# EMPLOYMENT TRIBUNALS

**Claimant:** **Mrs P Armstrong**

**Respondent:** **HMRC**

**HELD AT:** **Newcastle ET (by CVP)**

**ON:** **15, 16, 17 and 18 January 2023**

**BEFORE:** **Employment Judge McCluskey, Ms E Wiles, Ms D Winship**

**REPRESENTATION**

**Claimant:** **In person**
**Respondent:** **Represented by Mr J Duffy, Counsel**

**JUDGMENT** having been sent to the parties on 24 January 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided

# REASONS

**Introduction**

1. The claimant is making the following complaint: failure to comply with a duty to make reasonable adjustments in breach of sections 20 and 21 Equality Act 2010 (EqA).

2. Prior to the final hearing the respondent accepted that the claimant was disabled as defined by section 6 Equality Act 2006 at the time of the events that the claim is about, by reason of her thyroid and breast cancer and her multifactorial medical fatigue. The respondent also accepts that they had knowledge of her disabilities at all relevant times,

3. Parties had prepared and exchanged witness statements prior to the final hearing.

4. There was a joint bundle of documents extending to around 460 pages. References to page numbers are to pages in the bundle.

5. The claimant gave evidence on her own behalf. Peter Woolford – claimant's line manager from around January 2021 to June 2022; Christine Glynn – claimant's line manager from around July 2022 and Nicola Adamson – appeal manager gave evidence on behalf of the respondent.

## Issues

6. The final list of issues to be determined by us was set out in the case summary following the case management preliminary hearing on 15 June 2023. The list is set out below in the Appendix. We referred parties to this list of agreed issues at the outset of this final hearing. We reminded parties that these were the issues and the only issues which the Tribunal would determine. The parties again agreed this list of issues.

7. At the case management hearing on 15 June 2023, it was decided that this final hearing would deal with liability only. Remedy (if necessary) was to be dealt with at a later date.

## Findings in fact

8. We have only made findings in fact necessary to determine the issues. All references to page numbers are to the paginated joint bundle of documents provided to us.

9. The claimant was employed by the respondent from 12 January 1988, most recently as an administrative officer. At the time of presenting her complaint to the Tribunal she remained employed by the respondent. Her employment terminated subsequently. She does not bring a claim about termination of employment.

10. The claimant is a disabled person for the purposes of the Equality Act 2010. She has the following disabilities: thyroid cancer, breast cancer and multifactorial medical fatigue. The respondent had knowledge of these disabilities at all relevant times. In her evidence the claimant referred to her multifactorial medical fatigue as “chronic fatigue”.

11. On 28 September 2021 the claimant and Peter Woolford (PW), her line manager, had a meeting using “Working in an office – discussion toolkit” as the framework (p152). The toolkit set out the respondent’s approach to a return to office working for staff. It stated, “Before the end of September 2021, we are encouraging colleagues in Scotland and England to try out working in your office again”.

12. At that meeting the claimant’s concerns about returning to work in the office were recorded as follows: “Concerns raised over health (has been advised

homeworking is better for her condition); using Access to Work in new hours (7:45 start will hit rush hour traffic from Prudhoe); unable to lie down when fatigued in the office, but can currently have a nap in lunch breaks while at home."(p155)

13. Prior to covid the claimant had had used a taxi under the respondent's Access to Work Scheme to travel to and from the office.

14. The claimant made an application for home working on 29 September 2021 (p163). She wrote "I have had two ear operations, and I've unfortunately had cancer twice which resulted in two major operations, this has led to me suffering from chronic fatigue and I have tinnitus which adds to my extreme tiredness massively" (page 164).

