EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON CENTRAL**

BEFORE: **EMPLOYMENT JUDGE F SPENCER**

MEMBERS: **MS D WARMAN**
MR D SHAW

CLAIMANT **MS I PILAT**

RESPONDENT **IMPERIAL COLLEGE HEALTHCARE NHS TRUST**

ON: **31 October, 1-3 November and (in chambers) 7 November 2023**

Representation:

For the Claimant: Mr P Ferreira, husband
For the Respondent: Mr L Harris, counsel

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that, from 7 December 2022 until 25 January 2023, the Respondent was in breach of its duty to make reasonable adjustments and the Claimant's claim succeeds in part.

A remedy hearing has been listed to take place on 27th February 2024.

REASONS

1. The Claimant is employed by the Respondent as a band 5 service support manager. She brings a claim of disability discrimination. She complains that from 15 April 2022 until 11 January 2023 the Respondent failed to make reasonable adjustments and indirectly discriminated against her. The Respondent now concedes that the Claimant was a disabled person at the relevant time by reference to a

mental impairment, namely anxiety. The Respondent disputes that they had actual or constructive knowledge of her disability at the relevant time.

The Issues.

2. Essentially this case is about whether the Respondent required the Claimant to work 9-to-5 five days a week, rather than compressed hours over four days. If so, did the Respondent breach their duty to make reasonable adjustments or did such a requirement amount to indirect disability discrimination. The legal and factual Issues in the case were set out in the case management order by Employment Judge Grewal and are as follows:

Failure to make reasonable adjustments.

2.1 Whether from 15 April 2022 until the date of the presentation of the claim the Respondent applied the following provisions, criteria or practices ("PCPs") to the Claimant:

(a) It required the Claimant to work her hours of work over five days (Monday to Friday) from 9 a.m. to 5 p.m.

(b) It repeatedly changed the Claimant's working hours and the information it gave her about her working hours.

2.2 Whether those PCPs put the Claimant at a substantial disadvantage in comparison with persons who were not disabled.

2.3 Whether the Respondent knew or could reasonably have been expected to know that the Claimant was disabled and that the PCPs put her at that disadvantage.

2.4 Whether the Respondent failed to take such steps as it was reasonable to take to avoid that disadvantage.

Indirect disability discrimination

2.5 Whether the Respondent applied the PCP at 3.2(a) to persons who were not disabled.

2.6 Whether it put or would put persons who were disabled at a particular disadvantage when compared with persons who were not disabled.

2.7 Whether it put, or would put, the Claimant at that disadvantage.

2.8 Whether the Respondent could show it to be a proportionate

means of achieving a legitimate aim.

Jurisdiction

2.9 Whether the Tribunal has jurisdiction to consider complaints about any acts or failures to act that occurred before 1 August 2022.

Evidence

3. the Tribunal heard evidence from the Claimant and, on her behalf, from her husband. For the Respondent we heard from Ms Williamson, Deputy General Manager in Oncology and Palliative care, from Ms Lewis, Business Support Manager, and from Ms Wiles who heard the Claimant's (successful) appeal against the withdrawal of her compressed hours arrangement. We also had a bundle of documents of 1680 pages.

Relevant facts

4. The Claimant worked, and continues to work, providing administrative support for the Specialist Palliative Care Team. The palliative care service operates from three sites: Charing Cross Hospital (CXH), Hammersmith Hospital and St Mary's Hospital. The Claimant was based at Charing Cross and provided support to the clinical team there. Another Band 5 colleague, Ms Naidoo, provided administrative support for the teams at St Mary's and Hammersmith hospitals. Their duties were broadly similar, although the Charing Cross site was the busier service, with a significantly greater number of phone calls to deal with.

5. Both the Claimant and Ms Naidoo are contracted to work 37.5 hours per week. Initially the Claimant worked 9 - 5, five days a week while Ms Naidoo worked compressed hours, 6 am – 4 pm over four days. A job description appears at page 338 of the bundle and the Standing Operating procedure for both roles is at 367. The Claimant's job included answering the phone and passing it on to the relevant clinician or, if they were not available, to record in the message book. However the Claimant's job was not confined to answering the phone but included minute taking, inputting information onto the palliative care database and preparing monthly data. If the phone was not answered the caller could leave a message which went into an email inbox, which was accessible by both the Claimant and Ms Naidoo.

6. On 9 March 2021, during a one-to-one meeting with the Claimant's new manager, Ms Quigley the Claimant told Ms Quigley that her "current health conditions of anxiety and iron deficiency" might be impacting her ability to work on site/support the team in the office. As a result Ms Quigley drafted a referral to occupational health which asked, among other things, whether any adjustments needed to be made to her duties/days/hours. (407). However, the Claimant responded to Ms

Quigley the following day that she did not wish to discuss the situation with occupational health at this time. (405)

7. On 15 March 2021 the Claimant submitted two applications. The first under the Remote and Agile Working policy (i.e. working from home) and the second under the Flexible Working policy. (412) Ultimately it was agreed that only the flexible working application would be progressed. In her application the Claimant gave a number of reasons why she wanted a flexible working pattern. The first reason given was that it would help her deal with her "anxiety and stress", which had been exacerbated by the pandemic. She also referred to work/ life balance, and that being in the office during quieter times gave her more time without distractions, and that it would help her in her professional development.

