claimant, any suitable vacancies at SEO grade on a part time basis, adding to a job share list in the region and job carving possibilities. The email recorded that the claimant would find it beneficial to have some time at home working and a shorter working week.

33. Ms Bruce respondent by email dated 6 August indicating she was 'not aware of any SEO suitable to job share in this post, there are currently no part time SEO vacancies within CFCD" and that she was not aware of any job share list within the region. She also indicated that job carving was not relevant. Ms Bruce had not taken any active steps to identify whether the claimant's role could be carried out part time, or whether an advertisement

could be placed for a job share partner or whether the claimant could have job shared with the person covering her role on a temporary basis.

34. On the 1 September a formal meeting to consider the claimant's dismissal took place. The claimant is recorded as stating at that meeting that she "felt disappointed that the DWP has not given her a goal to help with her return to work i.e. an offer of a part time roles. She felt in the current COVID 19 circumstances about working from home showed there was a different way of carrying out our business there could have been a better offer to help her return. The claimant went on to say that she felt she may be able to consider coming back to work 4 weeks after her sick note expired on 16 September. She thought she could work 16-18 hours a week over 3 days in a blend of working from home or office near to home and no more than a couple of visits to other offices a month. During the meeting Ms Campbell asked the claimant in passing if she thought that a further occupational health referral would be beneficial, and the claimant respond no. At no time did the claimant refuse to attend an occupational health referral and had the claimant been asked to do so she would have agreed.

35. The claimant was dismissed by letter dated 14 September 2020, which was then replaced by a further letter on 15 September as the previous letter had inaccurate information in relation to the claimant's notice entitlement. The claimant was dismissed because of unsatisfactory attendance. In the letter Ms Campbell indicated "I have explored at your request a return to your current role on a part time basis but the role is a senior leadership role and not suitable for an 18 hours week undertaking and there are not any available job share opportunities." Ms Campbell had not taken any steps to explore these matters and was relying on the information given to her by Ms Bruce who had not taken any active steps to explore job share other than an email earlier in the year. There was no reference in the letter to the respondent's duties under the Equality Act or whether they had taken any steps to make reasonable adjustments in the context of that Act.

36. The claimant was entitled to compensation under the Civil Service compensation scheme because of the nature of her dismissal. She was

initially informed by Ms Campbell that the compensation would be based on her entire public service. That information was incorrect and the claimant discovered that the compensation she would receive was substantially less than that initially envisaged. The respondent also gave the claimant incorrect information regarding the notice to which she was entitled.

37. During the claimant's absence another member of staff was temporarily promoted to carry out her role. This was intended to last for three months but lasted for nineteen months and had been filled on the basis of an expression of interest. That role had not been advertised.

38. The claimant appealed against the decision to dismiss her to the nominated officer who was Mr Brooks in an email of 29 September. She appealed on the basis that it was unreasonable not to grant job sharing for her role and that there was a failure to make a reasonable adjustment. She also raised that there had been an advert for a role which she believed herself suitable for and queried why she had not been considered for a priority move.

39. Mr Brooks contacted the claimant by phone to arrange a meeting and the claimant indicated she was undecided as to whether she wanted to continue with her appeal (as she was exploring whether she would be entitled to additional compensation) and that she should contact him if she did. There was no further contact between the claimant and Mr Brooks. The appeal therefore remained live as the claimant was not given any time limit which would have to be adhered to in pursuing her appeal.

40. The claimant and her trade union then spent time trying to determine whether the claimant could receive the higher level of compensation because of her dismissal.

41. The claimant considered bringing a Tribunal claim for unfair dismissal and disability discrimination. She had understood that her trade union would draft the form for her. The claimant was unwell after her dismissal. When she discovered that no claim had been raised and she was now out of time to raise a claim she proceeded with an appeal against her dismissal.

42. The claimant was thereafter informed by a Ms Rouse from HR that Ms Savage would deal with her appeal. The claimant's trade union representative set out her grounds of appeal in an email dated 11 February 2022.