15. The claimant also wrote in her application "Working from home [due to covid] is also helping as I'm able to sleep or rest properly for short periods throughout the day which I can't do in the office and is extremely helpful to my wellbeing. I also have to pace everything I do, so being at home means I can do things such as, getting up, dressing, getting generally ready in my own time which greatly helps me and which I can't do if I have to work from the office and be in for 07:45. Also, not having to travel an hour each way would be a huge help too, as my chronic fatigue is all about pacing everything in my life and 2 hours is a long way to travel 1 to 2 days a week even with access to work, and now the start time has been changed to 7.45 I will hit peak hour traffic making the journey longer. My cancers have also left me with high levels of anxiety for which I take medication and being at home helps to keep this down which also adds to my wellbeing. It would be extremely beneficial for me to work from home if not on a fulltime basis as much as possible for the reasons I've mentioned above, but fulltime would be extremely beneficial as my condition will not get any better unfortunately." (page 165)

16. The claimant also wrote in her application "It will have no impact on my team or the business as the work I do is work which can be done anywhere and on your own without needing any one around you." (page 166)

17. The claimant was absent on special bereavement leave from around 4 October 2021 until 13 October 2021.She was then absent on sick leave from around 18 October 2021 to 14 November 2021 and again from around 19 December 2021 and to 30 January 2022. During that time her application for home working made on 29 September 2021 was not progressed.

18. In around January 2022 the respondent announced that a new flexible way of working was to be introduced to encourage staff to return to the office three days per week.

19. Around the same time the respondent introduced its Contractual Home Working Policy (pages 80 – 90). This policy stated that "most colleagues will work most of the time in the office named in their contract of employment, with flexibility to work at home for around 2 days a week under the balancing home and office working policy" (page 81). The aims of requiring staff to work in the office were stated to include because "everyone needs to interact with each other face to face some of the time, sharing our knowledge and expertise and learning from each other" (page 80).

20. The policy also stated "However, there are some occasions when colleagues may need to work differently due to exceptional personal circumstance, and HMRC is committed to supporting all colleagues who need to work at home all of the time to do so where all other flexible arrangements are insufficient to meet their needs, and where the only other alternative would mean an end to employment. This may be because of a disability and complex needs meaning we are unable to meet these in an office...". (page 81).

21. As a result of the introduction of the Contractual Homeworking Policy, PW asked the claimant to submit a new application for home working. The claimant did so on 16 February 2022 (page 169) ("February 2022 home working application").

22. In her February 2022 home working application the claimant said "I have a lot of health conditions which do not enable me to work a lot of workloads, as I have to pace whatever I do in my life, I have had a recent OH referral, which has enabled me to continue working by making many workplace adjustments, without this I would not off been able to continue working. I have however found that homeworking for me is making a big difference to my wellbeing, and conditions as I can manage them better from home. I get up when my body is able to as my worst condition is chronic fatigue, I can take breaks when I need to. My stress level is down as I don't have to worry about travelling to work and back which puts 2 hours to my working days and makes my fatigue extreme." (page 170)

23. In her February 2022 home working application the claimant asked for homeworking for all of her working hours, "Monday 4 hours, Tuesday and Wednesday 8 hours 30 minutes which is what I work now" (page 171) and "As soon as possible, as at present I am very stressed worrying about returning to the office, as I know this will make my conditions worse, just before Covid 19 I had to reduce my hours [to 2 days] due to not being able to do 3 days as I was becoming more and more tired from week to week (page 171). I have found I do more work from home. In the last 2 years I have worked very well on my own, as my work does not need input from other colleagues and I know it well. I know more about IT now as well as I have had to do it myself, which is a great

bonus. I always participate and join in team meetings and keep in close contact with my manager." (page 171)

24. In her February 2022 home working application the claimant said "If for any reason I need to attend the office say for training or a specific meeting, or to pick up equipment etc, I am very happy to do this." (page 171)

25. On 10 May 2022 PW met with the claimant to discuss her February 2022 home working application. Ms Cullen attended as a note taker. The claimant chose not to be accompanied.

26. In the meeting the claimant said "working from home had reduced her travelling time and if HMRC put that back in her life after 2 and a half years it would impact how many hours she could work.." (page 206)

27. In the meeting the claimant referred to two previous OH reports, the latter of which had been prepared in 2018. PW said that the OH reports were not current and said in terms of adjustments he needed to consider if anything had changed since those previous reports. The claimant said things had changed since the previous OH reports. She said she had chronic fatigue. She said she had seen consultants and specialists about this. They advised her fatigue was due to her cancer and it was too much for her body. She had been working with the CRESTA Clinic for her chronic fatigue and will remain 'on their books' forever. She said once she had got her head round the chronic fatigue, she had put a lot of working into pacing her life. She said she needed to pace herself with everything and at work she has stuck to repetitive work which is familiar to her. (page 206/ 207).

