EMPLOYMENT TRIBUNALS

Claimant	**Respondents**
	v
Mr Gabriel Elombah	Chelsea and Westminster NHS Foundation Trust (1) and Ms Janet Rice (2)

Heard at: **London Central Employment Tribunal**

On: **23-25 April 2024**

Before: **EJ Webster**
Mr T Cook
Ms D Keyms

Appearances
For the Claimant: **Mr Downey (Counsel)**
For the Respondent: **Ms C Ibbotson (Counsel)**

RESERVED JUDGMENT

1. The Claimant's claims for reasonable adjustments are dismissed.

2. The Claimant's claims for harassment related to disability are dismissed.

REASONS

The Hearing

3. We were provided with a hearing bundle numbering 1094 pages and a witness statement bundle including the following statements:
   (i) The Claimant
   (ii) Ms Janet Rice

(iii) Mr James McKean
(iv) Ms Anwesha Chakraborty

4. The Claimant's witness statement appended numerous documents as opposed to referring to documents in the bundle. They were considered in the same way as other documents, namely when we were taken to them either during cross examination or by the witness statements.

5. All witnesses gave oral evidence to the Tribunal.

6. At the outset of the hearing Mr Downey made an application for a supplementary witness statement to be allowed into evidence and for further documents to be added to the bundle. A full decision regarding that was given orally at the time and is not repeated here. However for the purposes of recording what we considered we confirm that we allowed paragraphs 14-18 of the additional witness statement and allowed Ms Ibbotson to ask questions of the respondent witnesses relating to that new evidence as additional evidence in chief.

7. Many of the additional documents that the Claimant sought to add were in fact in the bundle already and were therefore considered accordingly. Those that were not had not been established as relevant to the issues before us. We accepted that if they appeared to become relevant during cross examination by either counsel then we would reconsider our position but on the face of it the Claimant had not established sufficient relevance. This did not in fact transpire during the hearing.

The Issues

8. The issues had been agreed at the preliminary hearing before EJ Davidson on 13 September 2023. The parties agreed that they remained the issues in dispute save that the Respondent had conceded disability in the interim period. The issues to be decided were as follows:

9. Time limits

a. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 3 February 2023 may not have been brought in time.

The Respondent clarified at the outset of the hearing that they pursued this point in relation to the failure to make reasonable adjustments claim.

b. Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:
    i. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
    ii. If not, was there conduct extending over a period?

iii. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
iv. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

(i) Why were the complaints not made to the Tribunal in time?
(ii) In any event, is it just and equitable in all the circumstances to extend time?

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

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

b. A "PCP" is a provision, criterion or practice. Did the respondent have the PCP of requiring employees to attend the office at least three days a week?

c. Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that he found it difficult to travel to work and to be at his desk for long periods?

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

e. What steps could have been taken to avoid the disadvantage? The claimant suggests allowing him to work from home three days a week and in the office two days a week.

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

g. Did the respondent fail to take those steps?

11. Harassment related to disability (Equality Act 2010 section 26)

a. Did the respondent do the following: did Anwesha Chakraborty berate the claimant in an email saying he took long toilet breaks due to his IBS?
b. If so, was that unwanted conduct?
c. Did it have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment
d. Did it relate to disability?

12. Remedy for discrimination or victimisation

a. What financial losses has the discrimination caused the claimant?
b. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?
c. Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?
d. Should interest be awarded? How much?

The Law

Time Limits

13. The time limit that applies to discrimination claims is that set out in Section 123 of the Equality Act 2010. A claim must be presented within 3 months of the act complained of or within such further period as is just and equitable. The test for extension under Section123(2)(b) allows for the Tribunal to extend time where it is just and equitable to do so. That discretion is the exception rather than the rule: *Robertson v. Bexley Community Centre* [2003] IRLR 434, at para 25. Although the discretion is wide, the burden is on a claimant to displace the statutory time limits, *Chief Constable of Lincolnshire Police v. Caston* [2010] IRLR 327.

14. In *Abertawe Bro Morgannwg University Local Health Board v. Morgan (Unreported)* (UKEAT/0305/13/LA), Langstaff P held at para 52 that a litigant could hardly hope to satisfy the burden unless she provides an answer to two questions: The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the second is reason why after the expiry of the primary time limit the claim was not brought sooner than it was. The case of Owen v Network Rail Infrastructure Ltd [2023] EAT 106 held that a Tribunal had erred in finding that if no explanation or reason for the late submission of the tribunal claim could be found in the evidence, this necessarily meant that an extension of time should be refused, as opposed to that being a relevant, but not necessarily decisive, consideration to weigh in the balance.