43. An appeal hearing took place in Carlisle on 5 April 2022. Ms Savage was the decision maker. The claimant and her union representative had requested that the appeal be a rehearing because of the procedural irregularities of the original decision. The two main aspects of the claimant's appeal were that there was a lack of an up-to-date occupational health referral at the time of dismissal and the lack of the ability to offer a reasonable adjustment to her role to allow her to return to work.

44. The claimant contacted ACAS in April 2022 seeking to engage in early conciliation but was advised that the time limit had expired. She therefore did not lodge a Tribunal claim form at that time.

45. The claimant was advised by letter dated 27 July that her appeal had not been upheld. The letter stated "even if an OHS had been conducted and supported a return to work there was no a suitable role available." The letter also stated "the DM (dismissing manager) fully investigated the LM attempts to secure an alternative role." In reality Ms Campbell had not taken any independent steps to investigate what efforts had been made to find a suitable role for the claimant.

46. Paragraph 90 of the Attendance Management Procedures states "In individual cases where the Department Trades Union Side has serious concerns that either the process followed or the decision is fundamentally flawed, they may put the issue to the Employee Policy team for advice on how the case could be remedied".

47. The claimant's Trade Union referred the claimant's case on the basis of paragraph 90 to the Employee Policy Team in an email of 10 October 2022. The view of the Policy team was expressed in an email of 11 October, and their view was that dismissal was procedurally unsound because an up-to-date occupational health report was not obtained. In addition, it was said

that the initial thoughts were that the dismissing manager should first have dealt with the request for part time working as a reasonable adjustment prior to dismissal. The Policy Team pointed out that were only able to give their opinion and advice regarding referrals to them and then refer that on to the business for a decision. The Policy Team could not take a decision on the matter.

48. Ms Peddie from the Policy team contacted Ms Rouse and Ms Squires who were involved in looking at the matter from the business's point of view by email dated 8 November indicating that it might be advisable to alert the business that a claim may be made to the Employment Tribunal.

49. Ms Squires and Ms Rouse proposed answers to the points raised by the Trade Union. They did not review the original paperwork prior to doing so and did not speak to Ms Bruce or Ms Campbell. Although there had been a clear breach of the respondent's attendance management policy by not obtaining an up to date OH report prior to considering the dismissal of the claimant, Ms Squires and Ms Rouse concluded there was no failing in process or procedures. It was not reasonable to adopt the position as appeared to be adopted that because the claimant said in response to a question as to whether she thought an OH report would be beneficial at the dismissal meeting that there was no breach of procedures. Ms Squires and Ms Rouse also indicated that reasonable adjustments had been discussed at the meeting, when that was not the case at all. The draft responses were put to Ms Savage who agreed with them all despite some of them being inaccurate.

50. The deputy director Gillian Brown made the decision that the claimant's case should not be reviewed. There was no evidence as to when that decision was made or on what basis.

51. The claimant commenced early conciliation on 22 November.

52. The respondent contacted the claimant's trade union by email of 23 November indicating that it would not take any further action in relation to the claimant's dismissal.

53. Since the lifting of lockdown restrictions, the respondent offers staff hybrid working where they can work from home and attend the office only on a part time basis.

**Issues to determine**

54. The claimant had originally claimed that she had been subjected to direct discrimination by the respondent because of her disability. At the time of submissions, she recognised that there had been no evidence led to support a claim of direct discrimination and she did not therefore insist on that claim. The issues for the Tribunal to determine were therefore:

    a. Was the respondent under a duty to make reasonable adjustments in respect of section 20 Equality Act 2010 by varying the claimant's role to allow her to work part-time or job-share with an element of home working prior to her dismissal on 14 September 2020;

    b. Was the respondent's failure to uphold the claimant's appeal against her dismissal on 27 July 2022 a failure to make a reasonable adjustment?

    c. Was the respondent's failure to reopen the claimant's case following the application to the Employment Support group communicated on 23 November 2022, a failure to make a reasonable adjustment?

    d. In so far as the respondent had failed to make a reasonable adjustment, did that form part of a continuing act and if so, what was the date of the last act (or omission)?

    e. Did the Tribunal have jurisdiction to consider the claimant's claim in terms of section 20 Equality Act 2010 either on the basis that there had been a continuing act in terms of section 123(3) Equality Act 2010, or that it was nonetheless just and equitable for the Tribunal to determine the claims?

    f. Did the respondent's failure to accept that the claimant's application to the Employment Support Group was made out and review matters

further amount to victimisation in terms of section 27 Equality Act 2010?

g. If the Tribunal found any of the claimant's claims to have been established, what remedy should it award?