8. The Claimant's evidence was that a compressed hours pattern gave her 7.5 hours away from the interruptions caused by the phone to focus on other tasks, and this helped her to manage her anxiety. Without a compressed working pattern she would frequently have to work beyond her contracted hours. She told the Tribunal that from 9 to 5 she was required to answer the phone, and to transfer the calls to the relevant clinician. However she had a lot of data management to do, and she could not do it if she was being constantly interrupted. Outside of the core hours the phone did not ring, (a recorded message would inform the caller that the service hours were 9-to-5 and if it was urgent to call the main switchboard).

9. On 30th April Ms Quigley approved the flexible working request on a trial basis for five weeks. It was agreed that the Claimant would work 9 a.m. – 7 p.m. four days a week with Monday as a day off. (426).

10. The Respondent's Flexible Working policy provides that:

> Clause 3.4 "All flexible working arrangements should be reviewed, at least annually."
>
> Clause 5.2 " Employees should be prepared to have a trial period to show that it can work in practice."
>
> Clause 7.1 "while every effort should be made to proactively support flexible working requests, there are recognised business reasons for why a request may be declined, after thorough exploration, including: the detrimental effect on our ability to meet service demands (including impact on patient safety)."

11. On 25th June Ms Quigley reviewed the trial. The team had asked the Claimant to change her day out of the office and it was agreed that the Claimant would take Thursday as a day off, rather than Monday. A further six-week trial was agreed.

12. Prior to the expiry of the six-week trial period, Ms Quigley asked for feedback from the medical staff (463). It is apparent from documents in

the bundle that the medical staff were unhappy with the Claimant's compressed working hours. In the minutes of the palliative care management meeting held on 4 August it is recorded that "*currently the flexible working hours are not supporting the service. Referral to occupational health has been offered as a next step to resolution."* Ms Gillon, the Palliative Care team leader emailed Ms Quigley on 12th August saying that feedback from the team about the Claimant's compressed hours had been negative, and that she was not sure if the new model "really works for us" Dr Opoku-Darko a palliative care consultant, also reported that "speaking with colleagues at CXH" they don't think the trial period worked for the service. He said that as there was no one in the office after 5 pm there were no specific jobs that could be assigned to her, and phone calls could not be actioned because there was no one in the office to refer them to. The Claimant says that her job was not about assigning tasks to her - she had regular work in data management that were required to be done each month.

13. A meeting had been scheduled by Ms Quigley in August to review the Claimant's flexible working pattern. However, that meeting did not take place and the Claimant continued to work her compressed hours. On 10th November, Dr Frearson a consultant in palliative medicine and the clinical lead emailed Ms Quigley that *"it was agreed by all of the team that the flexible working for the admin at the CXH site was not working for the team… Now it is months past the end of the trial and feedback from both nursing and medical teams is the same; this does not work for the team – but I note the trial is still continuing. Please can you update myself and Tori on this."* Ms Tori Martin, the lead nurse in the palliative care team also noted that the four-day week administration provision was affecting the service "*at CXH we do need admin five days a week to run the service. Clinicians are having to cover admin work on the Thursday that Iwona is not here. Now that we are down to four CNSs it's just not sustainable*."

14. Ms Quigley left the trust about a week later. Ms Williamson was appointed as the Claimant's interim line manager. In January 2022 Ms Williamson met with the palliative care consultants and nurses, who again raised the issue of the four-day administration service, saying that consultants and clinical nurse specialists needed to remain in the office on Thursday to answer the telephone, reducing the amount of time spent delivering direct patient care. They told Ms Williamson that outside of the core hours of 9-to-5 there was no work to be given to the Claimant other than a small amount of data capture, and occasional minutes of the monthly meetings. Ms Martin followed up on this in an email of on 17th January 2022, asking when the Claimant would be returning to normal office hours, five days a week (1261).

15. Ms Williamson raised the matter with the Claimant in the week beginning 24th January. The Claimant asked to meet with Dr Frearson and Ms Martin before her hours were changed as the Claimant believed that both Dr Frearson and Ms Martin thought that her current hours met the service

requirements. (She also said she wanted HR to be present at any meeting to discuss her working hours.) Dr Frearson responded on 31st January that she was "quite shocked" that the Claimant felt that her hours met the service needs. She said that she and Ms Martin "have both made it very clear that we don't think this and never have – not before the supposed six weeks trial nor during it. Thank you for arranging a meeting with HR – please can be as soon as possible, as the longer this goes on the worse it is becoming. " (1262)

16. Nonetheless it was not until 23rd March 2022 that Ms Williamson sent an email to the Claimant to arrange a meeting to discuss a flexible working arrangement. The Claimant was also told that HR had advised that they did not attend such meetings. The meeting on 4 April 2022 was aborted because the Claimant became very upset and Ms Williamson decided to postpone it. It was rearranged for 25th April with Ms Lewis present.

17. At the meeting on 25th April 2022 the Claimant was told that the current flexible working agreement was not working and needed to be revoked. The Claimant would be given two months' notice before the change was implemented and she could choose either 9-to-5 or 8-to-4, five days a week, as her working pattern. She was also told that she had the right to appeal against this decision once she had received the written confirmation of the decision from the Respondent. The Claimant told them her compressed hours was a permanent arrangement. She became upset. (It is however clear from the documents in the bundle that it was not a permanent arrangement.)

