EMPLOYMENT TRIBUNALS

Claimant: Miss G Geoghegan

Respondent: Ash Heaton Moor Ltd

Heard at: Manchester **On:** 29 April to 1 May 2024

Before: Employment Judge Phil Allen
Mr A Egerton
Ms A Berkeley-Hill

REPRESENTATION:

Claimant: In person
Respondent: Mr M Todd, counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The complaint of unfavourable treatment because of something arising in consequence of disability is well-founded and succeeds, in the way alleged at 1(a) in the list of issues.

2. The complaint of unfavourable treatment because of something arising in consequence of disability in the way alleged at 1(b) in the list of issues is not well-founded and is dismissed.

3. The complaint of failure to make reasonable adjustments for disability is not well-founded and is dismissed.

4. The complaint of unfair dismissal is well-founded. The claimant was unfairly (constructively) dismissed.

5. The claimant is awarded a basic award for unfair dismissal in the agreed sum of **£3,472.80**. The claimant is not awarded any compensatory award as the losses which would have been compensated in such an award have been addressed in the discrimination award made.

6. The respondent shall pay the claimant the following sums as a result of the discrimination found:

a. Compensation for injury to feelings of **£10,000**;

b. Interest on compensation for injury to feelings of **£995.07**;

c. Compensation for past financial losses of **£8,192.05**;

d. Interest on compensation for past financial losses of **£407.58**; and

e. Compensation for future financial loss of **£709.20**.

REASONS

Introduction

1. The claimant was employed by the respondent from 2018 until she resigned on 13 May 2023. She was a stylist. The claimant had a seizure in October 2022 and was subsequently diagnosed with a brain tumour. It was not in dispute that the claimant had a disability at the relevant time. The claimant alleged disability discrimination (discrimination arising from disability and breach of the duty to make reasonable adjustments) and constructive dismissal. The respondent denied discrimination or that the claimant was constructively dismissed.

Claims and Issues

2. Two preliminary hearings (case management) were conducted in this case, on 29 August 2023 and 18 March 2024. Following the second preliminary hearing, the claims being pursed were clarified. The case management order made following the second preliminary hearing contained case management orders for a list of issues to be prepared and agreed.

3. At the start of this hearing the respondent provided a draft list of issues. The claimant had only seen it on the morning of the first day of the hearing. During the reading time taken on the first day, the claimant was given the opportunity to consider the list of issues. She did so and discussed it with the respondent's representative. When we returned from the time spent reading, three amendments were made to the proposed list of issues and (with those amendments) it was agreed. We determined the liability issues first and (after they were determined) determined the remedy issues.

4. The list of issues (as amended) is appended to this Judgment.

5. The respondent had accepted that the claimant had a disability at the relevant time by reason of her epilepsy.

Procedure

6. The claimant represented herself at the hearing. Mr Todd, counsel, represented the respondent.

7. The hearing was conducted in-person with both parties and all witnesses attending in-person at Manchester Employment Tribunal.

8. An agreed bundle of documents was prepared in advance of the hearing. The bundle was numbered in three sections, with: A-1 to A-101 being the pleadings and related Tribunal correspondence; B-1 to B-104 being the documents and correspondence; and C-1 to C-14 being medical documents. That numbering is used in this Judgment to refer to pages in the bundle. We read only the documents in the bundle to which we were referred, including in witness statements or as directed by the parties.

9. We were also provided with witness statements from each of the witnesses called to give evidence at the hearing. On the first morning, after an initial discussion with the parties, we read the witness statements and the documents referred to.

10. We heard evidence from the claimant, who was cross examined by the respondent's representative, before we asked her questions. Mrs Carmel Geoghegan, the claimant's mother, also gave evidence and was cross examined. The claimant also called her aunt to give evidence, Mrs Angela Craughwell, but as she was only able to attend and give attendance at certain times on the second day of the hearing, her evidence was heard after that of the respondent's witnesses, when she was briefly cross-examined.

11. For the respondent, we heard evidence from: Miss Ashley Gilbody, the owner of the respondent; and Ms Kirsty Crawley, the manager and a stylist. Miss Gilbody gave evidence on the afternoon of the first day, when she was cross-examined by the claimant, and we asked her questions. Some of the questions we asked were to ensure that the key points in the claimant's case were put to her (so her answers to those questions could be heard). Ms Crawley gave evidence at the start of the second day and was cross-examined by the claimant before we asked her some questions.

12. After the evidence was heard, each of the parties was given the opportunity to make submissions. They each made their submissions orally. In their submissions the parties focussed upon the facts, and we were not taken to, or referred to, any particular case law.

13. On the morning of the third day of hearing we informed the parties orally of our Judgment in the liability issues and the reasons for it. The parties requested the written reasons of the decision. Accordingly, that Judgment and the reasons for it are contained in this document.

14. When we proceeded to address remedy, the respondent's representaive applied for the remedy hearing to be conducted on a later date. We heard why he said we should do so. The claimant asked for remedy to be addressed on the day. We adjourned to consider whether we should adjourn the hearing and re-list the case for a further remedy hearing. We decided not to do so. The final hearing had been listed to address both liability and remedy. There was a significant part of the day remaining in which remedy could be heard and determined. We concluded that it was appropriate and in accordance with the overriding objective (and, in particular, avoiding delay) for remedy to be heard and determined.

15. The claimant then returned to give evidence, her evidence in respect of remedy having been included at the end of her witness statement. The claimant was cross-examined by the respondent's representative. We asked her some questions. During the lunch break following the claimant's evidence, we asked the parties to look at electronic payslips and agree what the claimant had been paid by the respondent during the relevant period at the end of the claimant's employment (which the parties did). After the lunch break (which was extended at the respondent's representative's request), we heard submissions from each of the parties regarding remedy.

16. The remedy Judgment was reserved. This Judgment contains our Judgment on the remedy issues and our reasons for reaching the decisions which we reached on remedy.

Facts

17. The claimant worked for the respondent initially as an apprentice and then as a stylist. We were provided with her contract of employment (B-1) which recorded that her employment commenced in May 2018. The contract was signed on behalf of the employer on 10 August 2018. We were not provided with any policies or procedures.

18. The respondent operates a hair salon in Heaton Moor. Miss Gilbody set up the respondent as a business. It was Miss Gilbody's evidence that, at the time of the events, there were six stylists working at the salon. The respondent operates the single salon. The stylists are all employed by the respondent. There was no dispute that the clients are clients of the salon, and are not clients of any individual stylist, albeit that a client may (and frequently will) choose to book to see a stylist of their choice.

19. The evidence we heard was that the claimant's employment with the respondent was entirely positive until the relevant events. In late 2021, the claimant had a period of absence as a result of something entirely unrelated to the condition relevant to the claim. When she returned to work, the respondent proactively contacted those clients who usually used her services and gave them the option of re-booking with the claimant. The claimant's evidence (with which Miss Gilbody did not disagree) was that approximately 60-70% of the clients seen by her would be those who would regularly re-book with her.

20. On 15 October 2022 the claimant had a seizure. She attended hospital. The claimant's partner texted Miss Gilbody to inform her (B-15). Miss Gilbody responded stating that she hoped she was ok. The claimant was diagnosed later that day with a brain tumour. The claimant was absent from work for a period following that date.