28. At the meeting the claimant said that if the door was closed on homeworking "it would make my working week longer and this would in turn make my fatigue worse. As for my hours just before covid I had to reduce them due to the fatigue from 3 days to 2 days as it had been too much for me. Only increasing them during covid by 4 hours as I did not have the worry of travelling, getting ready, etc" (page 209)

29. PW proposed that an up to date OH report should be obtained, and the claimant consented to this.

30. The claimant thereafter attended an OH referral and the OH doctor produced a report dated 13 June 2022 (page 218) (June 2022 OH report).

31. The June 2022 OH report said "Based on information provided by Mrs Armstrong regarding the health I believe she is fit for work albeit with adjustments to support her at work. She will continue to require short regular breaks to manage her fatigue and she may struggle to take such breaks in the

office environment for the reasons already mentioned the body of report. It will be best to avoid increasing the number of days she is at work as it will not allow sufficient time for rest and recovery" (page 219).

32. The June 2022 OH report also said "As she has said, it is likely that the effort of preparing for work as well as the one-hour commute to work would impact on her energy levels and in turn her ability to cope with her current working hours. She is therefore likely to benefit from working from home on a long-term basis if this can be accommodated by her employer. There is a potential for absences in relation to flareups of her chronic fatigue. This would need to be taken into consideration when managing her attendance at work. You may wish to continue allowing her to pace activities as this would enable her to manage her fatigue. Ultimately, it is for the organisation to determine whether these adjustments are reasonable and the extent to which they are achievable. In response to your specific questions, from what Mrs Armstrong told me about her health, it appears there has been a deterioration of her health conditions since her last referral to occupational health. I have already discussed possible ways to support her at work". (page 219).

33. On 13 September 2022 Christine Glynn (CG) met with the claimant (page 231) to discuss her February 2022 home working application and the June 2022 OH report. CG proposed other options with the claimant as an alternative to home working for all her contracted hours.

34. CG proposed "Only work in the office 2 days per month on your short day (Monday)". The claimant said she was worried this would cause her anxiety and she did not want to take any more medication as her body was already "hammered through taking medication". She said she would not feel comfortable going into a rest room to take her breaks and it would also add to her anxiety. She said if she had to come into the office, she would definitely have to take more medication. The claimant referred to the Access to Work Scheme which she had used before the pandemic which provided a taxi to take her to and from the office. She said there were no local taxi firms willing to take on the HMRC contract so she had to use Blueline [taxi service] who are not reliable, Sje has to wait more than 20 mins outside for them adding more time to her day which affects her chronic fatigue.

35. CG proposed changing the claimant's working pattern from Monday, Tuesday, Wednesday to Monday, Wednesday, Friday. The claimant said she did not want to change the way she works now as it works for her." (page 231). The claimant explained that pacing her week by working in the first half and allowing the second half for rest worked for her.

36. The claimant told the respondent that "pacing" to manage her condition included eliminating as many tasks as possible during the day to conserve

energy for the remaining tasks. Working from home meant she could eliminate the tasks of getting ready and travel to the office.

37. On 13 October 2022 CG wrote to the claimant with the outcome of her February 2022 home working application. CG refused the claimant's request for homeworking. The letter said "as I feel that all the other options available to help support you have not been fully explored.... "My rationale for declining your request was primarily down to the fact as I explained to you that as part of the PACR agreement contractual home working is a last resort and when complex needs cannot be met within the HMRC workplace." (page 255)

38. The Pay and Contract Reform (PACR) agreement was a pay and contract reform offer made to all staff, which included a requirement for office working for 60% of working hours.