18. Beyond that there is a conflict of evidence as to what happened during the remainder of the meeting. The Claimant says that she remained calm and told them that having an additional day off in the week helped her to manage her mental health and to control her workload. It was her evidence that she said was being discriminated against and asked them to carry out an Equality Impact Assessment. The Claimant also says that Mr Lewis told that her that she could not use the Equality Act unless she had had a disability for one year or more.

19. Ms Lewis denies that. While she accepts that the Claimant referred to anxiety, she had understood the Claimant to be saying that she was anxious about the reduction in her compressed hours and the loss of her protected time (i.e. outside the core hours), rather than that she had anxiety as an ongoing problem. She had said that it was unfair to revoke her compressed hours, but the unfairness related to the fact that Ms Naidoo had a compressed hours pattern. Ms Williamson accepted that the Claimant referred to anxiety but could not recall the Claimant referred to her mental health, although "it was possible". Both say that that the Claimant became extremely upset "crying and shouting at the same time."

20. On balance we accept that the Claimant said that the compressed hours were needed for her mental health, and that she was anxious about the loss of her protected time. We do not accept that she said that her

flexible working request had been due to a disability or an anxiety, nor do we accept that she mentioned discrimination or that she asked for an Equality Impact statement.

21. The Claimant was very upset after the meeting and was advised by one of the consultants to go home. On Monday, 28 April 2022 the Claimant was signed off work sick for two weeks due to "anxiety and emotional distress - work-related." On 10th May there was a further 2-week certificate for a "stress related illness". (507/508)

22. Thereafter the Claimant remained off sick until 21 November 2022. During her absence, Ms Lewis called her twice a week. The Claimant completed a workplace stress assessment which identified the stressors related to being continually interrupted by phone calls during the core working hours and the need for a quiet time to do focused activities. There is no mention of anxiety as a medical condition.

23. During her absence Ms Lewis told the Claimant that she had not yet been given confirmation of the cessation of her flexible working in writing because she had not yet been back to work. Ms Lewis told her that she would not send out this written notification until she was well enough to return to work; but that once she got notification writing she could submit an appeal. The Claimant initially though that she would like to receive the written notification nonetheless, but then changed her mind and advised Ms Lewis that she wanted the written notification to wait until she was well enough to return to work.

24. The Claimant attended a telephone occupational health appointment on 12th July. At that time the Claimant completed a workplace stress risk assessment indicating that the workload and the requirement to answer the telephone was the reason she wished to condense her hours. She also cited unfair treatment in comparison to Ms Naidoo. (513-516) In the referral Ms Lewis commented that it was not possible to reduce her workplace stressors identified as they related to the departmental decision to revoke her current flexible working agreement, which had been effected on the current needs of the service and was being dealt with as an independent process. (526) OH reported that the Claimant remained unfit to work with a "stress reaction" and was likely to remain so until her perception of unfairness was resolved. In the opinion of the OH practitioner ""the issues in this case are not primarily medical". (1102).

25. A stage 1 sickness review meeting took place on 16 August 2022. The Claimant said that she was not sure if she was well enough to return to work because there was no resolution with regard to flexible working arrangement. The Claimant said that the reason for her requesting flexible working was related to anxiety and personal development, and that the constant distraction of dealing with phone calls made it difficult to compete focused work. Ms Lewis offered the Claimant a phased return to work, working four days a week 9-to-5 with a 30-minute lunch break. (557) The Claimant declined this suggesting an 11 am – 7pm pattern.

26. Following the stage 1 sickness review meeting the Claimant's wrote to the Respondent suggesting a number of options all of which involved working from home for part of the working week, which the Respondent did not consider acceptable. (567)

27. A Stage 2 Sickness Review Meeting took place via Teams on 27th September. The Claimant was accompanied by her husband. She said she was not feeling any better, was on stress medication and in therapy. She said that she would be available to return back to work on 15th October, but she could not have a phased return as none of her suggestions had been accepted. The Claimant's concern was that she should have protected time outside of core hours. Ms Lewis, however reiterated that a phased return to work would need to be during core hours to enable the Claimant to get the necessary support from the remaining team. The Claimant was told that if she was unable to return to work on 15 October a further sickness meeting would be convened which could lead to her dismissal.

28. On 12th October the Claimant advised that she would return to work on 18th November. She said that as they had been unable to agree on a phased return, she asked to reduce her working hours for a period of 4 to 12 months on the basis that she worked Monday to Wednesday from 9 a.m. - 7 p.m.. Ms Lewis responded that she should submit a new flexible working application to Ms Williamson.

29. The Claimant submitted a written request for a temporary reduction in her working hours to Ms Williamson on 3 November 2022. (710)

30. Ms Lewis met with the Claimant on 9 November. Ms Lewis stressed that they would be reviewing her workload to ensure that it was manageable within 37.5 hours and would ensure that she did not have to work additional hours to complete her duties.

31. The Claimant has disclosed that she saw a solicitor on 11th November to obtain advice, who advised her that her condition could be considered a disability.

32. In an email of 16th November (664) Ms Lewis informed the Claimant that she would be returning to work on the condensed working hours agreement held prior to sickness absence. As part of a phased return to work, for the first two weeks, she would work Mondays to Wednesdays from 9 to 5 with Thursday and Fridays off.