**Observations on the evidence**

55. In reality there was very little dispute on the facts of this case. The Tribunal found the claimant to be generally credible and reliable in her evidence. She pointed out that she was still unwell and the Tribunal took this into account in assessing her evidence.

56. The respondent's witnesses were generally credible and reliable. However, the Tribunal found that all the witnesses' refusal to concede that the failure to obtain an occupational health report prior to referring the claimant for dismissal was not a breach of their policy not credible. It appeared to the Tribunal that the respondent's witnesses were unwilling to acknowledge this in case it impacted negatively on the respondent's position. The suggestion that asking an employee in passing when they are at a dismissal hearing whether an occupational health report would be beneficial meant that the procedure was not breached was simply not credible. The position adopted by the respondent's witnesses in this regard demonstrated to the Tribunal that they were unwilling to accept any responsibility in relation to any breach of procedure in case it reflected negatively on them. The procedure made clear that it was the responsibility of the manager who referred a member of staff for potential dismissal to ensure that an up-to-date report was obtained prior to referring them. That did not happen in this case and that was a material error which none of the subsequent managers involved in the claimant's case were willing to acknowledge or take action regarding.

57. The Tribunal found the evidence of Ms Squires difficult to follow. She appeared to have been required to give evidence on the issue of whether the claimant's case should be reconsidered without having been a decision maker in that regard. Moreover, she could not say why the decision had

been reached as there appeared to be no documentation in that regard. The Tribunal found this extremely concerning.

**Relevant law**

58. Section 20 Equality Act 2010 provides that:

> (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.

59. **Archibald v Fife Council 2004 ICR 954, HL** demonstrates that the duty to make reasonable adjustments is a positive one on the part of the employer, which can require an employer to treat a disabled employee more favourably than other employees.

60. A Tribunal is also obliged to take into account the EHRC Code of Practice when assessing the duty to make reasonable adjustments. The Code provides that what is a reasonable step for an employer to take will depend on all the circumstances of each individual case and that there is no onus on the disabled person to suggest what adjustments should be made. That said, the claimant is required to establish facts from which it would be inferred, absent a reasonable explanation that the duty has been breached. Once it is established that the duty is triggered and the nature of the adjustment has been identified in broad terms, it is for the employer to demonstrate that the disadvantage would not have been eliminated and/or that the adjustment was not a reasonable one to make.

61. There is however no duty on an employer to take steps which would impose a disproportionate burden on it. A holistic approach should be taken in assessing the reasonableness of an adjustment (see **Home Office (UK Visas and Immigration) v Kuranchie EAT 0202/16**).

62. Section 123 EA deals with the issue of time limits and provides that:

> (1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
> (b) such other period as the employment tribunal thinks just and equitable.
> …..
> (3) For the purposes of this section—
> (a) conduct extending over a period is to be treated as done at the end of the period;
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
> (a) when P does an act inconsistent with doing it, or
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

63. The question of when a time limit commences was considered by the Court of Appeal in **Kingston upon Hull city Council v Matuszowicz 2009 ICR 1170 CA.** In that case the Court of Appeal found that where an employer had made an inadvertent omission to make a reasonable adjustment, the time should be considered to run from the point at which the employer might reasonably have been expected to have done the thing omitted.

64. In **Humphries v Chevler Packaging Limited UKEAT/0224/06**, the EAT found that when there is a definitive refusal to make a reasonable adjustment, time will run from the refusal and not in those particular circumstances when the claimant resigned some weeks after the refusal had been intimated.