39. The letter set out the options which CG had discussed with her, the claimant's response to those options and why the respondent did not support the claimant's responses. The letter said "I understand and appreciate that you are worried that coming back into the office could cause your anxiety to start up again and that you don't want to take any more medication for this as you feel your body has taken enough through taking medication and that you would not feel comfortable using the rest room to take your breaks as this could add to your anxiety as you feel embarrassed, I have explained in my e-mail on the 5th October 2022 that PAM Assist could help with strategies to help overcome/cope with this. I have explained to you we can accommodate options of you working on quiet days in the office such as Mondays. We can explore other areas where you could work from within BPV where a quiet room/ Wellbeing room was more accessible to you. I have discussed the options to you about spacing out your working days in the work, working Monday, Wednesday and Friday as a result of your chronic fatigue, but you have informed me that you do not wish to change those days as you have other commitments such as being a carer for your mother whom you travel to by Taxi taking you 20 to 30 minutes.... I have studied your performance statistics over a period of time, and I have not discovered anything of a significant concern where your performance is impacted by Chronic Fatigue. I am not discounting the fact that your conditions have deteriorated including Chronic Fatigue and I am happy to support you through various adjustments, but you have declined them all without any attempt at them. You did explain to me that Access to Work did not work well for you as the Taxi Companies could let you down adding more time to your day which affects your Chronic fatigue. I have made it clear to you as you are not currently undertaking telephony function, we can be more flexible with your start time and finish times, providing you assurance in writing via email that no action will be taken if you did arrive late than expected as long as you communicated to myself on your whereabouts. I did assure you that a flexi credit is also available if necessary to support you on those occasions. I did

explain in the e-mail on the 5th October 2022 that we could explore different taxi company and possibly Uber taxi who have an app where you can track your driver and could book them in advance, but you have continuously declined all measures. I asked you about your working pattern and if you would like to change it you said no as it works for you" (page 256).

40. On 29 November 2023 Nicola Adamson (NA) met with the claimant to discuss her appeal against the decision to refuse her February 2022 application for home working.

41. On 7 March 2023 NA wrote to the claimant with the outcome of her appeal. She upheld the claimant's appeal. She said "*O*n review of the information provided I feel the decision manager did take the OH report into consideration. However, I have taken into account the procedural error and I feel the decision was not proportionate. On this basis I am upholding your appeal and agree your request for contractual home working." (page 364) "This means that the original decision made to decline request for contractual home working by Christine Glynn is deemed unreasonable based on your personal circumstances and the additional evidence you have supplied to me for this appeal. Reasons for my decision I considered the following: • OH advice. • Information you provided in the meeting. • Your personal circumstances and the difficulties you face". (page 365)

42. The claimant submitted a statement of fitness for work dated 14 October 2022 for work related stress. She remained absent for work related stress until 20 April 2023. The claimant submitted a statement of fitness for work dated 15 April 2023 for work related stress, anxiety disorder, fatigue and tinnitus for the period 17 April 2023 to 15 June 2023. The claimant submitted a statement of fitness for work for fatigue thereafter until 11 September 2023. The claimant did not return to work for the respondent. She was granted ill health retirement on around 5 September 2023.

**Observations on the evidence**

43. We have only made findings of fact in relation to matters which are relevant to the legal issues to be decided. Given the passage of time it is inevitable that memories will have faded on certain aspects and the contemporaneous documentary evidence to which we were referred in the bundle has therefore been of assistance to us in making our findings of fact.

44. In relation to the material facts as found, there were no significant areas of dispute between the parties which we required to resolve. In the letter of 13 October 2022 CG stated that the claimant did not want to change her working days Monday – Wednesday as she had other commitments such as being a carer for her mother to whom she travelled by taxi taking around 20 to 30

minutes. The claimant's evidence was that she did not wish to change her working days Monday – Wednesday as, for pacing reasons, to manage her fatigue it was better for her to work three consecutive days than to stretch out her working week. We accepted this evidence of the claimant. We also accepted that the claimant had explained "pacing" to the respondent, by working Monday – Wednesday prior to the decision being made on 13 October 2022 and that they were aware of this explanation. We accepted the claimant's evidence that she had not told CG the reason for wishing to work Monday – Wednesday was because of caring responsibilities and that this had been a misunderstanding on CG's part. We also preferred the evidence of the claimant that she had not told CG she travelled to her mother by taxi. The claimant said she had never taken taxis to her mother. In the evidence before us that matter was not disputed by the respondent.