21. It was the claimant's evidence that she kept Ms Crawley informed about her medical progress, and her potential return to work. We were shown some text messages. On 21 October 2022 (B-24) the claimant explained she had been given a six-week sick note and then referred to having been told that she would need to return to work part-time. Ms Crawley was the manager, and we were told that she was responsible for line management of staff, albeit in practice it was very clear from the evidence that we heard that Miss Gilbody was the decision-maker for all of the

key decisions. We were also provided with text messages exchanged between the claimant and Miss Gilbody. When she was asked about them, Miss Gilbody accepted that she spoke to the claimant about her health on at least two occasions in November 2022.

22. The claimant had first intended to return to work in November 2022. She spoke to Miss Crawley about doing so. She decided not to do so until she had a scan which had been arranged and the subsequent appointment with her consultant. She was certified as not fit to return to work. On 8 December 2022 the claimant provided the respondent with a fit note which recorded she was not fit for work due to "*epilepsy awaiting scan unable to work*" until 20 January 2023.

23. The claimant expected to return to work at the end of January 2023. Miss Gilbody's evidence was that, until the claimant had seen the consultant, nobody knew whether the claimant would be returning to work, or whether she would be returning part-time or full-time. The respondent took no steps to prepare for the claimant's return to work at the end of her fit note, or to take advice about her return in advance.

24. The claimant had a brain scan in early January and saw her consultant on 26 January 2023. When she saw her consultant, she was told that she required surgery. At that time, the surgery was proposed for March 2023, albeit it did not in fact take place until much later in the year. At that time, the claimant had not had a seizure for approximately six weeks.

25. On 27 January the claimant informed the respondent about the need for surgery and about her wish to return to work. On 31 January the claimant spoke on the phone to Miss Crawley about her return to work. The claimant took part in the call on speakerphone and the call was heard by her mother and her aunt (Mrs Craughwell, an HR Director). Miss Crawley spoke to the claimant and then passed the phone to Miss Gilbody, something which the claimant was not expecting. We were provided notes of what was said in the call (B-36). It was agreed that the claimant would receive some training. The hours and days of the proposed phased return were discussed. It was agreed that the claimant could have time off for a medical appointment on the second week of her return. Miss Gilbody asked the claimant a number of questions about what the claimant could and could not do. She referred to her insurance (which was clarified in the hearing as meaning she needed to talk to her legal advisers). Miss Craughwell's evidence, which we accepted, was that the questioning style on the phone was direct and blunt, especially given the nature of the claimant's condition. The call ended with Miss Gilbody promising to be in touch. The claimant felt dejected after the call.

26. At 5.21pm on 31 January Miss Gilbody texted the claimant and said (B-19): "*Hi Grace, sorry I've not been able to speak today, I've not heard back from the people I needed to speak too. I will let you know when I do asap x"*. The claimant replied: "*Ooh that makes sense why you have not been in touch til now. I am a little confused as to what further info you need or who you are speaking to? As I am medically fit for work and I was hoping to return tomorrow? X"*. Miss Gilbody said in response "*Unfortunately it's not as simple as that. We have to arrange a back to work meeting in person amongst other procedures of how we are going to phase your return to work. I will be in touch tomorrow to arrange a face to face meeting this*

week where we can plan for your phased return. I have your best interests at heart and want to make this return to work as easy and comfortable as possible x". The claimant's response at 7.02 pm said "*Thanks Ash, I was hoping my rtw would move a little faster than this, I did let you all know in November that I would be returning at the end of January. I don't think it needs to be overly complicated, the only reasonable adjustment I need is a reduced 2 day working week and a reduced working day from 10 til 3pm. Everything else is fine…"*. At 7.41 pm Miss Gilbody told the claimant that she had been advised that she needed to postpone the claimant's return to work and said "*This is to allow the advisors time assess, as yours and our clients health and safety is paramount … I get that your probably frustrated with the situation but my hands are tied and I have to follow procedures X*". The claimant expressed confusion in her response.

27. On 1 February Miss Gilbody texted the claimant and proposed a meeting on 2 February.

28. On 2 February the claimant met with Miss Gilbody and Ms Crawley. They spoke about the claimant's condition. The days for the phased return to work were discussed and agreed (it being agreed that Saturday would be too busy for the start back). There was a discussion about surgery. There was a dispute between the parties about what was said in the meeting about regular clients and the claimant's duties after her return. I will address that dispute in our findings. The claimant felt that there was an odd atmosphere in the salon and that others did not speak to her as she would have expected.

29. After the meeting the claimant and her mother went to have the claimant's nails done. The claimant's mother referred to the claimant as being positive and that she felt happy that she would soon be back at work. The claimant contacted her GP and asked for an extended sick note, as had been agreed at the meeting.

30. While the claimant was in the nail salon, the claimant received a telephone call from Miss Gilbody. Mrs Geoghegan overheard what was said in that call (although it was not on speakerphone). Mrs Geoghegan's account was that Miss Gilbody had a loud voice and an aggressive tone and stated that the claimant would not be able to return to work with that fit note. Miss Gilbody told the claimant that she needed to ask her GP to include on the fit note the details of the duties which the claimant could perform. The claimant's evidence was that, in the call, Miss Gilbody referred to using scissors and asked if she could dye hair using chemicals? Miss Gilbody's evidence was that she asked the claimant if the GP could confirm in writing that they were happy for the claimant to return to work, particularly as the claimant would be required to stand for long periods. It was Miss Gilbody's evidence to the Tribunal that she had spoken to her advisers and that what she requested was based upon that advice.

31. Following the telephone conversation, Miss Gilbody sent a text message which said (B-21) "*Hey Grace, if this helps when you speak to him later, we just need from your doctor that he is happy with your return to work and to undertake all your hair stylist duties. Which is cutting with scissors and clippers and colouring with chemicals. He just needs to put this in writing please. Any questions let me know x"*. The claimant responded by questioning the request and explaining that fit for work on a fit note meant fit for work as a hairdresser. After a further exchange, the

updated fit note was provided by the claimant to Miss Gilbody. The claimant commented when sending it "*The phased return until 27th. Which is annoying cos I asked till March when I spoke to the receptionist x*".

32. Miss Gilbody replied: "*Its not easy dealing with doctors I know, but if you could get them to put in writing or Amend sick note that you undertake all your hair stylist duties that will cover everything on your risk assessment*". Further messages were exchanged.

33. In a text message at 11.21 on 3 February the claimant explained that she had left a message for her GP to call her. She explicitly asked whether she could still return to work without the further note. At 1.17 pm Miss Gilbody replied in a message which we considered to be very important when considering the claimant's claims and said (B-22):

> "*Hi, you can come in work but I just can't book any clients in until I have that confirmation from your doctor that he is happy with you carrying out all duties of a hair stylist. – cutting with scissors/clippers – colouring with chemicals Hope he calls you back x"*

34. The claimant questioned Miss Gilbody's position in a subsequent text and Miss Gilbody replied and said (B-23):

> "*The fit note gives no clarity and differs from your last one and I just need confirmation from your GP about your duties on a phased return so we're clear. I'm not trying to be difficult at all but just need to consider my duty to you as an employer to protect your safety and welfare on your return. We're looking forward to having you back and hearing from your GP so we know the position so we can get you back to full duties."*

35. We were provided with an extract from the claimant's GP notes (C-7). Those notes recorded a conversation with the GP on 6 February.