15. In *British Coal Corporation v. Keeble* [1997] IRLR 336, the EAT considered Limitation Act 1980, s.33 to provide a useful checklist for a Tribunal's consideration of whether to exercise its discretion to extend time. That checklist sets out the following factors:

    (a) the length of and reasons for the delay;

    (b) the extent to which the cogency of the evidence is likely to be affected by the delay;

    (c) the extent to which the party sued had cooperated with any requests for information;

    (d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to cause of action;

    (e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

16. The courts have subsequently clarified that this is merely a useful checklist rather than a statutory requirement: *Southwark London Borough Council v. Alfolabi* [2003] IRLR 220.

17. The tribunal should consider whether to exercise its discretion to extend time separately in respect of each claim rather than doing so on a global basis.

18. **S 20 Equality Act - Duty to make adjustments**

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

(2) The duty comprises the following three requirements.

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

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

19. S 21 Equality Act - Failure to comply with duty to make reasonable adjustments

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

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

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

20. Schedule 8, Equality Act 2010 states that the duty to make reasonable adjustments arises unless the employer can show that it did not know or “could

not reasonably be expected to know" that the employee is disabled or that there was a substantial disadvantage.

21. Case law and the EHRC Code suggest that knowledge will sometimes be imputed to the employer. The EHRC Code advises that employers must "do all they can reasonably be expected to do" to find out this information.

22. Guidance for a tribunal's approach to reasonable adjustments was given in *Environment Agency v Rowan* [2008] ICR 218:

- The PCP must be identified;
- The identity of the non-disabled comparators must be identified (where appropriate);
- The nature and extent of the substantial disadvantage suffered by C must be identified;
- The reasonableness of the adjustment claimed must be analysed.

23. The duty does not arise however unless the employer knows or ought reasonably to know that the employee is disabled *and* that the PCP put him at a substantial disadvantage per paragraph 20(1) Schedule 8, EA 2010). The EHRC *Code of Practice on Employment* gives useful guidance on knowledge particularly at paragraph 6.15 – 6.19.

24. It is for the tribunal to assess for itself the reasonableness of adjustments. The Equality and Human Rights Commission Code of Practice gives useful guidance at paragraphs 6.28 and 6.29 upon potentially relevant factors. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case' — para 6.23.

25. In *Royal Bank of Scotland v Ashton 2011 ICR 632, EAT*, (confirmed by the Court of Appeal in *Owen v Amec Foster Wheeler Energy Ltd and anor 2019 ICR 1593), CA*. it was held that when addressing the issue of reasonableness of any proposed adjustment the focus has to be on the practical result of the measures that can be taken. Mr Justice Langstaff stated:

'It is not — and it is an error — for the focus to be upon the process of reasoning by which a possible adjustment was considered… [I]t is irrelevant to consider the employer's thought processes or other processes leading to the making or failure to make a reasonable adjustment.'

26. The test of reasonableness in S.20 EqA is an objective one and it is the employment tribunal's view of what is reasonable that matters (*Smith v Churchills Stairlifts plc 2006 ICR 524, CA*). The exercise for the tribunal is to determine objectively the extent to which any objected to adjustment would cause disruption, not whether the employer reasonably believed that such disruption would occur. The proposed adjustment must be considered from both sides – that of the claimant and the respondent.

27. A Tribunal may be required to substitute its own view for that of the employer, rather than focusing on the reasonableness of the process by which the employer reached the decision not to make a proposed adjustment.

28. Harassment – s26 Equality Act 2010

S26 (1)A person (A) harasses another (B) if—

(a)A engages in unwanted conduct related to a relevant protected characteristic, and

(b)the conduct has the purpose or effect of—

(i)violating B's dignity, or

(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…..

(4)In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a)the perception of B;

(b)the other circumstances of the case;

(c)whether it is reasonable for the conduct to have that effect.

(5)The relevant protected characteristics are—

….

disability

29. The EHRC code, which we look to for guidance, sets out what is meant by 'related to' in paragraphs 7.9-7.11. It states that related to has a broad meaning and that the conduct under consideration need not be because of the protected characteristic.

30. The Claimant must establish first that the conduct is unwanted and then whether, taking into account all of the circumstances of the case it is reasonable for the conduct to have the stated effect. This is an objective test with a subjective factor of hearing in mind the perception of the claimant.

31. The gravity of the conduct is a key part of the objective assessment. Some complaints will fall short of the standard required. Elias LJ in Land Registry v Grant [2011] ICR 1390 CA (para 47):

… even if in fact the [act complained of] was unwanted, and the Claimant was upset by it, the effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.

Facts

32. We have made findings of fact solely in relation to matters which assisted us in reaching our conclusions. Where evidence was before us that we do not

mention below this does not mean that we have not considered it; simply that it was not relevant to our conclusions.