33. The Claimant returned to work on 21st November. During the return to work meeting the Claimant said that she had a disability that had not previously been mentioned and her compressed hours should be allowed as a reasonable adjustment. She followed this up with an email later that day (679) which stated that she was making an application for reasonable adjustments to temporarily reduce her working hours to compressed days Monday to Wednesday 9- 7.

34. On 24th November Ms Lewis responded to the Claimant in relation to her application for temporary reduction in hours. She said they would not be able to meet the entirety of her request because the Charing Cross service only required cover during core hours. Instead they offered her a choice of 9-to-5 Monday to Wednesday and Friday or 9-to-5 Monday to Wednesday. Ms Lewis said the reduced hours were offered as a reasonable adjustment for her previously undeclared disability. She was asked to respond to this proposal by Friday, 2 December 2022 .

35. The Claimant responded on 2nd December that she declined option 1 and that the second option did not help her to deal with her anxiety disorder (791) and that that she had indicated "to you on many occasions that some time working away from 9-5 would be beneficial to me." She asked for original proposal to be reconsidered. She said that she would be using her annual leave to extend her phased return for the next three months until the end of February 2023.

36. Separately on 1st December the Claimant emailed an application for reasonable adjustments under the Trust's disability policy (760). The application was to work from home some of the time, and compressed hours over a 4-day week. In this application she referred to the fact that she had had anxiety since 2014.

37. The Respondent never sent the Claimant the formal letter revoking her flexible working arrangement, as it had been superseded by a new request.

38. On 7 December Ms Martin emailed Ms Lewis (774) asking for clarification of the Claimant's working hours. She said that she had understood that she was working 9 till 5 Monday to Wednesday but the Claimant had still been at her desk at 6 p.m. When this was queried, the Claimant told Ms Martin that she had finished her two-week phased return and was back working compressed hours. Mr Ephraim (HR) emailed a Ms Callow that this was a conduct issue, and the letter of concern should be issued.

39. On 7th December Ms Lewis informed the Claimant that (i) her phased return had finished (ii) her contracted hours would revert to 9 till 5 , 5 days a week and that she should not work outside the hours (iii) she could use annual leave to reduce her working hours on either option originally presented to her, and should elect which of the reduced working patterns proposed to her she wished to choose (iv) she had the right to appeal that decision. (790). This instruction was applicable immediately and no notice was given. Ms Lewis's evidence was that she understood that the Claimant's new application for reduced hours had superseded her wish to work her original compressed hours. However, we note that this is not really a valid explanation given that the Claimant had expressly been told when her compressed working hours arrangement had been revoked that she would have two months' notice from the date of any formal confirmation and that that it was subject to appeal. The Claimant had only been back at work just over two weeks at

this stage – and on any account it was clear that she did not want to work 9-5 over five days a week.

40. The Claimant responded (326) that she was shocked to hear about "this sudden change to my working pattern" and that she understood she was not to work outside 9-to-5. Ms Lewis responded in turn that the Claimant had still not provided a response, as required, to their proposal in relation to her request for a reduction in working hours. She asked again that the Claimant elect between 9-5 Monday to Wednesday or 9-5 Monday-Wednesday and 9-to-5 Friday. These hours had been offered as a reasonable adjustment and she had a right to appeal within 15 days, but that this would be extended to 30th December.

41. From 7 December 2022– 25 January 2023 the Claimant worked 9 – 5, three days a week, using her annual leave in order to have the two working days off per week. (She also had some annual leave from 22nd December), so that she retained her full-time salary.

42. On 12 December the Claimant wrote to the service saying that she had had to work three hours after 5 p.m. in order to send her grievance to the Respondent's resolution team and asked for those extra hours to be added onto her annual leave. Ms Lewis responded that she was not to work past her contracted working hours and that if she was unable to fulfil any tasks within her normal working hours, she should highlight that to management. However time spent working on grievances should be managed in her own time. (869)

43. On 20th December the Claimant appealed against the 7th December email from Ms Lewis terminating the Claimant's original compressed hours arrangement. She said that the outcome which she desired was to continue with her compressed hours 9-7 Monday – Wednesday and Friday 9 am – 6.30 pm (896). She provided a letter from her GP (882), in which her GP set out that the Claimant had "a long-standing history of anxiety and depression", that the main stressors related to her work environment and working hours and that flexible working hours in the past had been successful in controlling her anxiety. The recent change had led to a deterioration in her mental health with worsening of her mood and panic attacks.

44. The following day she also appealed the decision to reject her request to temporarily reduce her working hours (923) which had been made by way of an application for a reasonable adjustment. (Though her request to reduce her working hours had not been refused - simply her preferred working pattern had been rejected).

45. Ms Lewis provided a management response in which she stated that the needs of the service required the Claimant to work core hours. She had understood that the Claimant was appealing against the refusal of the reduction in working hours made on 3 November 2022 – though it is apparent from the documentation that in fact the Claimant had lodged two separate appeals.

46. In the intervening correspondence between the parties the Claimant clarified (1009) that she was not appealing her decision about a reasonable adjustment (i.e. the reduced hours decision) but was appealing the cancellation of her flexible working request.

47. The Claimant's appeal was heard by Ms Wiles, head of strategic planning and business development on 25th January via Teams. The Claimant was permitted to work from home that day and was accompanied by her husband .