36. We were also provided with a letter from the consultant neurosurgeon (C-10). The letter stated it was typed on 3 February 2023. There was no dispute that the report was provided to the respondent by the claimant as part of her grievance, it was not provided before. The report clearly and succinctly said:

> "*Grace is a patient of mine with a new diagnosis of a brain tumour. She presented with a seizure, and she is now on anticonvulsant medications that will minimise the chances of having further seizures in the future.*
>
> *I think that she is fit to return to work on a phased return. Grace and I are having discussions about whether she will have an operation for her brain tumour in the coming months. We will talk about this in the appointment coming up. In the meantime, I would be grateful if you would support her in a phased return to work"*

37. In a text message sent at 4.30 pm on 3 February the claimant asked for the respondent's grievance procedure (B-23). On 9 February she raised a formal grievance (B-46). At the end of her grievance the claimant said (B-50):

> "*Although it was confirmed I could return to the salon, Ash confirmed that unless she had it in writing that I could perform the duties of a hair stylist, I would not be able to have any clients … At this point I feel extremely humiliated and a burden. I believe refusing to allow me to fulfil my full role is both demeaning and frustrating. … I believe the actions, specifically from Ash are making my role untenable. I am anxious about this situation"*

38. The respondent appointed an HR consultant, Matthew Keeffe, to investigate the claimant's grievance. We did not hear evidence from Mr Keeffe. We were provided with the notes of a grievance hearing held on 21 February 2023 (B-51). Mr Keeffe also met with Miss Gilbody on 1 March. We were provided with the notes of that meeting, and I will refer to one extract from those notes in our reasons. A grievance outcome letter of 20 March informed the claimant that her grievance was not upheld (B-84). Of note, he described the respondent's position regarding its clients as follows (B-89): "*In terms of clients they are clients of the business and not personal clients to stylists, having spoken to Ash on this she advises that she and Kirsty were ensuring the operation of the salon was paramount"*. When asked about the words used, Miss Gilbody said they were not her own words.

39. The claimant appealed on 23 March (B-92). The respondent appointed an HR & Employment Law Adviser, Jen Saint, to hear the appeal. A hearing took place on 6 April. An outcome letter dated 5 May 2023 was sent to the claimant informing her that the grievance appeal was not upheld (B-97). Within the letter Ms Saint did say the following "*What I do acknowledge is that communication from the business could have been better in relation to how and why this additional information, in relation to your condition and whether any further recommended adjustments, if any, were needed. This will be fed back to the business".* We did not hear any evidence from Ms Saint.

40. On 13 May 2023 the claimant resigned with immediate effect. In the email in which she resigned (B-104) she said:

> "*Please accept this email as my resignation with immediate effect. I have now exhausted all the grievance procedure and now feel I have no other option other than resigning. I feel the whole process has been detrimental to me and my employment contract has been breached along with a breakdown of mutual trust and confidence. The relationships and friendships have been broken, there hasn't been any contact and I am being ignored by other colleagues. As a result of that I don not feel like I could return into that hostile environment"*

41. When asked about why she resigned, the claimant emphasised her wish to return to work, she referred to (what she described as) the horrendous phone call she had with Miss Gilbody, and the fact that she was fit to return to work as her condition had stabilised with medication.

42. The claimant did not return to work during the period whilst her grievance and grievance appeal were being addressed. A fit note dated 7 March signed the claimant as not fit for work due to stress at work for one month (C-12). A fit note dated 18 April recorded that the claimant was not fit for work until 8 June 2023 due to stress at work.

43. Following her resignation, the claimant did not find other employment immediately, because she was waiting for her proposed operation (which was delayed on more than one occasion). In her schedule of loss the claimant did not claim losses for the period between 17 October and 30 December 2023 as that was the period covered by her surgery and recovery from surgery when she would have been unable to work in any event.

44. The claimant has obtained new employment since her surgery. It was the claimant's evidence that the role was available from when she felt fit and able to return to work. She delayed starting that new role in order to ensure that she was fit and, in part, as a result of a period when she had migraines which followed her operation. She is intending to build up her hours in her new job. She had worked one day per week during April. She then intends to build up her time working by working two days per week for four weeks, three days per week for the next four weeks, and four days per week for the four weeks thereafter. The claimant is not aware of whether she will earn commission in her new role, but she is currently being paid at a lower hourly rate than she was being paid by the respondent at the end of her employment.

45. The claimant received employment support allowance at £339.20 per week for the period when she was fit to work and prior to starting her new employment. She also receives personal independent payments, but those payments will continue to be paid even when she has commenced her new employment as they are not directly related to her being out of work.

46. In her witness statement, the claimant listed a number of ways in which the loss of her employment and the discrimination she alleged had impacted upon her and inured her feelings. She said that since her resignation and throughout the process she had struggled to sleep and had felt anxious and distressed. The treatment had affected her confidence. She highlighted that all of this had occurred at a time when she was dealing with (what she described as) the horrific diagnosis of epilepsy and a brain tumour.

47. We heard a lot of evidence. This Judgment does not seek to address every point about which we heard or about which the parties disagreed. It only includes the points which we considered relevant to the issues which we needed to consider in order to decide if the claims succeeded or failed. If we have not mentioned a particular point, it does not mean that we have overlooked it, but rather we have not considered it relevant to the issues we needed to determine.

The Law

48. Section 15 of the Equality Act 2010 provides:

> *(1) A person (A) discriminates against a disabled person (B) if —*
>
> *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
>
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*

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

49. For unfavourable treatment there is no need for a comparison, as there would be for direct discrimination. However, the treatment must be unfavourable, that is there must be something intrinsically disadvantageous to it.

50. In **Sheikholeslami v University of Edinburgh** [2018] IRLR 1090 the Employment Appeal Tribunal held that:

> *"the approach to s 15 Equality Act 2010 is now well established … In short, this provision requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence."*

51. **Pnaiser v NHS England** [2016] IRLR 170 outlined the correct approach to be taken.

52. Section 15(1)(b) provides that unfavourable treatment can be justified where it is a proportionate means of achieving a legitimate aim. That requires: identification of the aim; determination of whether it is a legitimate aim; and a decision about whether the treatment was a proportionate means of achieving that aim. The test under section 15(1)(b) is an objective one, according to which the we must make our own assessment.

53. We took into account the Guidance in relation to objective justification contained in paras 5.11, 5.12 and 4.25-4.32 of the EHRC Code of Practice on Employment. It is for the respondent to justify the practice and it is up to the respondent to produce evidence to support its assertion that it is justified. We must ask ourselves whether the aim is legal, non-discriminatory, and one that represents a real, objective consideration? We must then ask ourselves whether the means of achieving the aim are proportionate? Treatment will be proportionate if it is 'an appropriate and necessary' means of achieving a legitimate aim. Necessary does not mean that it is the only possible way of achieving the legitimate aim, it will be sufficient that the same aim could not be achieved by less discriminatory means.

54. Section 20 of the Equality Act 2010 imposes a duty to make reasonable adjustments on an employer. Section 20(3) provides that the duty comprises the requirement that where a provision, criterion or practice of the employers puts a person with a disability at a substantial disadvantage in relation to a relevant matter in comparison with people who do not have a disability, to take such steps as it is reasonable to have to take to avoid the disadvantage. That requires not only the existence of a disability, but also identification of a PCP.

55. Section 21 of the Equality Act 2010 provides that a failure to comply with the requirement set out in section 20 is a failure to comply with a duty to make reasonable adjustments. Schedule 8 of the same Act also contains provisions regarding reasonable adjustments at work.

56. **Environment Agency v Rowan** [2008] IRLR 20 is authority that the matters we must identify in relation to a claim of discrimination on the grounds of failure to make reasonable adjustments are:

a. the provision, criterion or practice applied by or on behalf of an employer;

b. the identity of non-disabled comparators (where appropriate); and

c. the nature and extent of the substantial disadvantage suffered by the claimant.