45. The claimant in cross examination asked witnesses about the accuracy of certain aspects of the minutes of meetings. None of these matters pertained to material facts as found.

46. We found the claimant to be straightforward and truthful in her evidence. We accepted the evidence which she gave to us about her medical condition, the impact of her chronic fatigue, how she managed it and what she could and could not do. This evidence was consistent with what she had told the respondent during its relevant meetings with her and as recorded in our findings in fact. We therefore accepted that what she had told the respondent about her medical condition, the impact of her chronic fatigue, how she managed it and what she could and could not do was accurate. In short, we accepted the claimant's evidence on these matters in preference to CG's assessment of what the claimant could and could not do.

**Relevant law**

47. Sections 20 and 21 EqA provide as follows: "*20 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....*"

48. *"21 Failure to comply with duty (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...."*

49. Section 39 EqA provides as follows: "39 *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. …*"

50. Section 123 (1) EqA provides as follows: "*Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable*". For the purposes of this section (a) conduct extending over a period is to be treated as done at the end of the period.

51. Section 136 EqA provides as follows: "1*36 Burden of proof If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision*."

52. Section 212 EqA provides as follows: ""*212 General Interpretation In this Act - ….'substantial' means more than minor or trivia*l".

53. Schedule 8 EqA paragraph 20 provides as follows: "*Part 3 Limitations on the Duty 20 Lack of knowledge of disability, etc.(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—... (b) [in any case referred to in Part 2 of this Schedule] that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."*

54. Guidance on a complaint as to reasonable adjustments was provided by the EAT in **Royal Bank of Scotland v Ashton [2011] ICR 632** and in **Newham Sixth Form College v Sanders [2014] EWCA Civ 734**, and **Smith v Churchill's Stair Lifts plc [2005] EWCA Civ 1220** both at the Court of Appeal. These cases were in relation to the predecessor provision in the Disability Act 1995. Their application to the 2010 Act was confirmed by the EAT in **Muzi-Mabaso v HMRC UKEAT/0353/14**. The guidance given in **Environment Agency v Rowan [2008] IRLR 20** remains valid, being that to make a finding of failure to make reasonable adjustments there must be identification of, relevant for the present case: (a) the provision, criteria or practice applied by or on behalf of the respondent; and (b) the nature and extent of the substantial disadvantage suffered by the claimant.

55. Mr Justice Laws in **Saunders** added: "*the nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustment necessarily run together. An employer cannot … make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and extent of the substantial disadvantage imposed upon the employee by the PCP*."

56. More recently in **Rakova v London North West Healthcare NHS Trust [2020] IRLR 503, EAT**, Eady J reiterated that what the ET must do is firstly identify the PCP applied by or on behalf of the employer, and then go on to consider the nature and extent of the substantial disadvantage suffered by the claimant or which would otherwise be suffered by the claimant . She held (at [48]): "*For my part, I cannot see that it can be assumed that a desire to achieve greater efficiency does not reflect the suffering of a substantial disadvantage. Whilst it might be that a Stakhanovite desire for greater productivity would be entirely unrelated to any disadvantage suffered by the employee in question, it is also possible that, where the disability in question means that an employee is unable to work as productively as other colleagues, adjustments to enable her to be more efficient would indeed relate to the substantial disadvantage she would otherwise suffer. …*"

57. The nature of the duty under sections 20 and 21 was explained by the EAT in **Carranza v General Dynamics Information Technology Ltd [2015] IRLR 43** as follows: "*The Equality Act 2010 now defines two forms of prohibited conduct which are unique to the protected characteristic of disability. The first is discrimination arising out of disability: section 15 of the Act. The second is the duty to make adjustments: sections 20–21 of the Act. The focus of these provisions is different…… Sections 20–21 are focused on affirmative action: if it is reasonable for the employer to have to do so, it will be required to take a step or steps to avoid substantial disadvantage*."