48. Ms Wiles decided to uphold the Claimant's appeal. In a letter dated 27th January Ms Wiles said that, while the fundamentals of the flexible working policy had been followed by management, she did not believe that the work resource allocation across all sites had been considered when ceasing her compressed hours pattern; and that she could return to work on her original flexible working pattern of Monday – Wednesday 9 a.m. – 7 p.m. and Friday 9 a.m. – 6.30 p.m.. Ms Wiles's evidence to the Tribunal was that she considered there had been an inconsistent approach with the application of the flexible working policy because the Claimant's colleague continued to work under a compressed hours pattern and so the Claimant should be provided with the same.

49. Ms Wiles told the tribunal that as she had upheld the appeal under the flexible working policy, any disability alleged by the Claimant had been irrelevant to her decision and this is documented in the appeal outcome letter.

50. Since that date the Claimant continues to work compressed hours as per the appeal outcome. Despite having won her appeal, the Claimant remains unhappy because Ms Wiles did not tell her that her compressed hours pattern had been applied on a permanent basis.

The Law

51. Section 39(5) of the Equality Act 2010 imposes a duty to make reasonable adjustments on an employer. Section 20 provides that where a provision, criterion or practice (a PCP) applied by, or on behalf of, an employer, places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable to have to take in order to avoid the disadvantage.

52. Section 21 of the Equality Act provides that an employer discriminates against a disabled person if it fails to comply with a duty to make reasonable adjustments. This duty necessarily involves the disabled person being more favourably treated than a non disabled person in recognition of their special needs.

53. The phrase 'provision, criterion or practice' is not defined by the Act, but it should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A provision, criterion or

practice may also include decisions to do something in the future – such as a policy or criterion that has not yet been applied – as well as a 'one-off' or discretionary decision.

54. In *Ishola v Transport for London 2020 EWCA Civ 112* the Court of Appeal practice held that the function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee, or its operation, that causes substantial disadvantage to the disabled employee in comparison to others. To test whether the PCP is discriminatory, it must be capable of being applied to others, because the comparison of the disadvantage it causes has to be made by reference to a comparator, including a hypothetical one.

55. Although the concept of a PCP is to be interpreted widely, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the duty to make reasonable adjustments is intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability-related discrimination is made out because the act or decision was not done/made by reason of disability or another relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory practice.

56. The Code of Practice on Employment 2011 (chapter 6) gives guidance e in determining whether it is reasonable for employers to have to take a particular step to *comply with a duty to make adjustments. What is a reasonable step for an employer to take will depend on the circumstances of the particular case.*

57. *In* Environment Agency v *Rowan 2008 ICR 218* and *General Dynamics Information Technology Ltd v Carranza 2015 IRLR 4 the EAT* gave general guidance on the approach to be taken in the reasonable adjustment claims. A tribunal must identify:

- the PCP applied by or on behalf of the employer, or the physical feature of premises occupied by the employer
- the identity of non-disabled comparators (where appropriate), and
- the nature and extent of the substantial disadvantage suffered by the claimant.

58. Once these maters were identified then the Tribunal will be able to assess the likelihood of adjustments alleviating those disadvantages identified. The issue is whether the employer had made reasonable adjustments as matter of fact, not whether it failed to consider them.

59. Paragraph 6.28 sets out some of the factors which might be taken into account in determining whether it is reasonable for an employer to have to take a particular step in order to comply with the duty to make reasonable adjustments. These include whether taking the step would

be effective in preventing the substantial disadvantage, the practicability of the step, the cost to the employer and the extent of the employer's financial and other resources.

60. Para 20 (1) of Schedule 8 to the Equality Act also provides that a person is not subject to a duty to make reasonable adjustments if he does not know, and could not reasonably be expected to know, that the disabled person has a disability and is likely to be placed at a disadvantage by the PCP.

61. The duty to make reasonable adjustments does not apply if the employee is not fit for work, since the duty is in relation to assisting the employee in the workplace, though naturally that does not prevent the employer taking preparatory steps while the employee is off sick.

62. The adjustment contended for need not remove entirely the disadvantage. In *Leeds Teaching Hospital NHS Trust v Foster*, *[2011] EqLR 1075*, when the EAT again emphasised that when considering whether an adjustment is reasonable it is sufficient for a tribunal to find that there would be 'a prospect' of the adjustment removing the disadvantage—there does not have to be a 'good' or 'real' prospect of that occurring.

63. An employer cannot, make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and the extent of the substantial disadvantage imposed upon the employee by the PCP. Thus an adjustment to a working practice can only be categorised as reasonable or unreasonable in the light of a clear understanding as to the nature and extent of the disadvantage. Implicit in this is the proposition, perhaps obvious, that an adjustment will only be reasonable if it is, so to speak, tailored to the disadvantage in question; and the extent of the disadvantage is important since an adjustment which is either excessive or inadequate will not be reasonable.

Indirect discrimination

64. Section 19 of the Equality Act 2010, provides that:

> (1) A person (A) discriminates against another person (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a protected characteristic of B's.
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a protected characteristic of B's if:
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage, when compared with persons with whom B does not share it,
> (c) it puts, or would put, B at that disadvantage, and
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

65. All four conditions in s.19(2) must be met before a successful claim for indirect discrimination can be established. That is, there must be a PCP

which the employer applies or would apply to employees who do not share the protected characteristic of the claimant; that PCP must put people who share the claimant's protected characteristic at a particular disadvantage when compared with those who do not share that characteristic; the claimant must experience that particular disadvantage; and the employer must be unable to show that the PCP is justified as a proportionate means of achieving a legitimate aim.