57. The requirement can involve treating a people with a disability more favourably than those who are not disabled.

58. Whether something is a provision, criterion or practice should not be approached too restrictively or technically, it is intended that phrase should be construed widely. A one-off act can be a PCP but it is not necessarily the case that it is. Simler LJ said in **Ishola v Transport for London** [2020] IRLR 368:

> *"it is significant that Parliament chose to define claims based on reasonable adjustment … by reference to these particular words, and did not use the words 'act' or 'decision' in addition or instead. As a matter of ordinary language, I find it difficult to see what the word 'practice' adds to the words if all one-off decisions and acts necessarily qualify as PCPs … If something is simply done once without more, it is difficult to see on what basis it can be said to be 'done in practice'. It is just done; and the words 'in practice' add nothing …In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of … the duty to make reasonable adjustments [is] intended to address."*

59. When considering reasonable adjustments, we took into account the EHRC Code of Practice on Employment including paragraphs 4.5 and 6.10 on provision criterion or practice.

60. The unfair dismissal claim is brought under Part X of the Employment Rights Act 1996. An unfair dismissal claim can be pursued only if the employee has been dismissed as defined by Section 95. Section 95(1)(c) provides that an employee is dismissed by her employer if:

> *"the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."*

61. The principles behind such a constructive dismissal were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp** [1978] ICR 221. The statutory language incorporates the law of contract, which means that the employee is entitled to treat herself as constructively dismissed only if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.

62. Lord Denning said in that case:

> "*the conduct must … be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded to have elected to affirm the contract."*

63. The term of the contract upon which the claimant relied in this case was the implied term of trust and confidence. In **Malik and Mahmud v Bank of Credit and Commerce International SA** [1997] ICR 606 the House of Lords considered the scope of that implied term and the Court approved a formulation which imposed an obligation that the employer shall not:

> *"…without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."*

64. It is also apparent from the decision of the House of Lords that the test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. Lord Nicholls put the matter this way:

> *"The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances."*

65. The objective test also means that the intention or motive of the employer is not determinative. An employer with good intentions can still commit a repudiatory breach of contract.

66. Not every action by an employer which can properly give rise to complaint by an employee, amounts to a breach of trust and confidence. The formulation approved in **Malik** recognises that the conduct must be likely to destroy or seriously damage the relationship of confidence and trust.

67. A part of the test to be applied is whether the actions of the employer fell outside the range of reasonable responses which a reasonable employer might consider to be appropriate. What was said in **Claridge v Daler Rowney Ltd** [2008] IRLR 672 is:

> "*It is necessary that the conduct must be calculated to destroy or seriously damage the employment relationship. The employee must be*

> *entitled to say "You have behaved so badly that I should not be expected to have to stay in your employment". It seems to us that there is no artificiality in saying that an employee should not be able to satisfy that test unless the behaviour is outwith the band of reasonable responses."*

68. Where there is a fundamental breach of contract by the employer, the employee may elect to accept the breach and bring the contract to an end, or treat the contract as continuing, requiring the employer to continue to perform it – that is affirmation. Where the employee affirms the contract, they lose the right to treat the employer's conduct as having brought the contract to an end. Affirmation can be express or implied. Mere delay will not, in the absence of something amounting to affirmation, amount in itself to affirmation. However, the ongoing and dynamic nature of the employment relationship means that a prolonged or significant delay may give rise to an implied affirmation because of what occurred in that period. Acts which are consistent only with the contract continuing are likely to be implied affirmation.

69. Section 98(1) of the Employment Rights Act 1996, incorporating 1(b), says:

> "*In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show – that it is … some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held"*

70. Section 98(4) says:

> "*the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) –*
>
> *(a) depends upon whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably, in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case"*

71. Remedy for discrimination is governed by section 124 of the Equality Act 2010. The Tribunal may order the respondent to pay compensation to the claimant. Where compensation for discrimination is awarded, it is on the basis that, as best as money can do it, the claimant must be put into the position she would have been in but for the unlawful conduct.

72. **Vento v Chief Constable of West Yorkshire Police** [2003] IRLR 102 was the case which established the bands for injury to feelings awards, which have subsequently been modified and updated. In **Vento**, the Court of Appeal laid down three levels of award: most serious, middle, and lower. The Court of Appeal suggested that the top band should apply to the most serious cases, such as where there had been a lengthy campaign of discriminatory harassment on the prohibited ground; that the middle band should be used for serious cases which do not merit an award in the highest band; and the lower band would be appropriate for less serious

cases, such as where the act of discrimination is an isolated or one-off occurrence. When making an injury to feelings award, the Tribunal must keep in mind that the intention is to compensate, not punish. It must, therefore, be astute neither to conflate different types of awards nor to allow double recovery. The Tribunal should not allow its award to be inflated by any feeling of indignation or outrage towards the respondent. Awards should not be set too low as that would diminish respect for the policy of the anti-discrimination legislation.

73. The Employment Tribunal also took into account the Presidential Guidance on **Vento** bands. The Tribunal identified that it was the sixth addendum to the Presidential Guidance which applied to this case. That meant that the Vento bands were as follows: lower band - £1,100 to £11,200; middle band - £11,200 to £33,700; and upper band - £33,700 to £56,200.

74. The provisions as to remedy in an unfair dismissal claim are governed by sections 118 to 126 of the Employment Rights Act 1996, which it is not necessary for us to reproduce in this Judgment. However, section 126 provides that where compensation falls to be awarded both under provisions relating to unfair dismissal and under the Equality Act 2010, the Tribunal shall not award compensation under either of those Acts in respect of any loss which has been taken into account in the other. The Act does not set out under which Act compensation should be awarded first.

75. The rules which apply to interest on discrimination awards are set out in the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. Interest for an injury to feelings award is calculated for the period beginning on the date of the contravention or discrimination complained of and ending on the calculation date. Interest for other damages uses a mid-point date between the date of the discrimination and the calculation date.

Conclusions – applying the Law to the Facts

76. We started by considering the claim for discrimination arising from disability. That claim relied upon two matters. For each of those matters we needed to decide whether the respondent did what was alleged.

77. Issue 1(a) asked whether the respondent only permitted the claimant to take on new clients and would not permit her to have her regular clients back. It was the claimant's case that the respondent did. The respondent denied that it did so.

78. In her witness statement, the claimant stated that during the meeting on 2 February 2023 she asked Miss Gilbody and Ms Crawley about having her regular clients back and she was told that "*I couldn't have them, I would be doing new clients*". When asked about this in cross-examination, the claimant maintained that was what she had been told. In their witness statements, neither Miss Gilbody nor Ms Crawley expressly stated what was said in that meeting about clients. However, they were asked during their evidence, and both stated that the claimant was not told that she could not have her regular clients back and was not told she would be working with only new clients. Accordingly, there was a direct conflict of evidence about what was said in that meeting.

79. The limited notes of the meeting provided no assistance to us in determining what was said about clients.

80. We found the claimant on this issue to be a genuine and credible witness. The meeting was clearly important to her, and we accepted her recollection of this to be accurate. We were in a position where on balance on this issue we needed to prefer the account of either the claimant or of the respondent's witnesses. We preferred the account of the claimant. We found that, whatever specific words were used, the claimant was certainly left with the impression at the end of the meeting on 2 February 2023 that when she returned, she would be dealing with new clients only, as she told us in her witness statement.

