



EMPLOYMENT TRIBUNALS

Claimant: Mrs Joanne Page

Respondent: Howarth Timber and Building Supplies Limited

Heard at: Manchester **On:** 15-18 August 2023

Before: A panel comprising Judge Callum Cowx,
Mrs Sarah Humphreys and Mr Nigel
Williams

REPRESENTATION:

Claimant: Mrs Cutbill

Respondent: Miss Kight of Counsel

RESERVED LIABILITY JUDGMENT

1. The claimant's claim of unfair dismissal contrary to Section 98 of the Employment Rights Act 1996 is unfounded and is dismissed.
2. The claimant's claim of discriminatory dismissal arising out of disability, as defined by Section 15 of the Equality Act 2010 and in contravention of Section 39(2) of the same Act, is unfounded and is dismissed.
3. The claimant's claim of direct discrimination, as defined by Section 13 of the Equality Act 2010 and in contravention of Section 39(2) of the same Act, is unfounded and is dismissed.
4. The claimant's claim that the respondent failed to make reasonable adjustments, within the meaning of Sections 20 and 21 of the Equality Act 2010, and in contravention of Section 39(2) of the same Act, is unfounded and is dismissed.

REASONS

5. This was a final hearing conducted in person on 15, 16, 17 and 18 August 2023.
6. The claimant brought the following claims against the respondent:
 - a. Unfair dismissal contrary to Section 98 of the Employment Rights Act 1996 (*“the ERA”*).
 - b. Discriminatory dismissal arising out of disability, as defined by Section 15 of the Equality Act 2010 (*“the EqA”*) and in contravention of Section 39(2) of the same Act.
 - c. Direct discrimination, as defined by Section 13 of the EqA and in contravention of Section 39(2) of the same Act.
 - d. Failure to make reasonable adjustments, within the meaning of Sections 20 and 21 of the EqA, and in contravention of Section 39(2) of the same Act.
7. Prior to the hearing the Tribunal was provided with a bundle of documents running to 628 pages. The Tribunal was also provided with witness statements from Mrs Joanne Page, Mrs Michelle Hughes, Mr Robert Bailey, Mrs Beverley Morris and Mr Paul Bullivant, all of whom gave evidence to the Tribunal.
8. It was agreed that the respondent would open its case first.

FACTS

9. The Tribunal found the following facts.
10. The respondent is a limited company dealing in timber and building supplies. It has branches at various locations in the North of England. The claimant, Mrs Page, was employed at the Ashton-under-Lyne branch from 23 October 1993 until 27 April 2022.
11. Mrs Page was employed as the Assistant Branch Manager (ABM) at the respondent’s Ashton branch. Her line manager, the Branch Manager, was Mr Robert Bailey. The role of the ABM was varied, and Mrs Page was required to be involved in all aspects of the day to day running of the branch. This included managing deliveries, which including overseeing logistics, vehicles and drivers. She was also involved in in-branch sales as required and deputised for Mr Bailey in his absence. There were about 15 or 16 employees working at the Ashton branch at the relevant time.
12. On the evening of Saturday 26 June 2021, Mrs Page was on a work’s night out at a local pub with colleagues from the respondent company’s Ashton branch. During the course of the evening, Mrs Page became involved in an altercation

outside the pub with MB, the sister of one of the respondent's customers. Mr Bailey witnessed this. The incident did not go beyond a loud argument. MB left the scene as did Mr Bailey. The argument was prompted by MB's belief that Mrs Page had made an inappropriate comment about her brother, DB, not promptly paying monies owed to the respondent.

13. A short while later, MB returned to the pub with her brother, DB. Mrs Page was subjected to swearing and shouting from MB and DB, but no violence was used or threatened.

14. Later that same night, Mrs Page tried to contact Mr Bailey to inform him about the second incident at the pub. Mr Bailey did not answer that same night, but the next morning at 10:52 he messaged Mrs Page telling her he was free to talk. The pair had a telephone conversation about it and Mr Bailey reassured her.

15. Later that same day, DB telephoned Mr Bailey, complained about Mrs Page and said he would take the matter further. Mr Bailey messaged Mrs Page at 20:07 on Sunday 27 June 21 and informed her about DB's telephone call and that he was concerned about DB coming into the branch and "kicking off". Mrs Page responded at 20:31, telling Mr Bailey that she could not stop thinking about the events of the previous evening and that she thought she might stay off work the next day if DB intended to come into the branch. At 20:33, Mr Bailey replied and agreed with Mrs Page's suggestion that it was probably for the best that she stayed away from the branch when Mr Bailey spoke to DB. In her witness statement, Mrs Page suggested that she was disappointed by Mr Bailey's reply and that a meeting between Mr Bailey and DB could have been held away from the branch.