33. All of our conclusions are reached on the balance of probabilities. Where there were two conflicting accounts and we have made a finding, it will have been reached because we preferred the evidence of that party.

Background

34. The Claimant is employed as a Band 4 Senior Patient Access Administrator. His employment commenced on 25 March 2019 and has now been terminated. The termination occurred after the events we are considering for the purposes of this claim and we heard no evidence in relation to it.

35. In or around January 2021 the Claimant contracted Covid. He subsequently developed long Covid. He has the following conditions which the Respondent concedes are disabilities:

    (i) Long Covid with IBS
    (ii) Long Covid with associated chronic fatigue
    (iii) Anxiety and depression

36. The Claimant's impact statement gave details regarding the impact his conditions have on his day to day life. For the purposes of our considerations we note that the most relevant symptoms that caused him the most difficulty attending the workplace or travelling to work were as follows:
    (i) Needing to go to the toilet 5-6 times per day
    (ii) Experiencing sudden needs to go to the toilet
    (iii) Frequent, uncontrollable passing of wind
    (iv) Fatigue (though this was not elaborated on to any great extent)

37. In May 2021, following a case conference, it was agreed that the Claimant would work from home on a full time basis with reduced hours. That arrangement continued until October 2022. This was called a phased return to work but it remained in place for a prolonged period of time. We were told in evidence by the Respondent witnesses that the reason the Respondent did not reconsider the Claimant's position again until in or around September 2022, was that the Trust had, until then, a policy of not managing Covid-related absences under their normal sickness absence procedure. Prior to September 2022, Covid-related absences were not counted towards any absence monitoring nor, as far as we could tell, towards sick pay calculation. This policy changed in around September prompting the Claimant's situation to be considered.

38. Following the change in policy, the Respondent decided that the Claimant's situation and his sickness absence levels needed managing under their normal sickness absence process. It is not in dispute that prior to this the claimant was working reduced hours, in a reduced role, on full pay, and exclusively from home. The Claimant had been informed of the change in policy (p582) which

he confirmed during what was described as a Long Term sickness meeting with Ms Rice on 21 October 2022.

39. Prior to holding this meeting with the Claimant, he was referred to Occupational Health ('OH') and an OH report dated 26 September 2022 was produced. The report said that the claimant would not be able to return to full time on site working in the office and said that he was only fit for an equivalent level of duties as he had been undertaking in the past few months. The OH practitioner said that he was not fit to return to his full time role on site in the foreseeable future based on symptoms of excessive fatigue.

40. Ms Rice and the claimant had this report at their meeting on 21 October 2022. Ms Rice indicated that the Respondent could not sustain his full time working from home 'phased return' indefinitely. A different phased return to full time on site working was set out on 27 October 2022 (p623). That letter also confirmed that the claimant had stated at the meeting that he was feeling better from a fatigue point of view and wanted to return to work on full time hours (though not full time in the office). He accepted during this hearing that any adjustments he continued to need were solely in relation to his IBS symptoms and not in relation to his fatigue. He was clear that he could work full time hours.

41. We accept Ms Rice's evidence that the conversation stated that they needed the Claimant back on site, working his full time hours, but that they would consider some flexibility allowing him to work some days at home. The follow up letter confirms this by referencing the Claimant's need to put in a flexible working request.

42. Whilst we accept the Claimant's evidence that a separate flexible working request ought not to have been required under the respondent's reasonable adjustments policy, it is relevant that Ms Rice made it clear at the meeting that some form of flexibility would be forthcoming but the extent of that needed to be considered. Ms Rice accepted in evidence that she did not need the Claimant to submit a separate flexible working policy but said that she had misunderstood the policy and thought that a flexible working request was a necessary part of any process where someone needed or wanted to work flexibly in some way. Her understanding at the time was that a flexible working request was needed regardless of the reason behind the request. We accept that she genuinely believed this at the time.

43. The Claimant submitted a flexible working request on 15 November 2022. In that request he asked to work 3 days per week from home. Ms Rice met with the Claimant to discuss it. The Claimant's request was refused but the Claimant was allowed to work from home 2 days per week instead. The reason given for this was the operational needs of the Claimant's role and the department which necessitated the Claimant being on site more than he was. The Respondent indicated in evidence that the Claimant's previous working from home had had a detrimental impact on the standard of the Claimant's work and its service delivery. All of the respondent witnesses gave evidence of the impact on the department and colleagues in some detail and were clear that the service was suffering considerably.