81. That was a decision we needed to reach, determining a dispute between the evidence of the claimant and the respondent's witnesses. That was a finely balanced decision. However, in reaching the decision we noted the following:

(a) We did find some assistance from the notes of Mr Keeffe's investigation meeting into the claimant's grievance, with Miss Gilbody on 1 March 2023 (B-76). Within those notes (on a page to which we were taken by the respondent's representative during cross-examination of the claimant) Miss Gilbody explained what she viewed as being the position at the time. She described the enhanced pay which the claimant would receive and went on to say "*had to find the right clients to book in with her to manage the work, didn't have them just waiting, had to find them to book in with her*". What was said described a changed approach to clients consistent with the claimant being allocated only clients deemed appropriate for her;

(b) We noted the onus placed by the respondent on the clients being their own and not the claimant's, and considered that the reasonable offer made to the claimant regarding pay was consistent with the claimant's account of what was to happen with clients on her return;

(c) The meeting on 2 February followed on from the telephone conversation of 31 January. In that call the claimant had been questioned about what she could do, and we noted Mrs Craughwell's perception of that call – we found Mrs Craughwell to be a credible witness with experience in, and understanding of, HR issues (as an HR Director);

(d) The text message sent at 1.17 pm on 3 February appeared to support the claimant's account of what had been said in the meeting;

(e) On balance, we found the claimant's evidence to be more credible on this issue than the respondents' witnesses. In her submissions, the claimant made reference to Miss Gilbody's evidence that the words used in the grievance outcome about clients (B-89) would not have been her words because she did not use the word "*paramount*" when that word had in fact been used by Miss Gilbody in a text message she sent on 31 January (B-19). That inconsistency lent some weight to our decision that the claimant's evidence was more credible than Miss Gilbody's (on this issue); and

(f) We noted that Ms Crawley clearly deferred to Miss Gilbody and considered Miss Gilbody to be the decision-maker (describing her as the boss). We found that, on balance, we preferred the claimant's account of what occurred to Ms Crawley's, where Ms Crawley corroborated the evidence of the owner of the business for which she works.

82. For the reasons explained and on balance when determining a dispute on the evidence between the parties, we found that at the meeting on 2 February the respondent did only permit the claimant to take on new clients and said it would not permit her to have her regular clients back.

83. Issue 1(b) asked whether the respondent would only allow the claimant to return to work in a junior role (performing blow-dry's and cleaning the salon). This was also based upon what was said in the meeting of 2 February 2023 and was something which was disputed between the claimant and the respondent's witnesses. In her witness statement, the claimant said that she was told that she would be doing blow dry's only. The respondent's witnesses denied that was what she was told. There was clearly some discussion in the meeting on 2 February about what tasks the claimant could do on her return.

84. It was the evidence of the claimant that when the meeting ended, it all seemed very positive, and she was excited for her return. The evidence of the claimant's mother, who met her immediately after the meeting, was that the claimant was positive and felt happy that she would soon be back at work. We did not find that evidence to be consistent with the claimant having been told in the meeting that she would be doing blow dry's only and/or only returning to work in a junior role. We also particularly noted what was said in the text messages sent following the meeting by Miss Gilbody. At 1.56 pm, on the same day, she asked the claimant to ask the Doctor if he was happy with the claimant's return to work to undertake all her hair stylist duties. On 3 February, at 1.17 pm, she also referred to wanting confirmation from the doctor that he was happy with claimant carrying out all of her duties. We accepted the respondent's representative's submission that what was said was not consistent with the claimant having been told that she would return to work carrying out a junior role with blow drying only. As a result of the fact that the claimant's evidence on those issues was inconsistent with the evidence we have described, we found that part of the claimant's recollection of what was said in the meeting was incorrect and we preferred the evidence of the respondent's witnesses on that issue.

85. As a result, for the reasons explained, we did not find that the respondent would only allow the claimant to return to work in a junior role (performing blow-dry's and cleaning the salon), as alleged.

86. For issue two, we found that the seizures (of both types as recorded in the list of issues) were something which arose in consequence of the claimant's disability. The respondent's representative did not make any submissions on that issue.

87. Issue three asked whether the acts at issue one constituted unfavourable treatment for the claimant? We have only needed to consider this for issue 1(a) (only being permitted to take on new clients and not have regular clients back). As we have recorded in the legal section of this Judgment, there is no need for a

comparison as there would be for direct discrimination, however the treatment must be unfavourable, that is there must be something intrinsically disadvantageous to it.

88. The respondent's representative submitted that what was done was not unfavourable for the claimant. He highlighted the respondent's decision to pay the claimant at a rate of pay which reflected her actual earnings in the three-month period prior to her absence and which meant she was not financially disadvantaged if she did not have her regular clients. He highlighted, what was not in dispute, that the clients were those of the respondent and not any individual stylist. His view was that there was no disadvantage to the claimant in cutting one person's hair (a new client's) over another's (a regular).

89. We accepted the claimant's case that this was unfavourable for her. We found that, for the claimant, no longer cutting the hair of those who were her regulars (where they chose to return to her) was a disadvantage. It was something which was intrinsically disadvantageous to her, as it would be to most (if not all) stylists. The loss of regulars was disadvantageous because the relationship of a stylist with her regulars would go beyond simply the act of cutting or styling hair. It would adversely affect the perception of the claimant by others, including her loyal regulars and colleagues. A stylist can have a very personal relationship with a regular customer, and we found the loss of that was unfavourable for the claimant. We also considered the fact that it was unfavourable was supported by the steps undertaken by the respondent the previous year to enable regular clients to return to the claimant after her period of absence (albeit that may also have been as a result of what was considered to be in the best interests of the respondent).

90. Issue four was not in dispute. It was accepted by the respondent's counsel, who confirmed that it had been accepted by Miss Gilbody in her evidence. As a result, it was accepted that the unfavourable treatment found was because of something arising in consequence of the claimant's disability.

91. The final issue in the claim for discrimination arising from disability was whether what we found at issue 1(a) was a proportionate means of achieving a legitimate aim? In practice that was two questions. Was the aim or aims relied upon legitimate? If so, was the respondent's approach a proportionate means of achieving that aim or aims?

92. The aim or aims relied upon by the respondent was that such treatment was necessary to protect the health and safety of the claimant, its staff, and customers. We entirely accepted that protecting the health and safety of the claimant, the respondent's staff, and the respondent's customers, was a legitimate aim.

93. The key question was whether what the respondent did as found at 1(a) was a proportionate means of achieving that aim or aims. We reminded ourselves of what is said about doing so in the EHRC Code of Practice on employment. We must undertake a balancing exercise. Proportionate means appropriate and necessary. The approach does not have to be the only way of achieving those aims.

94. It was clear, in our view, that not permitting the claimant to have any of her regular clients return to her on her return to work, was not a proportionate means of achieving the aim relied upon. We fully accepted that the respondent did not have to

return all of the claimant's regular clients to her. Those clients would need to be able to choose whether or not to do so. The claimant was initially returning to work on a phased return to work and therefore all of her regular clients could not have returned to her during that phased return due to the time constraints on that phased return (similarly she could not have undertaken the longest procedures). However, there were less discriminatory ways of achieving the aims relied upon, than not permitting the claimant to have any of her regular clients back at all (as we have found occurred). Not permitting any regular clients to return to the claimant, which is what we have found occurred, was not a proportionate means of achieving the legitimate aim relied upon.