16. In cross examination it was put to Mrs Page that she did not tell Mr Bailey that DB should have been seen somewhere other than the branch or that she told Mr Bailey she was unhappy about that because it caused her to stay away from work. To both questions she disagreed and said she did tell Mr Bailey she was unhappy about this. The Tribunal did not accept Mrs Page's evidence on this point. Any such comments to Mr Bailey were inconsistent with the text messages which clearly showed that it was Mrs Page's idea that she should keep herself out of the way to allow Mr Bailey to deal with DB. The Tribunal found no reason to criticise Mr Bailey on this point. He merely acceded to Mrs Page's suggestion that she stay away from the branch for that one day.

17. Mrs Page said that she contacted her doctor on Monday 28 June 23 because she was not sleeping, was having palpitations and panic attacks. It was her evidence that these symptoms were a direct result of the incident on the preceding Saturday night. However, Mrs Page's medical records for 28 June 23 make no reference at all to the incident on the Saturday night as being the trigger or cause of her symptoms which she disclosed to her GP as being an upset stomach, difficulty sleeping, feeling sweaty and a pulsing sensation in her head. She told her GP that she also had achy legs and her mood was described as low. She said she had been experiencing her symptoms for longer than 2-weeks and attributed these to work, finding it busy and stressful, and she told her doctor that she was considering looking for another job.

18. The Tribunal asked Mrs Page about why she told her GP that she felt her symptoms were work related and made no mention of the incident at the pub on the preceding Saturday night. Mrs Page told the Tribunal that what she told her GP was made up. She said she relayed her symptoms truthfully but falsely told her GP they were work related. She also said she falsely told her GP that she had been experiencing low mood for some time. The panel was not satisfied that Mrs Page was telling the truth on this point and that it was more likely that her GP notes, as a contemporaneous record, were an accurate record of her true feelings at the time. The panel concluded that Mrs Page was most likely feeling stressed about work, as she told her doctor, rather than deeply upset about the incident at the pub on the Saturday night. The panel concluded that had she been as upset as claimed, it was more likely that she would have mentioned it to her GP.

19. In her witness statement Mrs Page said that Mr Bailey called her on 28 June 2021 and asked to come and see her because the customer, DB, had been into the branch to see him and to make a complaint about her. Mrs Page wrote that she told Mr Bailey that she did not feel the matter was being handled correctly, that DB should have been seen away from the branch and that she felt ostracised. Mr Bailey had no recollection of Mrs Page complaining about how the situation was handled. When cross examined on this it was put to her that she did not mention to Mr Bailey anything about seeing DB away from the branch, but she insisted she had.

20. On 5 July 2021 Mrs Page's GP signed her off work for 2-weeks with anxiety and depression. She was signed off work repeatedly thereafter. She was prescribed anti-depressants and put on a cognitive behavioural therapy programme called "Silvercloud". On 12 July 2021 Mr Bailey called Mrs Page and told her he would make a welfare call to her every week. It was accepted by Mr Bailey that he did not maintain that weekly schedule and he put that down to his workload. The panel heard and accepted that during Mrs Page's absence Mr Bailey was particularly busy. He was managing the branch without a deputy and was also called upon to carry out additional driving and delivery tasks. Miss Kight referred the Tribunal to a call log which showed that from June 2021 to February 2022 contact calls were made to Mrs Page about once every 3-weeks.

21. On 29 July 2021, a "Keeping in Touch" ("KIT") meeting was held with Mrs Page. Mr Bailey was unable to attend the meeting as planned because he was delivering goods for the respondent. The meeting was attended by Mrs Beverley Morris of the respondent's HR department. At that meeting in Mrs Page's home, she told Mrs Morris that she was feeling anxious and agitated and expected to be absent for a further 4 to 6 weeks. The note of the meeting described it as an informal chat and Mrs Morris left the meeting thinking that Mrs Page was likely to return to work.

22. At the KIT meeting Mrs Morris suggested to Mrs Page that she may benefit from a visit to the office for a coffee and a chat, as a means of easing back into work. This offer was left with Mrs Page. Mrs Morris also provided Mrs Page with information about an advice and counselling service called the "Employee Assistance Programme" ("EAP"). This was not a service Mrs Page chose to avail herself of.

23. Meanwhile, an internal disciplinary investigation into Mrs Page's conduct on 26 June 2021 was concluded in early September 2021 when she was informed of the respondent's decision that there was insufficient evidence of misconduct, and no further action would be taken against Mrs Page.

24. Following this first KIT meeting Mrs Morris arranged for Mrs Page to be referred to Occupational Health (OH).

25. Mr Bailey had a follow up KIT meeting with Mrs Page on 31 August 2021 and according to Mr Bailey, it was apparent Mrs Page showed no signs of improvement.