58. There is a two-stage process in applying the burden of proof provisions in discrimination cases, which may be relevant to the issue of whether the respondents applied a PCP to the claimant, as explained in the authorities of **Igen v Wong [2005] IRLR 258** and **Madarassy v Nomura International Plc [2007] IRLR 246**, both from the Court of Appeal. The claimant must first establish a first base or prima facie case by reference to the facts made out. If she does so, the burden of proof shifts to the respondent at the second stage. If the second stage is reached and the respondent's explanation is inadequate, it is necessary for the tribunal to conclude that the claimant's allegation in this regard is to be upheld. If the explanation is adequate, that conclusion is not reached.

59. The application of the burden of proof is not as clear as in a claim of direct discrimination. In **Project Management Institute v Latif [2007] IRLR 579**, Mr

Justice Elias, as he then was, said this: “53 ……It seems to us that by the time the case is heard before a tribunal, there must be some indication as to what adjustments it is alleged should have been made. It would be an impossible burden to place on a respondent to prove a negative; that is what would be required if a respondent had to show that there is no adjustment that could reasonably be made. Mr Epstein is right to say that the respondent is in the best position to say whether any apparently reasonable adjustment is in fact reasonable given his own particular circumstances. That is why the burden is reversed once a potentially reasonable adjustment has been identified. In our opinion the paragraph in the code is correct. The key point identified therein is that the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made. We do not suggest that in every case the claimant would have had to provide the detailed adjustment that would need to be made before the burden would shift. However, we do think that it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not.”

60. **Jennings v Barts and the London NHS Trust UKEAT/0056/12** held that **Latif** did not require the application of the concept of shifting burdens of proof, which '*in this context*' added '*unnecessary complication in what is essentially a straightforward factual analysis of the evidence provided*' as to whether the adjustment contended for would have been a reasonable one.

61. The reasonableness of a step for these purposes is assessed objectively, as confirmed in **Smith v Churchill [2006] ICR 524**. The need to focus on the practical result of the step proposed was referred to in **Royal Bank of Scotland plc v Ashton [2011] ICR 632**.

62. We also considered the terms of the Equality and Human Rights Commission Code of Practice on Employment, the following provisions in particular:

63. Knowledge 6.19 For disabled workers already in employment, an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment.

64. Substantial disadvantage 6.15 The Act says that a substantial disadvantage is one which is more than minor or trivial. Whether such a disadvantage exists in a particular case is a question of fact and is assessed on an objective basis.

**Submissions**

65. Both parties made oral submissions. Mr Duffy also provided us with a skeleton argument prior to oral submissions and provided a copy to the claimant. We carefully considered the submissions of both parties during our deliberations. We have dealt with the points made in submissions, where relevant, when setting out the facts, the law and the application of the law to those facts. It should not be taken that a submission was not considered because it is not part of the discussion and decision recorded.

## Discussion and decision

### Reasonable adjustments

66. A claim of failure to make reasonable adjustments requires that a provision, criterion or practice (PCP), or a physical feature, or the absence of an auxiliary aid put the claimant at a particular disadvantage compared with people not sharing their disability, and that it would be reasonable for the respondent to make an adjustment which would wholly or partly alleviate the disadvantage. The respondent must have known or reasonably been expected to know about the disability and the disadvantage caused at the time the adjustment allegedly should have been made. Knowledge, in this regard, is not limited to actual knowledge but extends to constructive knowledge (i.e. what the respondent ought reasonably to have known).

67. The issue in relation to time limits was not relevant. The respondent conceded that the claim was in time. The alleged discriminatory act took place on 13 October 2022. The claim was presented on 16 January 2023. Taking account of ACAS early conciliation, the claim is presented in time.

68. The respondent conceded that it knew the claimant had the disabilities pled, namely thyroid and breast cancer and multi factorial medical fatigue (chronic fatigue). It agreed that it knew about these disabilities at the relevant time.

69. The PCP in the agreed list of issue was a requirement for employees to work in the office. In evidence it was agreed that the requirement, as set out in the respondent's Pay and Contract Reform agreement (PACR) was for employees to work in the office 60% of their working time. It was agreed that accorded with the PCP of a requirement to work in the office as set out in the agreed list of issues.