65. In terms of section 123(1)(b) an Employment Tribunal has discretion to extend the time limit for presenting a complaint where it considers it just and equitable to do so. In **Abertawe Bro Morgannwg University Local Health board v Morgan 2018 ICR 1194, CA** the Court of Appeal noted that a Tribunal will have the 'widest possible discretion' to extend a time limit where it deems it just and equitable to do so. Factors such as the length of and reason for the delay in addition to whether there is any prejudice to the respondent will be relevant for a Tribunal to consider when exercising its discretion. However, it should be noted that the exercise of discretion

should be the exception and not the rule (see **Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR, 434, CA**).

66. It may also be relevant for a Tribunal to take into account a claimant's disability in determining whether to exercise its discretion, which may be relevant in cases involved mental health issues. However, as Lord Justice Pill stated in **Department of Constitutional Affairs v Jones 2008 IRLR 128**, there is no general principle that person with mental health problems is entitled to delay as a matter of course in bringing a claim.

67. Section 27 EA provides that a person will have been victimised in circumstances where they are subjected to a detriment, either because they have done a protected act, or the employer believes that they have done or may do a protected act. A protected act would include the lodging of Tribunal proceedings complaining of discrimination.

68. In establishing whether victimisation has occurred, the initial burden is on the claimant to prove facts from which the tribunal could decide in the absence of any other explanation that the respondent has contravened a provision of the Act. The burden will then shift to the employer to provide that discrimination did not occur. If the employer fails to discharge that burden of proof, a tribunal is obliged to uphold the discrimination claim.

**Submissions**

69. The claimant made brief oral submissions. She accepted that she had not led any evidence that she had been directly discriminated against because of her disability. In terms of her victimisation claim she accepted that she had originally argued that it was the contact with ACAS that was the protected act upon which she was relying. She had believed that the fact that she had contacted ACAS on 22 November and that she had been told that no action would be taken in relation to the review of her case on 23 November meant that the reason no action was taken was because she indicated she was going to raise a claim. She now accepted that the information which had been provided demonstrated that those involved in making that decision would not have been aware of her contact with ACAS

at that time. However, she said that it was clear from the evidence which had been provided shortly before the hearing which she had not seen before, that the Employee Policy Group had advised the business that a claim was possible in an email on 11 October 2022 and then raised it again on 8 November 2022.

70. In terms of reasonable adjustments, the claimant's position was that there was an ongoing failure on the part of the respondent and that it was a continuing act. In the absence of that the Tribunal should exercise its discretion on the basis that it was just and equitable to consider the claim.

71. The respondent's position was that if the claimant wished to rely on different information in terms of her claim of victimisation, she would be required to amend her claim and any amendment application would be resisted.

72. In more general terms the respondent's position was that the claimant's claims were out of time and that she had not adduced sufficient evidence to demonstrate that it was just and equitable to extend the time limit.

73. It was also said that it would not have been reasonable to make the adjustment sought as it was not clear that this would result in the claimant coming back to work.

**Discussion and decision**

Was there a duty to make reasonable adjustments?

74. In the first instance, the Tribunal considered whether there was a duty on the respondent to make reasonable adjustments. The Tribunal had no difficulty in accepting that the respondent applied a provision, criterion or practice which placed the claimant at a substantial disadvantage. In particular, the respondent required the claimant to work full time from the office which would involve travel to other offices. The requirement to work full time amounted to a PCP, as did the requirement to work from the office, as did the requirement to travel. It seemed to the Tribunal therefore that there were three distinct PCPs at play in the circumstances.

75. The Tribunal also accepted that each of these PCPs placed the claimant at a substantial disadvantage due to her mental health condition. She was not able to work full time, and while she envisaged that she would be able to work part time in the future, she would find being required to spend all her working hours in the office and travel to other offices tiring which would impact upon her condition and ability to attend work. Therefore, all of these factors placed the claimant at a substantial disadvantage.

76. In these circumstances, the Tribunal was satisfied that the respondent was under a duty to make reasonable adjustments to remove those disadvantages.

When did the duty arise?

77. The Tribunal then went on to consider when the duty arose. The respondent's position was that the claimant had never indicated a firm date on which she would return to work and although it was not stated in terms, it appeared to be the respondent's position that any duty would only arise on the claimant's return to work. That certainly appeared to be the position of Ms Bruce who was noted as saying that when the claimant returned to work the question of adjustments would be considered.