26. On 1 September 2021 a first OH report was produced for Mrs Page. This recorded such things as Mrs Page's reasons for absence, her symptoms and measures to assist her in returning to work. The EAP was mentioned but her response appears to have been that she preferred to work with her GP and the NHS "Healthy Mind" resources before accessing additional services.

27. The opinion of Dr Vander was that Mrs Page was suffering from substantial work-place anxiety, caused by fear of DB and his family, and that a graded return to work was not a realistic option at that time.

28. On 24 September 2021, Miss Melanie Carr had a meeting with Mrs Page to discuss the findings in the first OH report. Miss Carr reminded Mrs Page that she could access Cognitive Behavioural Therapy ("CBT") or other suitable counselling therapies through the respondent's EAP. Mrs Page said that she would take advice from her GP and NHS Healthy Minds on whether she was ready for such therapies, but did not subsequently accept what was offered by the respondent.

29. Miss Carr also reminded Mrs Page of Mrs Morris' offer of coming into the branch for coffee. Mrs Page said she was unable to do so but would try at a later date. Again, Mrs Page never availed herself of this opportunity, suggesting she would not be fit to do so until she had completed counselling.

30. It was at this meeting that Mrs Page first said that she would prefer it if DB did not go into the Aston-under-Lyne branch. On 27 September 2021 Mrs Page emailed Miss Carr setting out measures she felt the respondent should take on her behalf. She suggested that DB should be banned from the branch and that he and his family should not be permitted to contact the branch in person or by telephone. In her witness statement, Mrs Page said that if the customer had been banned from her branch, then she could have returned to work. She also suggested that a swipe card access system should be fitted to the counter area and that a protocol should be put in place so that every branch member of staff would know what to do if DB or members of his family entered the branch.

31. Mrs Page was critical of the respondent's failure to have a swipe card access system fitted to the counter which divides the branch office from the branch shop and customer area. Mr Bailey said that he had had brief discussion with an electrician about the cost of the system. However, questions put to Mrs Page by the Tribunal established that there would have been no benefit at all to the card system suggested by Mrs Page. The counter was described as little more than 3 feet high

with a half-door that allowed passage between the office and the shop floor. It was apparent that a determined person could easily climb over the half door or counter and that a swipe card access system would do nothing to prevent this.

32. The respondent's witnesses spoke of the measures that were taken or proposed in an effort to allay Mrs Page's fears and concerns. For example, it was suggested that she could move her desk closer to a lockable room into which she could go if she felt threatened at any point. It was also clear on the evidence that if DB or members of his family came into the branch, Mrs Page was under no compulsion from the respondent to speak to them. This was implicit in the suggestion she could withdraw to the lockable office. There were other members of staff in the branch who could serve DB or his family and Mrs Page, as the ABM, must have had the authority to delegate the task of dealing with customers to more junior members of staff in the Panel's judgement.

33. One of Mrs Page's complaints was that the respondent did not carry out an effective risk assessment which might have addressed her concerns about DB and his family. In January 2022 the respondent produced a risk assessment setting out various risk control measures to deal with challenging, aggressive or violent behaviour. This was a generic risk assessment for all members of staff. However, on 28 March 2022, a bespoke risk assessment was produced in direct response to Mrs Page's concerns and referred to her directly. This was a detailed risk assessment covering various risk factors identified by Mrs Page, or on her behalf, and the assessment provided a number of response strategies to deal with a variety of scenarios. The panel rejected Mrs Page's suggestion that a bespoke risk assessment was not produced.

34. Mrs Morris responded to points raised by Mrs Page in her email of 27 September 2021, in an internal email to other staff. In it she mentioned that she had already told Mrs Page that in the event DB came into the branch and attempted to "liaise with Joanne in a negative way" he would be asked to leave and if he failed to do so, the police would be called.

35. Mr Bailey also added that he had explained to Mrs Page that DB had said that he did not want any further altercations with Mrs Page and had "no intention of doing so". The panel was satisfied the respondent had done all it could to allay Mrs Page's fears about a confrontation with DB in the branch.

36. A third KIT meeting took place on 13 October 2021 attended by Mrs Page, Mr Bailey and Mrs Morris. At that meeting Mrs Page expressed the feeling that she had not been supported by her colleagues. In her witness statement, Mrs Morris expressed her surprise at that because she knew that Mr Bailey phoned her regularly (although not the weekly calls originally hoped for), and that other Ashton team members texted or called Mrs Page after the incident at the pub. Mrs Page also frequently went to the gym with work colleague Rachel Barton. Mrs Morris reassured Mrs Page that she was still part of the team, and she was wanted back at work. In addition to the repeated offer of being driven to the office for coffee and an informal chat with colleagues, the panel heard that Mr Bailey invited Mrs Page to a barbecue at his home, which would be attended by other work colleagues, but this offer was declined by Mrs Page. Despite Mrs Page's feelings at the time, the

evidence led the panel to conclude that genuine efforts were made by colleagues at the respondent company to support her.