70. The respondent submitted that the PCP did not "put" the claimant at a substantial disadvantage compared with non-disabled employees because it was not implemented in any practical sense. They submitted that the claimant was permitted to work from home from the outbreak of the covid pandemic and throughout her home working application process up to 13 October 2022, when her home working application was refused. Thereafter she was absent from work by reason of sickness from 14 October 2022 until the outcome of her appeal when her request for home working was granted.

71. We do not agree with the respondent's submission. We concluded that the respondent was clear to the claimant and other employees that staff were required to be back in the office some of the time (60%). It was the respondent's Contractual Home Working Policy and a predecessor communication in 2021 about return to the office which prompted the claimant's applications for permanent home working, including her February 2022 home working application. Shortly thereafter the respondent made it clear to all employees that the requirement for home working was 60% of working hours (PACR). The imposition of that requirement was recorded in various meetings between the claimant and the respondent using the working in an office / discussion toolkit. By the time of the February 2022 home working application, which was for home working for all her contractual hours, the claimant had told the respondent the substantial disadvantage to which she had been put prior to the pandemic in attending the office and which would resume if she was required to return to the office.

72. The claimant's evidence, which was not disputed, was that she had to reduce her working days from three days to two days prior to the pandemic to help alleviate the effects which travelling were having on her chronic fatigue. The claimant's evidence, also undisputed, was that working from home had helped with her energy levels such that she was able to return to three days working per week (half day on a Monday).

73. We concluded that it could not be correct that simply because the claimant was not forced back into the office during the lengthy home working application process that there was no PCP which "put" the claimant to the substantial disadvantage pled. We found support for this in the wording of Schedule 8 EqA paragraph 20 which although dealing with knowledge of disability refers to a disabled person who "is likely to be placed at the disadvantage" imposed by the PCP; the EHRC Code of Practice on Employment, which refers to Knowledge (para 6.19) and again uses language about a worker with a disability who "is or is likely to be, placed at a substantial disadvantage" and reference by the EAT to "the substantial disadvantage [the claimant] would otherwise suffer. …' (**Rakova v London North West Healthcare NHS Trust [2020] IRLR 503, EAT)**.

74. We concluded that the PCP had or was likely to put the claimant at the substantial disadvantage pled, namely “given the claimant’s disability it was physically demanding just to get to and from work and the journey had a substantial detrimental impact on her physical health”. The claimant had had to reduce her hours from three day to two days prior to the pandemic. She was asked what she would do if her application was refused, and she said that she would have to reduce her hours. She gave evidence about the steps she took to manage her chronic fatigue through pacing and the support she had had from a chronic fatigue clinic to manage her condition which included eliminating as many tasks as possible during the day to conserve energy for the remaining tasks. The OH report in June 2022 also set out that it was “likely that the effort of preparing for work as well as the one-hour commute to work would impact on her energy levels and in turn her ability to cope with her current working hours. She is therefore likely to benefit from working from home on a long-term basis if this can be accommodated by her employer.”

75. As set out in Section 212 EqA 'substantial' means more than minor or trivial”. Given the evidence from the claimant about the effect of her condition and the contents of the June 2022 OH report we are satisfied that the claimant was put to the substantial disadvantage set out in the list of issues.

76. We are also satisifed that the respondent knew that the claimant was likely to be placed at the disadvantage pled at the time the respondent made their decision on 13 October 2022. The claimant told the respondent on numerous occasions. Knowledge is not disputed by the respondent.

77. We reminded ourselves that the test of reasonableness is an objective one and the Tribunal’s view of what is reasonable is what matters. We had regard to the EHRC Employment Code (EHRC Code) which sets out examples of matters that a tribunal might take into account (para 6.28) We were mindful that what is a reasonable step for an employer to take will depend on all the circumstances of each individual case’ — para 6.23.