Submissions

66. For the Respondent Mr Harris submitted that the Claimant was never required to work 9 – 5 Mondays to Fridays. The compressed hours pattern was not brought to end until 7 December 2022, and by then she had been offered a reduction in hours. Nor had the Respondent repeatedly changed the Claimant's working hours and information given to her.

67. There was no substantial disadvantage to the Claimant in requiring her to work 9- 5. The Claimant had not produced any evidence to show that she suffered any disadvantage in the short period when her compressed hours working pattern was not in place.

68. The Respondent had no knowledge that the Claimant was or might be disabled until 21st November when they were aware that her condition might amount to disability. However they were not aware of any substantial disadvantage caused to the Claimant from having to work 9-5.

69. In any event it was not a reasonable adjustment. A compressed hours working pattern did not meet the needs of the service.

70. The submissions were repeated, and applied equally, to the claim for indirect discrimination. In addition the PCP of requiring the Claimant to work 9 to 5 was objectively justified.

71. For the Claimant Mr Ferreira submitted that the Claimant had suffered a detriment from 25th April at the point the decision to end compressed hours was announced to her and referred the Tribunal to *Glover v Lacoste UK Limited, 2023 UKEAT 4.*

72. The Respondent repeatedly changed the Claimant's working hours and information. It did not send the Claimant the letter from Ms Williamson after 25 April decision, nor did they send it once the Claimant was back at work. It required the Claimant to leave the office by five .

73. The Claimant was at a substantial disadvantage because she had no protected periods of time away from the phone calls and no time to complete her work. Working 9-to-5 meant that she worked in a state of heightened anxiety.

74. The Claimant made the Respondent aware of her disability through her request for reasonable adjustments. They failed to take reasonable steps to avoid that disadvantage and the Claimant was clear about what she needed in terms of reasonable adjustments.

75. As for indirect discrimination the Respondent required the Claimant to work from 9-to-5 which put the Claimant at a disadvantage because she could not work flexible hours or have hybrid working arrangements or allow her protected time away from telephone calls. It was not a proportionate means of achieving a legitimate aim.

Conclusions

76. Did the Respondent from 25 April 2022 until the date of the presentation of the claim require the Claimant to work elsewhere five days 9 a.m.to 5 p.m.?

77. On 25th April 2022 the Claimant was given notice that her compressed working pattern was to come to an end two months after she had received the written notification of the change. She was given the right to appeal against that decision. Thereafter she was on sick leave until 21 November and the formal notice was not sent to her.

78. In his submissions Mr Ferreira submitted that it was wrong to say that the PCP was not applied to her until it was enforced. He referred the Tribunal to *Glover v Lacoste 2023 EAT 4*.

79. In *Little v Richmond Pharmacology Ltd 2014* ICR 85 the EAT found that a successful internal appeal could "cure" a prima facie case of indirect sex discrimination arising out of employer's initial rejection of a flexible working application. The employment appeal tribunal found that the claimant in that case did not suffer a disadvantage because the original decision had been overturned on appeal. In Glover, however, the claimant's request for flexible working had initially been rejected and her appeal was only partially successful. She resigned. However, later, on a reconsideration, the Claimant's request was agreed. The EAT found that the Claimant had suffered disadvantage even though she had not returned to work. *Little* was distinguished because the original decision had been provisional, and had been expressly stated to be subject to appeal.

80. In this case, the Claimant was told on 25th April, that the revocation of her flexible working pattern would not start until two months after she had received the formal notice of the change, and that the decision was expressly subject to appeal. We conclude that the facts of this case are more akin to that of Little, than that of Glover. There was a discussion about whether or not the Respondent should send her the formal notice while she was off sick, and Claimant agreed with the Respondent that it would not. On that basis the Claimant understood that the revocation of her flexible working arrangement would not take place until two months after her return to work from sick leave and was subject to appeal. Ms

Lewis confirmed this on 16 November.

81. We find that on 25th April, the PCP requiring the Claimant to work 9- 5 over 5 days a week had not yet been applied.

82. However, on 7 December, less than three weeks after the Claimant returned to work (790) Ms Lewis specifically told the Claimant that her contracted hours would revert to 9-5 Monday to Friday. This was contrary to the representation which had made her previously that the revocation of her flexible working would not take place for some two months after she had received formal notice.

83. Ms Lewis told the Tribunal that she had understood that the Claimant's subsequent application to reduce her working hours had superseded the compressed hours that the Claimant was on - but we have not seen any evidence to suggest that that would have been the case. In any event the Claimant had declined the Respondent's offer of reduced working hours. Thereafter although the Claimant used her annual leave in order to work a shorter working week, she was not allowed to work outside of core hours.

84. Mr Harris submits that on 25th April the Claimant had been given the option of working 8 am – 4 pm (rather than 9-5), so that she was never required to work 9-5, 5 days a week. However, as has been stressed by the appellate courts, a list of issues is not a pleading. In the Claimant's particulars of claim, (15) the Claimant makes it clear that what she sought as a reasonable adjustment was allowing her to compress her full-time hours into a four-day week and to allow her to have protected time. Extrapolating the PCP from that pleading, we understand that what the Claimant was really saying, was that the requirement to work five days a week and without an element of protected time put her at a disadvantage.