37. Various measures were raised by Mrs Morris at the 13 October 2021 KIT meeting. These again included a visit to the branch for coffee and chat with colleagues and that Mr Bailey would pick her up and drop her off. Mrs Morris also offered to pick her up and drop her off. This offer was made on several occasions, but it was Mrs Page who declined the offer until such time as she had completed one on one counselling, yet never gave her employers any clear indication when her counselling would begin and end.

38. A temporary move to the Oldham branch was suggested to help her regain confidence, but this was rejected by Mrs Page who said DB could go into that branch. Moving Mrs Page's desk to the back of the office to give her easy access to a lockable room was proposed as was a process whereby DB and his sister would be asked to leave the branch if they caused "issues" and if they did not the police would be called and DB and/or his sister would be banned. A phased return to work created by Mrs Page in consultation with HR was also proposed and Mrs Page was reminded of the availability of the EAP.

39. In response to the package of proposals, Mrs Page remained insistent that DB and his family should be banned from the store. Mr Bailey gave evidence on this point. He did not believe it was reasonable, in the circumstances, and three months after the incident, to ban DB and his sister from the branch. The incident between Mrs Page, DB and his sister MB did not occur on the respondent's premises, and Mr Bailey was of the opinion that Mrs Page was partly to blame, in that she initiated the altercation with DB's sister by making a comment about DB's failure to pay invoices. Mr Bailey also concluded that there had been no violence or threatening behaviour towards Mrs Page and there was no realistic prospect of the same occurring in the branch. Mr Bailey also felt that to ban a customer in such circumstances might have an adverse impact on the respondent's reputation with other customers, and consequently harmed the respondent's business.

40. A further KIT meeting took place on 13 October 2021 and on 23 December 2021 Mr Bailey had a "catch up" call with Mrs Page by telephone.

41. On 25 January 2022 Mrs Page attended a first capability meeting with Mr Bailey and Mrs Morris. The letter dated 18 January 2022 made it clear that the purpose of the meeting was quite different to the earlier KIT meetings and that the topic of discussion would be Mrs Page's ability to return to her job role as ABM. She was made aware of the impact her absence was having on the business and other employees, which could not be sustained indefinitely. The letter informed her that one outcome of the capability process was dismissal.

42. At that meeting she told Mrs Morris that she did not feel any closer to being able to return to work. She said she felt scared about coming back to work and there was nothing in place to keep her safe. She said the job was fine but the thought of DB or his sister coming into the branch distressed her. She added that a ban was not enough. She wanted a process in place that gave her the reassurance that if DB

or members of his family came into the branch, then staff would know how to react to keep her safe.

43. On 17 February 2022 Mrs Page attended a second OH meeting. The assessment from that meeting was that there had been no improvement in Mrs Page's condition. Mrs Page indicated that she had no confidence in the adjustments suggested by the respondent to assist with her anxiety and concerns.

44. A second capability meeting followed on 28 March 2022. In Mrs Morris' invitation letter to Mrs Page, Mrs Morris set out the various adjustments and measures taken or offered by the respondent. Mrs Morris also wrote that the respondent was keen to explore any workable solutions which might assist Mrs Page in returning to work. At the meeting Mrs Page confirmed that her situation had not changed. She did not feel safe coming into the branch but confirmed that she had had no contact with DB or his sister since the incident on 26 June 2021. At the meeting, redeployment to another branch was suggested to Mrs Page but she rejected that on the basis DB could turn up at any other branch.

45. After her dismissal, Mrs Page complained that she was not given the opportunity to apply for other vacancies within the company. According to Mr Bailey, Mrs Page showed no interest, at any stage, in vacancies in other parts of the respondent's business and she was not prevented from accessing such vacancies. Vacancies were posted on a notice board within the branch, but they were also accessible on the company's website.

46. After her dismissal, Mrs Page also complained that she was not given the opportunity to work from home. However, in oral evidence she conceded that she never indicated to Mr Bailey, Mrs Morris or anyone else that she wanted to work from home. The Tribunal also heard evidence from Mr Bailey that there were few tasks Mrs Page could have done from home. Banking or accounting was suggested, but this would have entailed additional work for Mr Bailey who would have had to drop off documents and cash at Mrs Page's home and to collect them later on. Mr Paul Bullivant, the respondent's Commercial Director, told the Tribunal that there are very few working from home opportunities within the respondent's organisation and the few that exist are head office-based hybrid roles. The role of branch ABM was not consistent with home working, although it was accepted that a limited number of tasks could have been done at home by Mrs Page in the short term, but again she did not ask for such work.

47. At the capability meeting, Mrs Page's friend Mrs Hughes asked Mrs Morris what "package is on the table" and would the respondent offer Mrs Page a "golden handshake"? Mrs Morris said she would ask those questions but said that she suspected Mrs Page would only be eligible for her standard notice terms. This was likely to have given the respondent the impression that at that time, Mrs Page was considering the possibility of not returning to work.