78. The respondent did not seem to appreciate that the claimant's position was that the idea that she would have to return to work on a full-time basis in the same job in which she had previously been employed was hindering her ability to return. As she said in the dismissal meeting, she was disappointed that the respondent had not given her a goal to aim for. The Tribunal accepted the claimant's evidence that if the respondent had taken active steps to discuss adjustments to the claimant's role on a permanent or semi-permanent basis, then the claimant would have been able to return to work.

79. The respondent did not make any adjustments to the claimant's role and the Tribunal concluded that the failure crystallised at the date of the claimant's dismissal. While it could be said that the respondent had omitted to take steps or had indicated that part time working would not be available at an earlier stage, the Tribunal concluded that as the circumstances of the

claimant in relation to her absence and potential recovery continued to change. Therefore even if it could be said that any failure was at an earlier stage in the process, either this was part of a continuing failure, or was an additional failure at the dismissal meeting. The Tribunal was of the view that the relevant date for consideration in terms of the application of time limits was 14 September 2020.

80. The Tribunal was of the view that the circumstances were quite different from that in the case of **Humphries** as the Tribunal came to the view that if the respondent had proposed adjustments rather than dismissing the claimant, the claimant was likely to have returned to work. In particular the Tribunal bore in mind what the claimant said in these meetings regarding how being given access to the respondent's system and having been given IT kit had helped her. The Tribunal accepted that there was merit in the claimant's position that a goal to aim for would have encouraged her back to work. Of course, if the respondent had taken that step and the claimant had not returned then the respondent would have satisfied its duty.

What reasonable adjustments ought to have been made?

81. The Tribunal then considered what adjustments would have been reasonable in the circumstances. The respondent's position appeared to be that there was nothing they could do. The claimant's job could not be part time, they had not found a job share partner and they had not found any other part time role. Their position was that their policy prevented them from advertising for any position. They did not explore whether the duty to make reasonable adjustments would impact in that regard.

82. The Tribunal's view was that the respondent had made no serious effort to find something suitable for the claimant. The Tribunal asked whether the claimant's job could have been split between her and the person who was carrying out her role on a temporary basis. It appeared that this had never crossed the mind of the respondent's witnesses and they said such a thing had never been done. Their position appeared to be that the role would have to be advertised, and that a temporary member of staff could not carry

out the promoted role indefinitely. However, at the same time their position was that no roles were being advertised because of the recruitment freeze. In addition, the respondent accepted that once the claimant was dismissed her role could not be advertised or filled other than by the person who had been temporarily carrying out the duties. All of this did not, in the Tribunal's view, take into account the proactive nature of the duty to make reasonable adjustments. It demonstrated that the respondent had a closed mind to the possibility of making reasonable adjustments and was unwilling to look at options beyond a strict reading of their existing policies.

83. It appeared to the Tribunal that the respondent treated the claimant in the same way as any member of staff who was off sick would be treated. They requested that she keep an eye on vacancies, when they were aware there would not be likely to be any vacancies because of the recruitment freeze. They made a half-hearted (at best) effort to find a job share partner. They did not explore at all how or whether the job could be carried out with the temporary cover at least for a period of time. They did not accept that the job carving policy might assist in encouraging the claimant back to work. Their priority did not appear to be to get the claimant back to work at all, unless she returned to the role she had already said she would not be able to carry out.

84. It was notable to the Tribunal that there was no record of HR advice having been taken by either Ms Bruce or Ms Campbell. The advice from the Employee Policy team was clear, that the question of part-time or job share work ought to be have been considered before the question of dismissal.

85. Therefore, the Tribunal concluded that the respondent failed in its duty to make a reasonable adjustment to the claimant's role in that the respondent could and should have offered the claimant the opportunity to return to her previous role on a part time or job share basis to get her back to work. The Tribunal was of the view that this was a reasonable adjustment to make and the respondent failed in its duty to make that adjustment.

86. While the respondent did indicate that the claimant could return to work on what was called part-time medical grounds, this would not have involved any change to the claimant's substantive role. The claimant's evidence, which was accepted by the Tribunal, was that she could not return on that basis in the knowledge that she would have to return to full time hours within 13 weeks thereafter, albeit there might have been scope to adjust the timings on that point.