78. Having regard to paragraph 6.28 of the EHRC Code, we considered the effectiveness of the proposed adjustment of home working permanently, that is for all of the claimant’s contractual hours. We considered whether that would be effective in allowing the claimant to continue working on her current work pattern of 3 days per week. We concluded that it would be effective in so doing. The claimant had been working from home successfully on this work pattern during the pandemic. The claimant’s evidence, which we accepted, was that working from home was an effective way in which to manage her chronic fatigue and that returning to work in the office for some of her contractual hours would increase her fatigue and result in her having to reduce her hours. The medical evidence in the June 2022 OH report also supported the effectiveness of the step of allowing the claimant to work from

home permanently where it says “As she has said, it is likely that the effort of preparing for work as well as the one-hour commute to work would impact on her energy levels and in turn her ability to cope with her current working hours. She is therefore likely to benefit from working from home on a long-term basis”. We concluded that the June 2022 OH report supported the claimant’s evidence that she would likely be unable to cope with her current working hours if she was required to work in the office. But she would be able to continue with her current working hours if permanent home working was agreed.

79. Having regard to paragraph 6.28 of the EHRC Code, we next considered the practicability of taking the step of allowing permanent home working. The claimant had been working from home for a number of years. There had been no issues with her performance during that time. CG looked at performance statistics as part of her consideration of the permanent home working application and agreed that there were no issues with performance. There was no evidence that the claimant’s role, which was administrative, required her to be in the office.

80. We also considered practicability from the perspective of the respondent. The starting point for the home working application was the respondent’s contractual home working policy to require staff to return to the office for part of their working week. The aims of this policy included because “everyone needs to interact with each other face to face some of the time, sharing our knowledge and expertise and learning from each other” (page 80), From the respondent’s perspective the reasons given for refusing the permanent home working request did not suggest that sharing knowledge and collaboration was an essential part of her role which required face to face contact. In addition, the claimant told the respondent during her application that she would attend the office for training. Further, there were no financial or other costs indentified by the respondent as a barrier to permanent home working. We concluded that from the perspective of both parties a permanent home working arrangement was practicable.

81. We next considered whether the other arrangements proposed by the respondent ought to have been tried by the claimant first of all. We heard evidence about the other arrangements proposed by the respondent namely, arrangements for breaks in the office, alternative taxi arrangements to take the claimant to and from the office, staggered start times; that her requirement to attend the office would be two Mondays per month and that her working pattern could be changed from Monday, Tuesday, Wednesday to Monday, Wednesday, Friday. We considered whether as the respondent submitted, the claimant ought to have tried working in the office with these arrangements first of all. We accepted that the claimant’s evidence was

truthful and straightforward as to why those arrangements would not work for her and that the impact would be an increase in fatigue and a need to reduce her hours. We were satisfied on balance that this was supported by the June 2022 OH report which recommended home working due to the effects on fatigue on getting ready for work and attending the office which would in turn affect "her ability to cope with her current working hours". We were satisfied on balance that those arrangements proposed by the respondent would not have operated to remove or alleviate the substantial disadvantage pled by the claimant. On the other hand, based on the evidence already referred to, we were satisfied that the proposal of permanent home working was a reasonable adjustment which would have alleviated the substantial disadvantage pled and that the respondent ought to have made this adjustment by 13 October 2022. It failed to do so. The respondent is therefore in breach of the duty to make reasonable adjustments under section 21 EqA.

Employment Judge McCluskey

Date: 7 March 2024

**Notes**

**Public access to employment tribunal decisions**
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

**Recording and Transcription**
Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

**APPENDIX 1**

**1. Time limits**

1.1. Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The tribunal will decide:

1.1.1. Was the claim made to the tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.1.2. If not, was there conduct extending over a period?

1.1.3. If so, was the claim made to the tribunal within three months (plus early conciliation extension) of the end of that period?

1.1.4. If not, were the claims made within a further period that the tribunal thinks is just and equitable? The tribunal will decide:

1.1.4.1. Why were the complaints not made to the tribunal in time?

1.1.4.2. In any event is it just and equitable in all the circumstances to extend time?

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

2.1. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

2.2. A “PCP” is a provision, criterion or practice. Did the respondent have the following PCPs:

2.2.1. A requirement for employees to work in the office.

2.3. Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant’s disability, in that given the claimant’s disability it was physically demanding just to get to and from work and the journey had a substantial detrimental impact on the physical health.

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

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

2.5.1. The claimant contends the respondent should have permitted her to work from home permanently at an earlier stage.

2.6 Was it reasonable for the respondent to have to take those steps and when?

2.7 Did the respondent fail to take those steps?