48. At the meeting Mrs Page was asked if she foresaw herself returning to work at any time in the near future, and she said she did not.

49. On 27 April 2022, Mrs Morris sent Mrs Page a letter notifying her of her immediate dismissal on medical capability grounds. Mrs Page unsuccessfully appealed against that decision.

THE LAW

50. The relevant law is to be found in the EqA and the ERA at:

Section 13 EqA

Direct discrimination

(1) *A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*

Section 15 EqA

Discrimination arising from disability

(1) *A person (A) discriminates against a disabled person (B) if—*

(a) *A treats B unfavourably because of something arising in consequence of B's disability, and*

(b) *A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*

(2) *Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

Section 20 EqA

Duty to make adjustments

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

(2) *The duty comprises the following three requirements.*

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

(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 a 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.*

Section 21 EqA

Failure to comply with duty [to make adjustments]

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

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

(3) *A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.*

Section 32(2) EqA

Employees and applicants

(2) *An employer (A) must not discriminate against an employee of A's (B)—*

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

Section 94 ERA

The Right [not to be unfairly dismissed]

(1) *An employee has the right not to be unfairly dismissed by his employer.*

Section 98

General

(1) *In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*

(a) *the reason (or, if more than one, the principal reason) for the dismissal, and*

(b) *that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

(2) *A reason falls within this subsection if it—*

(a) ***relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,***

(b) *relates to the conduct of the employee,*

(c) *is that the employee was redundant, or*

(d) *is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.*

APPLYING THE FACTS TO THE LAW

Jurisdiction

51. The respondent contended that the claimant's claims in relation to acts prior to 5 February 2022 were time barred. The panel considered this, and all of the circumstances of this case, and decided acts prior to 5 February 2022 were not time barred because the acts complained of amounted to a continuous course of conduct in the panel's judgement.

Disability

52. The respondent accepted that Mrs Page was disabled from January 2022. Mrs Page asserts that she was disabled from 28 June 2021. The panel carefully considered the test of disability established by Section 8 of the EqA. Mrs Page was diagnosed with low mood on 28 June 2021. It was not until her next appointment with her GP on 5 July 2021 that she was diagnosed with anxiety and depression and prescribed anti-depressants. She remained off work from that time and her unchallenged evidence was that her condition had a severe impact on her day-to-day activities.

53. The panel was satisfied that from 28 June 2021 Mrs Page was suffering from a mental impairment and that impairment had a substantial and long-term effect on her ability to carry out day-to-day activities. More likely than not her condition had an adverse effect on how she viewed her work situation and the threat posed by DB and his family. It must have become apparent after the first OH evaluation, or should have become apparent, that Mrs Page's impairment was a long term one likely to

last 12 months or more. For these reasons the panel found that Mrs Page was disabled, for the purposes of the EqA, from 28 June 2021.

54. The panel also found that it was more likely than not that her mental health was already in a state of decline prior to the incident on 28 June 2021, with her GP noting her low mood was work related.

Discriminatory Dismissal Arising from Disability

55. The respondent accepts that Mrs Page was dismissed for a reason relating to her disability, namely her absence with no prospect of return to work within any defined timescale.

56. The panel found that the respondent acted reasonably by following a clear and transparent process with the aim of assisting Mrs Page to return to work. The respondent did what it could to support Mrs Page and referred her to OH in order to best understand the nature of her condition and her needs.

57. During this process it should have become clear to the respondent, quite early on during the period of absence, that Mrs Page, diagnosed with anxiety and depression, met the statutory definition of disabled.

58. The panel was then required to decide if dismissal was a means of achieving the aims of requiring staff to attend their contractual role on a reliable and regular basis, and of managing long-term capability absence to save cost and management time, to ensure the effective delivery of the ABM role and to allow the respondent to plan its workforce and operational needs with certainty.

59. The panel agreed that the aforementioned aims are legitimate aims for any business and that Mrs Page's dismissal was a means of meeting those aims. The respondent's Ashton branch was without an ABM for 10 months by the time the decision was taken to dismiss her. At that point, the claimant was unable to give the respondent any indication as to when she might be fit to return to work or indeed if she would ever return to work. That long term gap created additional work for the Branch Manager which was not sustainable in the long term. At some point the gap had to be filled and Mrs Page's dismissal was a legitimate means of enabling this.

60. The panel was satisfied that in all the circumstances, the dismissal was a proportionate response to a situation which had no foreseeable end. The respondent had made great efforts to support Mrs Page and to set the conditions for her return to work. She was repeatedly offered the chance to come into the office for coffee and a chat in an effort to ease her back into the team. Measures were suggested which it was hoped would allay her concerns about DB and his family, but they were rejected. The sticking point for both sides was banning DB and his family. The panel found that in the circumstances, banning DB, his sister or other family members was an unreasonable request by Mrs Page.