87. The Tribunal then went on to consider whether the respondent failed in its duty to make a reasonable adjustment in relation to the appeal brought by the claimant.

88. It appeared to the Tribunal that what the claimant was seeking was for her appeal to be upheld and to be returned to work on the basis she was suggesting. The Tribunal did not consider this to be a reasonable adjustment. The view of the Tribunal was that the upholding of an appeal was not what was envisaged by the provisions of section 20. In the context of an appeal hearing, an adjustment might be to allow extra time to answer questions or to allow a person who was not otherwise entitled to attend to support an employee in the context of a policy. The upholding of an appeal itself was not what was envisaged by the legislation. Had the appeal been upheld, then the issue of reasonable adjustments to allow the claimant to return to work might have been relevant. However, in relation to the appeal, there was no provision, criterion or practice identified. Therefore, the respondent had not failed in any duty to make reasonable adjustments at that time.

89. The Tribunal then went on to consider the issue of the Employee Policy referral. For the same reasons as the Tribunal found that there had been no failure to make reasonable adjustment in relation to the claimant's appeal, the Tribunal also found that the failure to advance the referral made on behalf of the claimant did not amount to failure to make a reasonable adjustment. In reality, what the claimant was seeking was for the respondent to reverse the original decision to dismiss her and consider the matter afresh. While the consideration of the matter afresh may involve the

question of reasonable adjustments, and the Tribunal goes no further than suggesting that the duty may arise in such circumstances, this is a step beyond referring the matter for reconsideration in the first instance.

90. The Tribunal therefore concluded that there was no ongoing failure of the respondent to make reasonable adjustments, but that it did fail to make a reasonable adjustment on 14 September 2020 when the claimant was dismissed.

Is it just and equitable to consider the claimant's claim of failure to make a reasonable adjustment?

91. The claimant's claim was not lodged until January 2023, more than two years after the relevant failure. It is therefore significantly out of time. However, the Tribunal has a wide discretion to consider the matter nonetheless. In submissions, the respondent had acknowledged that it made sense to determine whether there had been any failure to make reasonable adjustment prior to considering any issue of discretion. This appeared to the Tribunal to be the correct approach to take on the basis that a factor which may be relevant in consideration of whether to exercise its discretion was the strength of the claimant's case and the prejudice to the parties in that regard.

92. The claimant's evidence was that she did not raise any claim initially as she believed her trade union would do so. When she realised that they had not done so, she did not take matters further at that point. She focussed on her efforts on determining whether her entire service could be taken into account in calculating the compensation to which she was entitled on termination of her employment. In her words, she became quite obsessed about this issue. When she realised that she would not be able to obtain the higher compensation, she then sought to resurrect the appeal against dismissal.

93. She contacted ACAS around April 2022 and was informed that any claim would be out of time. She decided on that basis not to take matters further. It was not until her trade union referred her case to the Employee Policy Group, that she decided to take matters further on the basis that this new event might result in her claim being in time.

94. The Tribunal noted that there was no prejudice to the respondent in relation to answering her claim in that they called relevant witnesses and produced documentation. The Tribunal was also mindful that the claimant continued to have poor mental health during the intervening period and has still not returned to work. There would be prejudice to the claimant in that her claim despite having been made out, could not succeed. It was clear however that the claimant was able to give instructions to her trade union and pursue the issue of additional compensation.

95. Moreover, the Tribunal was mindful that while it has wide discretion to extend time limits where it concludes it is just and equitable to do so, it is not required to exercise that discretion in all circumstances.

96. The Tribunal considered all the facts of this case, the clear failure of the respondent to make a reasonable adjustment and indeed to make very little effort at encouraging the claimant back to work. The Tribunal formed the view that the respondent was really adopting a tick box exercise of having meetings with the claimant and making referrals to Occupational Health, but that no effort went in to trying to find the claimant a role to which she would be likely to return. It was very surprising to the Tribunal that an organisation with the resources of the respondent would take such a closed mind approach to retaining a member of staff who had more than thirty years in public service.