95. The respondent might have been better able to explain the approach that they took had they educated themselves about the claimant's condition. They did not do so. They could have prepared for, and considered, the claimant's return to work at an earlier stage, prior to immediately before the expiry of the claimant's previous fit note. They did not obtain occupational health advice about what was required, as they could have done. However, in reaching our decision, we focussed upon whether the respondent's actual approach was a proportionate means of achieving the legitimate aim relied upon, and not whether the respondent could have been better informed about how to achieve that aim.

96. In his submissions on proportionality, the respondent's representative relied in part on the limited amount said in the fit note and the limited medical evidence or advice available to the respondent. We did consider that issue and submission. The claimant had previously been recorded as not fit for work until 30 January 2023 (C-6). The view of the Tribunal, which differs fundamentally from that of the respondent, is that once the fit note had expired, unless a relevant medical professional has certificated the employee as not being fit for work, that employee is assumed to be fit and able to return to work. The current fit note regime has absolutely no requirement for an employee to obtain a certificate from a medical professional which records explicitly that they are fit to work. Therefore, there was nothing which prevented the claimant in this case from appropriately returning to work once the fit note had expired. Once the claimant provided the additional fit note of 6 February 2023 (C-8), the position was clearer. That recorded explicitly that the GP considered that the claimant was fit for work on a phased return to work. In the light of that second certificate, the claimant was recorded by a medical professional as being fit to return to work on a phased return basis. We agreed with the claimant's point that the GP knew what her job was and had certificated her as fit for that role on a phased return. The fit note document does enable a medical professional to certify an individual as fit to return to work to amended duties only, but in this case that was not recorded (save for the uncontroversial advice that the return should be phased).

97. To the extent that the respondent's case on proportionality turned upon a contention that the respondent was entitled to, or able to, try to obtain more information or greater detail in a fit note or from the claimant's GP, we fundamentally did not agree. An employer is able to obtain its own medical advice if it wishes to do so, by obtaining its own occupational health advice. The respondent in this case chose not to do so. They were not obliged to do so. However, they were not reasonably able to require the claimant to obtain more medical evidence before allowing a return to clients or duties, particularly when a fit note had been provided which recorded that she was fit to return to work (if returning on a phased return).

98. In any event (and irrespective of what we have said about fit notes), the fit notes provided (or any initial absence thereof) did not, in our view, support the respondent's arguments on the proportionality of not permitting the claimant to have her regular clients back, as the notes did not (and would not) have provided any distinction between returning regular clients and undertaking work for any client.

99. As a result, we found that the respondent did unlawfully subject the claimant to discrimination arising from her disability in the way alleged at 1(a). We did not find that it did so in the way alleged at 1(b).

100. We next considered the claimant's claim that the respondent breached its duty to make reasonable adjustments (issues 6-12). When addressing one part of what was alleged, the respondent's representative submitted that it was legally simply incorrect. We found that submission to be correct and in practice accurate about the entire claim for breach of the duty to make reasonable adjustments. Disability discrimination and how allegations should be argued or categorised can be extremely complex. In this claim we found (for the reasons explained below) that the claim for breach of the duty to make reasonable adjustments was not the correct way to pursue what was alleged.

101. Issue 6(a) was whether the respondent applied a provision criterion or practice (PCP) and the PCP relied upon by the claimant was that the respondent required a letter from her General Practitioner confirming she was fit to undertake her usual duties, before the respondent would allow her to return to work. As the respondent's representative entirely correctly submitted, that was not a PCP at all. In reaching that decision we considered what was said in the EHRC code of practice and what was said in the **Ishola** decision (which is quoted in the legal section above). This was a single one-off decision applied to the claimant, without more. It was not something which was (or could have been) a PCP. It was not the respondent's practice.

102. The problem with applying the provisions regarding reasonable adjustments to this allegation, is further illustrated by issues 7 and 8. The respondent did not apply the PCP to other persons without the claimant's disability. Indeed, it had not applied the PCP to the claimant on her return to work the year before. It was a unique one-off decision made for the claimant alone. Persons who share the claimant's disability were also not put at a substantial disadvantage when compared to others who do not share it, as the PCP relied upon would have had the same impact on all to whom it applied (if it had been applied to others).

103. Issue 9 was whether the claimant was put at the substantial disadvantage? We did not need to determine that issue in the light of what we have found. However, we did find that, despite what the respondent's representative submitted, the request for the letter did put the claimant personally at what was a disadvantage generally. An individual being told that they cannot return to booking clients without a further medical certificate, as the claimant was told in the text message of 3 February from Miss Gilbody (B-22), we found was clearly and certainly a disadvantage (even if she subsequently tried to obtain what had been requested).

104. We then turned to consider the claimant's constructive dismissal claim. Issue 13 in practice was a summary of the questions asked in more detail in issues 14 and

15. As issue 14 made clear, we needed to consider whether the respondent had acted in breach of the implied term of trust and confidence, in the ways alleged at (a), (b) and (c) listed as part of issue 14.

105. 14(a) was alleged to be the respondent insisting the claimant obtained a letter from her General Practitioner confirming she was fit to undertake her duties, before the respondent would allow her to return to work. The claimant was not entirely precluded from returning to work at the respondent's premises without obtaining a further letter from her general practitioner. However, as was clearly stated in the text message of 3 February from Miss Gilbody (B-22), she was told that she could not book any clients unless she did so. That is, she was told she could not return to her role or to undertaking her usual duties without such a letter/note. We did find that to be a breach of the implied term of trust and confidence. The claimant was fit to work and wished to undertake her duties. The respondent was not permitting her to do so. We accepted that the respondent took steps to address pay and to ensure that the claimant was not financially disadvantaged. For some employees that might have been sufficient. For the claimant at the time, it was not sufficient for her. She wished to return and undertake her duties (at least on a phased return basis, part-time initially). By refusing to let her do so, we found that the respondent breached the implied term of trust and confidence.

106. Issue 14(b) reflected the allegation which we have already determined as being unlawful discrimination arising from disability as issue 1(a). As a result, and as we have already found that the respondent did not permit the claimant to have her regular clients back and that was unlawful, we found that it followed that the respondent breached the implied term of trust and confidence when doing so.

107. Issue 14(c) reflected issue 1(b) (discrimination arising from disability allegation). For the same reasons as we have already given, we did not find that the claimant did return to work in a junior role, nor did we find that the claimant was limited to blow dry's. We did not find that the respondent breached the implied term of trust and confidence in the way alleged at 14(c).

108. Issue 15 asked whether the breaches of contract together or separately amounted to a repudiatory breach of contract by the respondent, namely did they amount either together or separately to unreasonable conduct that was calculated to or likely to destroy or seriously damage the relationship of trust and confidence between the respondent and the claimant. We considered this for allegations (a) and (b) together.

109. Part of what we were asked was whether the conduct was <u>calculated</u> by the respondent to destroy or seriously damage the relationship of trust and confidence. We did not find that the respondent deliberately acted in the ways found because it wanted to destroy or damage the relationship with the claimant. That was not the intention of Miss Gilbody (or Ms Crawley).

110. Turning to the question of whether the way that the respondent acted (as found for (a) and (b)) was <u>in fact likely</u> to destroy or seriously damage the relationship of trust and confidence, we found that it was. We have found that the respondent acted in a way which amounted to unlawful discrimination and therefore it was clear that it did. In any event, for the two things found in the claimant's

circumstances, we found that it did. In the light of what the claimant had recently gone through, the respondent stopped the claimant from returning to her duties when she was fit and able to do so (on a part-time phased basis), by imposing two requirements on her, one which restricted her ability to book clients at all, and the other which stopped her returning to her regular duties. We found those things to be a fundamental breach of contract. That was the case even where the respondent had, very reasonably, endeavoured to address the potential loss of pay. We considered that refusing to allow an employee to return to their duties (or their full duties) in the claimant's circumstances, was a fundamental breach of the implied term of trust and confidence.