61. Whilst the respondent felt there was insufficient evidence or grounds to take disciplinary action against Mrs Page for the incident at the pub, the evidence did tend to suggest that Mrs Page did say something at the pub which was overheard by DB's

sister, and which sparked the row. The incident was just that, a row, with no violence used or threatened on either side. DB felt aggrieved by what had happened, and he made a complainant about it. He then seems to have accepted the respondent's findings and was prepared to let the matter drop. Mr Bailey had no concerns about DB or his sister coming into the branch and causing problems for Mrs Page or anyone else. But if they did come into the branch and caused problems, the respondent had what the panel found was a workable plan to deal with them, namely ask them to leave or call the police and ban them from the store if they did not leave.

62. The panel also accepted Mr Bailey's concern that to ban a customer in the circumstances described could quite easily have harmed the respondent's business, with other customers perhaps taking their trade elsewhere if they were aware of the background incident involving Mrs Page. Mrs Page told the panel that she had not experienced any threats or problems from DB and his family. The panel accepted that Mrs Page was genuinely concerned about encountering DB and his family in the store, but the panel found there was little or no actual threat to Mrs Park. The panel found it was more likely than not that Mrs Park's poor mental health caused her to exaggerate the threat in her own mind. Unlike Mrs Page, Mr Bailey's mind was not impaired, and he viewed the situation more rationally in the panel's judgement which led him to decide that banning customers was not appropriate.

63. For the above reasons the panel found that Mrs Page did not suffer discrimination arising out of her disability.

Direct Discrimination

64. Mrs Page claimed that she suffered direct discrimination in ten separate ways.

65. Firstly, she claimed that the respondent failed to give her further time to complete her counselling. It is true that the respondent did not allow Mrs Page more time to complete counselling but the reason for this was that 10 months had already elapsed by the date of dismissal, and she had not even begun counselling by that date. At the final capability meeting she very clearly told the respondent that she did not foresee herself returning to work in the near future. The respondent was given no assurance that Mrs Page would ever return to work. The reason she was not given more time for counselling was not because she was disabled but because there appeared to be no end in sight to her absence.

66. Mrs Page claimed discrimination on the basis she was not given a written warning about her capability, referring to the respondent's sickness absence policy. The sickness absence policy makes reference to a system of written warnings, but these are discretionary. Mr Bailey and Mrs Morris told the Tribunal that this form of written warning was not appropriate in cases of long-term absence of the kind Mrs Page found herself in and that it is more appropriate in cases of frequent short-term absence. The panel found that giving such a written warning to Mrs Page would have been inappropriate and contrary to her wellbeing and recovery. The respondent was alive to this and did not discriminate against Mrs Page in not issuing her with a formal written warning, because it was concerned for her welfare. The respondent did however warn Mrs Page, in writing, that she was at risk of dismissal.

This was done in the letters inviting her to the two capability absence meetings. Mrs Page was put on notice from 18 January 2022 that she was at risk of dismissal on capability grounds.

67. Mrs Page claims she was discriminated against because the respondent failed to explore the possibility of putting her in a non-customer facing role. The respondent proposed a suite of measures in its efforts to get her back to work. This possibility was not proposed by the respondent, but it was not identified by Mrs Page as something that would help her return to work. She repeatedly made it clear she could not return to work if DB and his family were not banned from the branch, and this was not something the respondent was prepared to do. At no time did Mrs Page ask if she could work from home, thereby keeping herself out of a customer facing role. The alternative must have been to work in some capacity from the Ashton branch or another branch. As the ABM at Ashton, the panel was satisfied that Mrs Page had a degree of freedom and could have chosen to concentrate on non-customer facing duties if she wished. The panel was satisfied that the respondent was amenable to any reasonable suggestions if it helped Mrs Page get back to work and would have permitted Mrs Page to avoid customer facing duties, at least until her condition improved. The panel was not satisfied this was a failure on the respondent's part and if it was, it was not because of Mrs Page's disability.

68. The next alleged failure was working from home. This was not a failure on the respondent's part. Mrs Page did not suggest it prior to her dismissal. Mr Bailey and others demonstrated concern and empathy for Mrs Page and gave her the time and space they felt she needed for her recovery. Suggesting to Mrs Page that she should work from home would have been contrary to the respondent's soft approach to Mrs Page's sickness absence because such a suggestion could, in the panel's judgement, have put Mrs Page under additional pressure and stress at a time when she was being given time and space by the respondent to recover. It was also reasonable not to suggest working from home because there were no obvious duties an ABM could perform from home.