85. On 7 December Ms Lewis emailed the Claimant with a clear instruction that her contracted hours would revert to 9-5 and that she could not work outside those core hours.

86. We therefore find that the Claimant was required to work 9 a.m. – 5 p.m. Monday- Friday between those dates. Using annual leave to take some days away from work does not mean that she was not working 9-5, 5 days a week.

87. We do not accept that the Respondent applied a PCP of "repeatedly changing the Claimant's working hours and the information given to her about working hours". First, as Mr Harris submits, a PCP must be capable of being applied to others. In this case the Claimant's complaint is specific to her own set of circumstances. In any event we do not accept that the Respondent did repeatedly change her working hours, or the information given to her. Her working hours were changed once - on 7 December – and then changed back following her successful appeal. On her first return to work she was allowed to use 30 hours of time without loss of pay, to allow for a phased return to work.

88. Did the requirement to work 9-5 Monday to Friday put the Claimant at a substantial disadvantage when compared to persons who were not disabled?

89. This was a trickier question, and the Tribunal has discussed this at length. There was no objective medical evidence to support the contention that the 9-5 requirement put the Claimant at a substantial disadvantage. On the other hand the Claimant's clear evidence was that she needed to have working time away from the core hours of 9-5, so that she could focus on her data management and other tasks. Not having this time, as well as a day off in the working week heightened her anxiety and made her ill. She had not been employed as a telephonist, and it was not the Claimant's only function to answer the telephone.

90. Ms Lewis evidently regarded this as a workload issue. She thought that the issue could be sorted by reviewing the Claimant's workload. At the Stage 2 sickness review Ms Lewis told the Claimant that on her return she would undertake a review of her workload, alongside a stress risk assessment (591 and 593). The stress risk assessment also indicated a review of her work was necessary. However by 25th January this review had not yet taken place, and Ms Lewis had told the Claimant that she had limited availability to undertake this (822). It may well have been that adjusting the workload would also have alleviated the Claimant's anxiety- but this had not taken place by the time of the Claimant's successful appeal. Ms Lewis also told the Tribunal that the Claimant could have worked part of her core hours in a quiet room, but from the evidence we have heard, this does not appear to have been proposed to the Claimant at the time, (nor is it clear how this would have met the clinical objections).

91. Many individuals will be stressed by constant interruptions and a high workload. Equally it is not enough that her colleague was allowed to work compressed hours as unfairness alone does not mean that the Claimant was at a substantial disadvantage in comparison to non disabled employees. The issue is whether the Claimant was at a substantial disadvantage in comparison to an individual in her position without anxiety. On balance we accept the Claimant's evidence that she was so disadvantaged. Substantial in this context means more than minor or trivial. The revocation of her compressed hours had caused a stress reaction which caused her to be unwell for a lengthy period. The Claimant's position that she needed time away from core hours and a day off in the week had been a reasonably consistent theme in her discussions with Ms Lewis at the time. We accept that the continual interruptions of the telephone prevented the Claimant from focusing on the other tasks which she had, and that because of the Claimant's anxiety, this put her at a substantial disadvantage in comparison to those that were not disabled.

92. Did the Respondent's know, or could it reasonably have been expected to know that the Claimant was disabled and that the PCPs put her at a disadvantage? The Respondent has conceded that the Claimant was

disabled at all material times, but have denied knowledge, actual or constructive.

93. We have found that no PCP was applied to the Claimant until 7 December so is unnecessary to consider whether or not the Claimant knew or could have known of the Claimant's disability before this date. However, by 7 December the Claimant had been off work for over six months, and, during the return-to-work meeting on 21st November the Claimant said she had a disability and asked for reasonable adjustments and Ms Lewis responded that the offer of a reduced working pattern was made as a reasonable adjustment.

94. Section 6 of the Equality Act provides that determining whether an individual has a disability, and impairment is long-term if it has lasted 12 months or "is likely to last" for at least 12 months. In *SCA Packaging Ltd v Boyle 2009 IRLR 746*, the Supreme Court determined that in that context likely means "could well happen", rather than more likely than not. By 7 December the Claimant had been off work for six months, with an occupational health report reporting that this was related to issues at work. By then we are satisfied that the Respondent would or should have been on notice that the Claimant's impairment was likely to last 12 months and that it was substantial (in the sense of more than minor or trivial) and accordingly that she was disabled.

95. Was the Respondent aware or should they have been aware that the requirement to work 9-5 put the Claimant at a substantial disadvantage in comparison to those who were not disabled? During this hearing the Claimant has emphasised that time away from the core hours was required to alleviate her symptoms of anxiety. This was less clearly expressed at the time. Although the Claimant had referred to the need to have working time away from phones for concentrated work this was given as one of many reasons. When the Claimant made her application for reduced working hours in March 2021 the reason for that application was given as "in order to help me return to work" (616). Although the Claimant does say the reduced working hours is in order to help her deal with her anxiety and gain strength to return to work full-time, she does not indicate that the key adjustment which she seeks is not to work core hours. In replying to the Respondent's offer of reduced hours – though not the exact hours she sought - the Claimant simply said that "some time working away from 9 to 5 would be beneficial to me".