111. We can address issues 16-18 together, albeit the precise questions asked were slightly different. The claimant did not waive the breach or affirm the contract. From when the breach occurred, the claimant was absent from work. She raised a grievance shortly after, and appealed the outcome when her grievance was not upheld. She resigned shortly after the grievance appeal outcome, as a result of the breaches we found. There was delay of three months, as the respondent's representative emphasised. In some cases, if a claimant delayed resigning for three months, they may have waived the breach or may have affirmed the contact in that time. In this case we did not find that the claimant did so. The claimant was absent from work on ill health grounds and did not do anything which waived the breach or affirmed the contract.

112. In issues 19 and 20 the respondent argued that the constructive dismissal was for a fair reason (some other substantial reason) and was fair applying section 98(4) of the Employment Rights Act 1996. In the list of issues, the reason had been recorded as breach of the duty of trust and confidence, but that was not pursued in submissions. In submissions, the reason relied upon was concern for health and safety. We had considerable concerns about the respondent relying upon a specific reason for dismissal raised only during submissions at the end of the hearing and not previously pleaded or even included in the list of issues, however despite those concerns we considered the issue on its merits (and in the light of our decision did not need to decide whether the respondent was technically able to do so).

113. As the category of some other substantial reason is so broad, we accepted that concern for health and safety can be some other substantial reason, albeit not one commonly relied upon. However, the definition of that reason in full in section 98(1)(b) is that the reason must be some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. Applying that full definition, we did not find that what the respondent relied upon in this case was a reason which justified dismissing a stylist. In any event, applying section 98(4), we did not find that the respondent acted reasonably in treating that as sufficient reason for constructively dismissing the claimant in accordance with equity and the substantial merits of the case (even taking account of the respondent's limited size and administrative resources). In our view, it clearly did not for reasons we have explained. The claimant was fit and able to return to her duties and (subject to the need for a phased return) should have been allowed to do so. The respondent did not act reasonably in treating their health and safety concerns as sufficient reason for fundamentally breaching the claimant's contract in the circumstances of this case. The dismissal was unfair.

Remedy

114. The amount of the basic award for unfair dismissal was agreed between the parties. That was **£3,742.80**. We have awarded that amount.

115. We next considered the injury to feelings award for the discrimination we found had occurred. The respondent had accepted that there was injury to feelings and an award should be made. The respondent contended that the award should be in the lower band. Whilst not accepting the claimant's figures, it was also contended that if the figure was accepted the award should be £3,300 as only one of the three allegations of discrimination had been found. The claimant had sought an award of £10,000 in her schedule of loss, but in submissions on remedy she instead sought an award of £40,000 in the higher band.

116. We found that there was evidence from the claimant about the injury to her feelings which had resulted from the actions of the respondent. The evidence in her witness statement was about the injury suffered from a mix of allegations and was not specific to the injury suffered for the discrimination found.

117. We needed to decide into which **Vento** band the injury to feelings found should be awarded. We were very clear that the impact of the discrimination found was not such as to place the injury in the highest band. We focussed on the injury to the claimant and not the discrimination itself. We understood that the award needed to address the injury suffered. We found that the award should be one which was within the lower band. We fully accepted that what we found did have an impact upon the claimant, but the period of discrimination found meant that was for a limited period. We were very close to awarding the claimant an award in the middle band, as a result of the importance to her of returning to work at the time and the impact which the discrimination had upon her. However, we eventually concluded that the correct band for the award was the lower band, but near the top of that band.

118. It was the case that the claimant was particularly vulnerable to injury at the time of the discrimination, because of the other events in her life. She had recently had epileptic seizures and had been diagnosed with a brain tumour. That background of events meant that the respondent's conduct had a greater impact upon her than it otherwise might have done. The remedy awarded must reflect the claimant as she was at the time and the fact that she was particularly vulnerable does not result in any reduction. We had evidence of the impact that events at the time had on the claimant because she was subsequently signed off as not fit for work by her Doctor initially for a period of two weeks following the discrimination found. She was then signed off for three months due to stress at work.

119. The respondent suggested that the injury to the claimant's feelings should be split to reflect the allegations found and not found. We did not accept that was the correct approach. The injury caused by the discriminatory action of the respondent could not be divided in that way. We had to focus on the injury caused by the discrimination we found. The claimant had been committed to returning to work. The discrimination found resulted in her being unable to do so (at least in full and to her duties). In a period of uncertainty and with the health concerns she had, the discrimination particularly impacted upon her when she was unable to return.

120. In her evidence about the injury to her feelings, the claimant had placed some emphasis on lost friendships with those in the salon. That was not something which could genuinely be taken into account by us when determining the injury to the claimant's feelings which resulted from the discrimination found.

121. As a result and balancing all of the factors explained, we determined that the appropriate injury to feelings award for the claimant was **£10,000**, being a figure in the lower **Vento** band but near the top of that band (and also being the figure the claimant had previously sought in her schedule of loss).

122. It was agreed by the parties that there were 454 days from the date of the discrimination found to the date of the hearing. We divided that number of days by 365 and multiplied it by 0.08 (being the applicable rate of interest). Applying that calculation to the injury to feelings award of £10,000, that resulted in interest on the injury to feelings award of **£995.07**. We determined that serious injustice was not caused by awarding that amount.

123. We then considered the damages which would be awarded for the discrimination found.

124. From the date of discrimination until the end of her employment, the claimant had calculated her lost net earnings in her schedule of loss (A-15) as being £3,437.73. That is the figure she would have earned had the discrimination not occurred and had she returned to work on the phased basis as envisaged. The parties had agreed that, when they looked at her payslips and added up the sick pay and holiday pay which she received prior to the end of her employment for the equivalent period, the claimant was paid (net) £3,294.70. As a result (using the difference between those two figures) the claimant's loss to the end of her employment was £143.03.

125. The next relevant period was the period between the end of the claimant's employment (16 May) and the date when she ceased to be able to work due to her surgery (14 October). The claimant was out of work for this period and did not receive any earnings. In submissions the respondent contended that we should take a view on mitigation and contended that the claimant had failed to mitigate her loss by not actively looking for work during this period. We accepted that the claimant did not fail to mitigate her loss by not doing so in the circumstances in which she found herself. She had only recently lost employment and was awaiting surgery, with the evidence being that the surgery was cancelled on more than one occasion. The claimant was not in breach of the duty to mitigate her loss in those circumstances.

126. The net figure which the claimant detailed that she lost in her schedule for that period (calculated using the figures recorded at A-16) was (net) £9,453.82. The claimant did receive £1,865.60 in employment support allowance for that period based on the figure the claimant gave (A-15). That ESA needed to be deducted to calculate the claimant's actual losses. We did not deduct the payments for personal independent payments as we understood those to be benefits which the claimant was paid irrespective of her employment situation. That meant that the claimant's lost earnings (less ESA) were £7,588.22.

127. The claimant also lost pension contributions for that period. The claimant claimed 5%. The respondent contended that the figure claimed was wrong because the employer contributions (the element lost) was only 3%. The figure claimed was £636.68. We awarded 3/5 of that amount as we accepted the respondent's submission. The lost pension contributions for that period were £382.