69. Mrs Page claimed that she was not given the opportunity to apply for other posts. There was no evidence of this other than the fact vacancies were posted in the branch and Mrs Page felt unable to go into the branch. However, she must also have known that vacancies were also advertised on-line. This alleged failure suggests that Mrs Page was interested in pursuing vacancies at other locations within the respondent company. But this is not consistent with Mrs Page's refusal to temporarily redeploy to the company's Oldham branch which was offered to her. There was no failure on the respondent's part to allow Mrs Page to apply for other roles, but if there was, it was not because she was disabled. In this regard she was not treated any differently to a non-disabled employee who was on long term sick whom the employer was trying to assist with recovery.

70. It was said by Mrs Page that the respondent failed to facilitate access to the branch in non-working hours to meet members of the team. Mr Bailey and Mrs Morris repeatedly offered Mrs Page the chance to come into the branch for coffee and a chat with colleagues. Mrs Page did not avail herself of that offer and said she could not go into the office until she had completed counselling. If it is Mrs Page's case that she would have gone into the branch outside working hours, then she did

not specify this when visits were offered to her. But such a contention is not consistent with the evidence that Mrs Page did not feel well enough to go through the gates of the branch, and this must have been the case whatever the time of day. The respondent did not fail in the manner described.

71. Mrs Page alleged that the respondent failed to carry out a risk assessment in regard to the risk of DB and/or his family coming into the branch and being violent and/or abusive towards her. This allegation was factually incorrect. On 28 March 2022 the respondent produced a bespoke risk assessment, tailored to meet Mrs Pages' concerns.

72. Mrs Page complained that the respondent failed to introduce a swipe card access system or to investigate the cost of the same. The latter part of the complaint is incorrect in that Mr Bailey did obtain a rough verbal estimate of the cost of such a system. The respondent did not fit such a system, but the panel concluded this was not a failure. The system suggested by Mrs Page would have been utterly useless in providing any sort of protection to her. If Mrs Page had her wish granted, the lock would have been fitted to a half door in the counter. When locked, anyone wishing to access the office area from the customer area would simply have to step over the door or climb over the counter. The respondent did not fail to introduce this system because Mrs Page had a disability, but because it would not have served any purpose in terms of keeping Mrs Page safe.

73. Mrs Page alleged that failing to ban DB and his sister MB from the branch was also direct discrimination. The respondent did fail to ban DB and MB, but not because Mrs Page was disabled. For reasons already given above, the respondent did not believe it was reasonable to ban those customers from the branch, and the panel agreed that that decision was a reasonable response on the facts and circumstances known to Mr Bailey. The respondent would have refused to ban DB and MB whether or not Mrs Page was disabled.

74. The final act of alleged direct discrimination was the failure to ask DB to use another branch. This would have been effectively the same as banning DB from the Ashton branch. Mr Bailey, for the respondent, did not deem it reasonable in the circumstances to tell DB he was not welcome in the branch and that he should use another. Mr Bailey and the respondent would have acted in the same way regardless of whether the person making the request was disabled or not.

75. The panel was satisfied that none of the above ten alleged failures amount to direct discrimination.

Unfair Dismissal

76. It was agreed that the reason for dismissal was one of capability, namely Mrs Page's 10-month absence and the fact there was no return-to-work date in sight.

77. The panel then had to decide whether the respondent acted reasonably or unreasonably in treating that reason as sufficient to dismiss Mrs Page.

78. Because of her long-term absence Mrs Page was incapable of performing her role. The respondent did its best to support Mrs Page and to enable her to come back to work. The one thing the respondent refused to do was to ban DB and MB from the branch which Mrs Page insisted was the barrier to her returning to work. The panel was not convinced that taking such action would have resulted in a marked improvement in Mrs Page's health given that she effectively told her GP that her mental health was in decline before the incident with DB and MB ever occurred and was brought on by her work. Notwithstanding that, as already mentioned, the panel agreed with Mr Bailey that banning DB and MB from the branch was not a reasonable step to take, even if Mrs Page insisted it would help her get back to work.

79. The panel was satisfied that the respondent was proactive in proposing a range of measures and adjustments which when viewed objectively should have alleviated Mrs Page's concerns about the customers and assisted in her to return to work. Mrs Page consistently refused to accept the measures proposed by the respondent, including counselling through the company's EAP. Instead, she opted for a counselling programme through the NHS which she had not begun at the time of her dismissal. Mrs Page had completed that counselling programme at the date of the hearing, yet she considered herself to be still unfit for work.

80. In all the circumstances the panel found that the respondent acted reasonably in treating capability as the reason for Mrs Page's dismissal. She was incapable of doing her job due to her illness and she could give no indication, after a 10-month absence, when she believed she would be fit for work, after declining various suggested measures which were intended to get her back to work. Mrs Page was not unfairly dismissed.