96. At times some of the Claimant's correspondence comes across as simply demanding a solution that she wants, rather than as explaining how the reduced/compressed hours will alleviate her anxiety.

97. Nonetheless, by 7 December 2022 the Claimant had been clear that she sought time away from the core hours and that her anxiety was exacerbated by having to work exclusively during the core hours. In her 1 December application for reasonable adjustments the Claimant said that the frequent interruptions increased her stress and anxiety. More generally, in meetings with Ms Lewis the Claimant had repeatedly

referred to the need for time away from the phones for concentrated work.

98. As we have found that the PCP was not applied before this date, it is not necessary to consider whether the Respondent had actual or constructive knowledge of any disability before then. However for the record, and for completeness, we would not have considered that the Claimant's brief references to anxiety before 21st November would have given them constructive knowledge that she might be a disabled person within the terms of the Equality Act 2010. Her fit notes generally referred to work related stress, which might indicate an issue with workload rather than anxiety.

99. On 1 December the Claimant had submitted her "request for reasonable adjustments" (760). In that document the Claimant says that a large part of the reason that she had requested a compressed working hours pattern had been to manage her anxiety. She also said that having some working hours without phone calls helped because the frequent interruptions increased her stress and anxiety. (762).

100. By 7 December 2022 therefore we find that the Respondent was aware that the Claimant was placed at a substantial disadvantage by working 9-5, 5 days a week.

101. Was the proposed adjustment reasonable? It is clear from the correspondence in the bundle that, in April 2022, the clinical staff were of the opinion that the Claimant's compressed hours working pattern was not meeting the needs of the service. Since the Claimant's successful appeal the Respondent has been required to engage a temporary worker to cover the Claimant's position on the day that she is not working.

102. Ms Williamson and Ms Lewis both gave evidence that the Claimant's hours continue to be a struggle for the service. Ms Williamson told us that the Service Leads remained adamant that the Claimant's working pattern did not fit the needs of the service, that there remained continued significant challenges with administrative support for the palliative care team and that its overall effectiveness was an issue, together with significant additional costs.

103. On the other hand, Ms Wiles, who heard both the Claimant's viewpoint during her appeal, and the management case, had concluded that her compressed working hours pattern could be accommodated. She considered that the work resource allocation across all the sites had not been properly considered before stopping the Claimant's compressed working hours, and that as the Claimant's colleague was able to work under a compressed hours pattern, the Claimant should do the same. If it was compressed hours pattern was something the Respondent could accommodate without considering her disability, it must be a reasonable adjustment to alleviate a substantial disadvantage.

104. We are also satisfied that the compressed hours would be effective in

alleviating the disadvantage, although we note that in any event it is sufficient for us to find that there would be a prospect of the adjustment removing the disadvantage. The Claimant has returned to work and has, as far as we are aware, been working effectively. The Respondent accepts that there have been no issues with the Claimant's performance.

105. We conclude therefore that the adjustment which the Claimant required was a reasonable one.

106. Indirect discrimination. As we have said, we have found that the Respondent applied a PCP of requiring her to work 9-5, 5 days a week from 7 December 2022 until 25 January 2023. For the same reasons as set out above we are satisfied that it put the Claimant at a substantial disadvantage. Nor can the Respondent show that it is a proportionate means of achieving a legitimate aim. We accept that the efficient and effective administration of the palliative care department during service hours is a legitimate aim. However, as Ms Wiles concluded that the Respondent was able to achieve this with a compressed working pattern, the removal of that pattern cannot be proportionate.

107. General points Despite having won her appeal, the Claimant remains unhappy because the Respondent's flexible working policy requires such arrangements to be reviewed at least annually. However we should stress that this judgment does not suggest that the Respondent has any duty to make this arrangement permanent. The situation must always be judged by the facts as they are at the relevant time. The reasonableness of an adjustment may change as the needs of the service change. The Respondent has now had to engage a temporary worker to work on the day that the Claimant does not work, a measure that did not appear to have been contemplated when Ms Wiles made her decision. The Claimant's anxiety may improve, or her workload may be reviewed and reduced so that she no longer needs, or needs less, protected time. Different adjustments may assist with her anxiety.

108. This has been a borderline decision. The Respondent made considerable efforts to assist the Claimant during the process; and although we have found that they did not make reasonable adjustments, we consider that Ms Lewis was genuinely trying to assist the Claimant, while at the same time balancing the needs of the service.

109. It is conceded that there is no financial loss to the Claimant as she has remained employed on a full-time basis throughout. She is, however entitled to an injury to feelings award. The parties are encouraged to agree terms as to the amount of this award, but if they are unable to do so, a remedy hearing has been listed to take place on 27th February 2024. If it is of assistance to the parties our initial assessment of this case is that this is likely to fall within the lower Vento band, but this can only be a provisional assessment and will depend on the evidence at the remedy hearing.

110. If either party is unable to attend a remedy hearing on 27th February 2024

they should notify the Tribunal no later than 4th January 2024 with an explanation of the reasons why they cannot attend, and a list of dates to avoid.

_____
Employment Judge Spencer
19 December 2023

JUDGMENT SENT TO THE PARTIES ON

19/12/2023

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FOR THE TRIBUNAL OFFICE