128. For the period during which the claimant underwent surgery and was unable to work there were no losses and no losses claimed.

129. In her schedule of loss, the claimant contended that she was fit to have returned to work from 3 January 2024. The respondent contended that the claimant wasn't fit to return to work until later. In her evidence, the claimant explained that she had suffered migraines following the surgery. We found, as a result, that the claimant would not have been fit to return to work even had she still been employed by the respondent. We found that from 1 April 2024 the claimant was first fit to undertake a phased return to work and she therefore suffered no loss prior to that date, based upon her evidence.

130. When comparing the earnings which the claimant will receive from her new employment with the amount she lost from not working with the respondent, based upon the evidence available to us, it is not possible to precisely calculate exactly what she has lost. However, the schedule of loss records that the claimant was earning £14.47 per hour from the respondent before her employment terminated (including the calculation for lost commission). With her new employer, at least initially, the evidence was that she will earn £12.50 per hour. As a result, the difference per hour is £1.97. During April the claimant worked one day per week and, based upon an eight-hour day, that resulted in a loss of £78.80.

131. Adding together those figures (£143.03, £7,588.22, £382 and £78.80) meant that the claimant's losses to hearing totalling **£8,192.05**. We have awarded the claimant that amount.

132. For future loss, the respondent contended that none should be awarded, highlighting the period already covered by the compensation awarded to date. We considered that submission but decided that it was appropriate to award some period of future loss. The year covered by loss to date included a period when the claimant had been unable to work due to her operation. The claimant was only now undertaking a phased return. There is no scientifically correct period of loss. We were satisfied that it was reasonable and appropriate to award the claimant a period of future loss. However, we did limit that period to reflect a further twelve weeks, both in the light of the period for which compensation had been awarded and to reflect the fact that the claimant may have left the respondent in any event and may increase her earnings in her new employment.

133. For the first four weeks of future loss, the claimant was intending to return to work for two days per week. Using the weekly loss figure for one day per week over a four-week period which we have already calculated, the losses for two days per week would be £157.60. The second four weeks of future loss, the claimant will be returning to work for three days per week and her losses would be £236.40. For the third four weeks of future loss, the claimant will be working four days per week and using the same figures but adjusted for the additional day, the loss would be

£315.20. We therefore awarded the claimant total future loss of **£709.20**, reflecting those losses over that period.

134. We then calculated interest to be awarded on the losses to the date of the hearing (but not the future loss). As explained in the legal section, a mid-point is used for that calculation. As the agreed total number of days was 454 days from the date of the discrimination found to the date of the hearing, the mid-point was 227. We divided that number of days by 365 and multiplied it by 0.08 (being the applicable rate of interest). Applying that calculation to the losses awarded for discrimination (but not future loss) of £8,192.05, that resulted in interest on award of **£407.58**. We determined that serious injustice was not caused by awarding that amount.

135. When we stood back and considered the remedy awarded for discrimination, we found that there was no reason why we would not award the sums determined when considering the remedy awarded globally.

136. As we had awarded the claimant her losses as part of the discrimination award, we did not award the claimant any additional award as a compensatory award for unfair dismissal. As a result, the recoupment provisions did not apply to the sums awarded and the losses have been calculated net of the relevant benefit.

Summary

137. For the reasons explained above, the Tribunal found for the claimant in one of her allegations of discrimination arising from disability, but not the other. We found that she was constructively unfairly dismissed. We did not find that the respondent breached the duty to make reasonable adjustments. We have awarded the claimant the compensation which we have recorded.

Employment Judge Phil Allen

22 May 2024

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

7 June 2024

FOR THE TRIBUNAL OFFICE

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/

Annex
List of Issues

Discrimination arising from disability (Section 15 Equality Act 2010)

1. Did the respondent do the following:

    a. Only permitted the claimant to take on new clients and would not permit her to have her regular clients back;

    b. Would only allow the claimant to return to work in a junior role (performing blow-dry's and cleaning the salon).

2. What is the 'something arising' in consequence of the claimant's disability?

    a. Generalised tonic clonic seizures;

    b. Aware focal seizures.

3. Do any of the asserted acts at 1 constitute unfavourable treatment?

4. If so, was any unfavourable treatment because of 'something arising' in consequence of the claimant's disability?

5. If so, was any unfavourable treatment a proportionate means of achieving a legitimate aim? The respondent will argue such treatment was necessary to protect the health and safety of the claimant, its staff and customers.

Failure to make reasonable adjustments (Sections 20/21 Equality Act 2010)

6. Did the respondent apply a provision, criterion or practice (PCP)? The claimant relies upon the following PCPs:

    a. The claimant alleges the respondent required a letter from her General Practitioner confirming she was fit to undertake her usual duties, before the respondent would allow her to return to work.

7. If so, did the respondent apply the PCP to persons who do not have the claimant's disability?

8. If so, did the PCP put persons who have the claimant's disability at a substantial disadvantage when compared to other persons who do not share the claimant's disability?

9. If so, did the PCP put the claimant at that disadvantage?

10. Did the claimant suffer the following substantial disadvantages, which were caused by each PCP because of her disability:

    a. The claimant was not permitted to return to work;

b. The claimant was constructively dismissed.

11. Did the respondent take reasonable steps to alleviate such a disadvantage by:
    a. Allowing the claimant to return to work based upon the content of her fit note from her GP dated 2 February 2023 which stated the claimant may be fit for work on a phased return to work.

12. Did the respondent have actual or constructive knowledge that the claimant was put to the substantial disadvantage at the material time?

Constructive Unfair dismissal (section 95(1)(c) Employment Rights Act 1996)

13. Was the claimant dismissed?

14. Did the respondent breach the claimant's contract of employment (namely the implied term of trust and confidence)? The claimant alleges the following breaches of contract:

    a. Insisting the claimant obtained a letter from her General Practitioner confirming she was fit to undertake her duties, before the respondent would allow her to return to work;

    b. Only permitting the claimant to take on new clients and would not permit her to have her regular clients back;

    c. Would only allow the claimant to take on new clients to return to work in a junior role (performing blow-dry's and cleaning the salon).

15. If so, do the breaches of contract together or separately amount to a repudiatory breach of contract by the respondent, namely did they amount either together or separately to unreasonable conduct that was calculated to or likely to destroy or seriously damage the relationship of trust and confidence between the respondent and the claimant?

16. Did the claimant waive any of the alleged repudiatory breaches?

17. Did the claimant resign in direct response to the alleged repudiatory breaches?

18. If so, did the claimant resign within a reasonable time of the repudiatory breaches relied upon?

19. If the claimant was dismissed by the respondent, can the respondent show a potentially fair reason for the dismissal for the purposes of section 98(1)-(2) ERA 1996? The respondent relies on some other substantial reason for the dismissal, namely a breakdown in trust and confidence.

20. If so, was the dismissal otherwise fair within the meaning of section 98(4) ERA 1996?

Remedy

21. If the claimant's claims are upheld:

    a. What remedies does the claimant seek?

    b. What financial compensation is appropriate in all of the circumstances?

    c. What compensation for injury to feelings is the claimant entitled to?

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990 ARTICLE 12

Case number: **2405797/2023**

Name of case: **Miss G Geoghegan** v **Ash Heaton Moor Ltd**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 7 June 2024

the calculation day in this case is: 8 June 2024

the stipulated rate of interest is: **8% per annum**.

For the Employment Tribunal Office