Failure to Make Reasonable Adjustments

81. Mrs Page identified two provisions, criteria or practices ("PCP") which required adjustments to be made.

82. PCP1 was the requirement for the ABM to deal with customers with whom the ABM had previously had an altercation with.

83. Mrs Page claimed this PCP1 put her at a substantial disadvantage in comparison with non-disabled persons, in that the fear of a potential confrontation with the customer or their relative was harder for her to cope with than it would be for a person not disabled with anxiety and depression. Mrs Page did not say that she was disadvantaged by a requirement to deal with customers in general.

84. By way of adjustment, Mrs Page said that the respondent should have taken the following steps:

- a. Re-deployed her into a non-customer facing role.
- b. Allowed her to work from home.
- c. Introduced a swipe card access system in the Ashton branch.
- d. Banned DB and MB from the Ashton branch.
- e. Suggested to DB that he use a different branch.

85. The panel concluded that Mrs Page did have a genuine fear, yet unfounded and irrational fear of a confrontation with DB or MB in the branch. The panel found this fear most likely resulted from Mrs Page's anxiety and depression. The catalyst incident on 26 June 2021, was nothing more than an argument. No violence was used or threatened, and Mr Bailey was satisfied, after speaking to DB, that the incident had been put to rest. Nevertheless, the respondent did take Mrs Page's fears seriously, suggesting practical measures such as moving her desk away from the counter and customer area, next to a lockable office into which she could withdraw should she feel the need. An action plan was also in place, arising from a bespoke risk assessment, to deal with the scenario Mrs Page was afraid of ie. DB or one of his relatives coming into the branch and behaving in an abusive or threatening manner towards her.

86. The panel considered the adjustments suggested by Mrs Page. Redeploying Mrs Page into a non-customer facing role was not something that Mrs Page ever suggested before her dismissal. Mrs Page's concern was not in dealing with customers other than DB and his family. Whilst this adjustment was not specifically considered by the respondent, the panel was satisfied the respondent took a very sympathetic view of Mrs Page's concerns and did not require her to deal with DB or his relatives if they came into the branch. This was implicit in the suggestion that she could withdraw to the lockable office if DB or his relatives came into the branch. Furthermore, Mrs Page was a manager and there were other more junior members of staff present in the branch to deal with any customer Mrs Page did not wish to deal with. The panel did not find that there was PCP in place which required Mrs Page to deal with DB or his relatives and was satisfied reasonable adjustments were suggested to address her concerns (ie. moving her desk, access to a lockable room and an action plan to deal with violent, threatening and abusive customers), but these were declined.

87. Allowing Mrs Page to work from home would have been an adjustment which addressed her fear of a confrontation in the branch. However, she at no time suggested this as an adjustment and for reasons already mentioned above, it was not reasonable for the respondent to make such an adjustment. Whilst a limited number of tasks might have been compatible with homeworking, the ABM role was not so suited. It was a role which involved deputising for the Branch Manager which required a physical presence in the office. Mr Bullivant's evidence, which was accepted by the panel, was that there were only a limited number of roles in the company which allowed home working and they were hybrid roles (ie. split between home and office working), based at head office. It was not therefore reasonable to make such an adjustment, notwithstanding the fact Mrs Page was not required to deal with DB or his family in any event.

88. The swipe cards system suggested was not a reasonable adjustment as already explained. It would have offered no protection or security at all to Mrs Page.

89. For the reasons already given it was not reasonable to expect the respondent to ban DB and MB from the branch or to expect DB to use a different branch.

90. The panel found there was no failure to make reasonable adjustments for Mrs Page in regard to PCP1.

91. PCP2 was described as the respondent's requirement that an absent ABM returned to work. The panel did not find this to be a PCP at all. A PCP is a provision, criterion or practice applied in the workplace. A PCP is something which governs or regulates how employees do their jobs. Simply requiring or expecting an employee to return to work to do their job is not a PCP in the panel's judgement. It is a basic contractual obligation even though it may be harder for a person with Mrs Page's disability to return to work and even though it may have been likely that she would have been off work for longer than a non-disabled person. The respondent took all reasonable steps it could to set the conditions for Mrs Page's return to work, but she felt unable to do so.

92. The panel found there was no failure by the respondent to make reasonable adjustments for Mrs Page.

Conclusion

93. Mrs Page was not subjected to discriminatory dismissal arising from disability, contrary to Section 15 of the EqA.

94. Mrs Page was not subjected to direct discrimination arising from disability, contrary to Section 13 of the EqA.

95. Mrs Page was not unfairly dismissed, contrary to Section 94 of the ERA.

96. The respondent did not fail to make reasonable adjustments for Mrs Page, contrary to Section 39(2) EqA.

97. The panel therefore dismissed all of the claimant's complaints.

Judge C J Cowx
29 November 2023

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON
30 November 2023

FOR THE TRIBUNAL OFFICE