97. However, it was also clear that there were various opportunities for the claimant to pursue a claim against the respondent. She was aware of time limits, and she had the benefit of advice from her trade union, albeit it was not clear that the advice she obtained was helpful to her. While she was

unwell, she was able to pursue other matters which were of concern to her. She took legal advice in relation to the issue of compensation.

98. In all of these circumstances, the Tribunal concluded that while it had considerable sympathy for the claimant in that she had been treated very poorly, the Tribunal did not consider it just and equitable to extend the time limit to allow it to award compensation to the claimant. In particular, the claimant had a number of opportunities to pursue a claim and made a decision not to do so. While the Tribunal could in some respects understand why the claimant had taken these decision, she is also required to take into account the consequences' of those decisions. The discretion afforded to the Tribunal should not be applied in all circumstances, even where a claim might be made out, and in its view the claimant had made a decision not to pursue a claim on at least two previous decisions. Therefore, taking into account all the circumstances of the case, it was not just and equitable to extend the time limit in this case.

**Was the claimant victimsed?**

99. The Tribunal then went on to consider whether the respondent had victimised the claimant for having done a protected act by not taking her referral to the Employee Policy Group further.

100. The claimant accepted that the decision maker in this matter would not have been aware that the claimant had contacted ACAS in relation to a claim at the time the decision was made. Therefore, the claimant's case was not as originally pled.

101. The first issue for the Tribunal to consider therefore was whether the claimant required to amend her claim in order to allow it to consider whether she was victimised for a different protected act than had originally been pled.

102. In essence the claimant's position by the end of the hearing was that it was clear that the respondent was aware that the claimant might raise a

claim of discrimination, because they had been told this by their Employee Policy Group. The claimant indicated that she could not have known this before the documents which were provided shortly before the hearing were read by her.

103. While the Tribunal accepted that the claim was not exactly as pled, the essence of the claim remained the same. The claimant's position was that she believed that the respondent refused to reopen her case because it believed that she might bring a Tribunal claim. Initially she believed that the respondent became aware of this through contact from ACAS, but she subsequently discovered that the respondent had been advised by its own staff that the claimant may raise a claim.

104. In these circumstances, the Tribunal formed the view that there was no requirement to amend the claimant's claim. Had the claimant been required to make such an amendment, the Tribunal would almost certainly have granted it, given that it accepted that the claimant would not have had sight of the correspondence from the Employee Policy Group until the week before the final hearing. The respondent was in no way prejudiced by this situation. The question for the Tribunal to determine remained the same, did the respondent refuse to reopen the claimant's case because it believed she was going to raise a claim of discrimination?

105. The Tribunal was in difficulty in determining the reason why the respondent refused to reopen the claimant's claim. The decision maker did not give evidence to the Tribunal and there was no record of why she reached the decision she reached. It was surprising to the Tribunal that the decision maker should not give evidence on this matter and the Tribunal had some sympathy for Ms Squires who was required to give evidence on a matter which was not within her knowledge.

106. The Tribunal considered whether the claimant had proved facts from which an inference could be drawn that the reason for the decision had been related to the possibility of the claimant raising a claim. It concluded that there was insufficient evidence for the burden of proof in this regard to

shift to the respondent. This was because the manner in which the respondent had dealt with the claimant throughout was not thorough and indeed was little more than going through the motions. While there was a potential link in terms of timing between the information being given to the respondent and the decision which was made, there was little to suggest anything beyond that link being circumstantial.

107. The Tribunal would however point out that had the burden of proof shifted to the respondent to prove that it had not taken the decision because of the claimant's potential claim, it would not have discharged that burden and the Tribunal would have been bound to have found that the claimant had been subjected to vicitmisation. This is because the Tribunal did not hear from the decision maker and could only speculate as to why she reached the decision she did, or indeed when or on the basis of what information.

108. In all these circumstances, the Tribunal found that the claimant had not been victimised by the respondent.

109. The claimant's claims therefore fall to be dismissed.

**Employment Judge:** **Jones**
**Date of Judgment:** **14 November 2023**
**Entered in register:** **15 November 2023**
**and copied to parties**