44. The Respondent considered the request through their flexible working policy. The claimant considers that the fact that they looked at it through this lens meant that they focused on the business needs of the Respondent exclusively and did not take into account their legal obligation to consider his disabilities and how best to alleviate any disadvantage he was placed at. We will deal with this properly in our conclusions below. However for the purposes of the relevant facts, we find that the Respondent took into account the Claimant's health and the medical evidence they had when reaching their decision as to whether to grant the Claimant's request to work flexibly. We note in particular Mr Cavalli's email to the Claimant at page 669 which includes the following paragraph:

    "Reasonable adjustments including the recommendations from occupational health have been taken into account during this process as well as the needs of the service and the impact of this request on the team. The report from occupational health are recommendations only and are dependent on what we are able to offer as an employer. I note from the consultant letter from April that the colonoscopy was not able to be performed and therefore an official diagnosis of IBS was not able to be made – if this has ***seen*** *taken place since then please do update me and we can look into what onsite support we can offer."*

45. We also accept the Respondent's witness evidence from Ms Rice that the flexible working request was part and parcel of the review of the Claimant's phased return to work from their point of view. Whilst she now accepts that the Claimant did not need to submit a separate request, the request was still considered with exactly the same thought processes in mind as would have been applied to considering whether to make reasonable adjustments.

46. Ms Rice's meeting with the Claimant was on 17 November 2022 and she communicated to him that his request would not be granted. The Claimant was not happy so Ms Rice escalated the request to Mr Cavalli. He agreed with Ms Rice's decision. Mr Cavalli confirmed his decision in writing to the Claimant on 15 December 2022.

47. The Claimant appealed against that decision on 3 January 2023 and an appeal hearing was heard on 17 January 2023 by Mr McKean. Mr Mckean upheld the decision to only allow the Claimant to work from home 2 days per week as opposed to the requested three. That written outcome was sent to the Claimant on 20 January 2023.

48. Mr McKean gave unchallenged evidence that he was sent, and considered, the OH reports and the Claimant's information regarding his disabilities as well as the management position which was that it was not sustainable to allow the Claimant to work from home three days per week. Mr Mckean met with the Claimant on 17 January 2023. We had the transcript of that meeting. The Claimant told Mr Mckean about his conditions and Mr Mckean confirmed that the Claimant's health was considered.

49. We accept that unfortunately Mr Moschos and the first respondent's managers overall, focused their written answers around the business needs and their reasons for refusal were tailored to complying with the flexible working ACAS code. This meant that Mr Mckean's letter made no reference to reasonable adjustments. However, the letter starts with a paragraph summarising the Claimant's health conditions thus indicating that the Claimant's health was considered and was known to be the reason the Claimant had submitted the flexible working request. The remainder of the letter focusses on the Respondent's business and resourcing needs and why they considered they could not support further working from home.

The Claimant's role

50. Prior to contracting Covid 19 the Claimant worked full time on site as did the rest of his team. This included working exclusively on site during a large part of the Covid pandemic. The Claimant was an administrator but his role, as a Band 4, included the following on site tasks:
    (i) Supervising colleagues
    (ii) Taking phone calls from 4 separate phone lines
    (iii) Speaking to doctors
    (iv) Speaking to patients (including irate ones)
    (v) Deputising for the Team leader when she was absent
    (vi) Cross cover for colleagues during breaks and absence
    (vii) Printing and sending heart failure appointment letters
    (viii) Urgent TIA referrals

51. The Claimant conceded during cross examination that the majority of the above matters could only be dealt with on site apart from supervising his colleagues and being supervised himself and answering the phone line that was diverted to his mobile.

52. Whilst, if taken in isolation, it may have been possible to ensure appropriate levels of supervision of colleagues and/or being supervised in a working from home role – it is artificial to reduce the Claimant's role to these tasks separately. It was also clear that although the Claimant could and did answer calls at home, he could not answer sufficient amounts of calls as there were 4 phone lines in the office and some calls would go unanswered. Sometimes it is possible to remove certain aspects of a person's role so that they can work exclusively from home. However the Claimant has conceded that, in effect, on the days he worked from home the majority of his role could not be done effectively and would have to wait for his days in the office or be covered by his colleagues.

53. We accept the Respondent witnesses' evidence that this placed a huge strain on the rest of the team. We had evidence from their ill-judged emails saying that the Claimant needed to go, along with more erudite ones which summarised the impact this was having on morale and staffing overall. The Claimant sought, in evidence, to suggest that his role could and ought to have been reduced to such an extent that he was simply doing administrative work from home and that he would only need to do the rest of his job on 2 days per week. We accept that when the Claimant was working from home, he performed so little of his role and responsibilities as to amount to a significant

downgrading of his position and significantly reduced the resourcing of the team and its functionality on those days.

The impact on the Respondent of the Claimant working from home

54. Paragraph 10 in Ms Chakraborty's witness statement sets out the issues that the team were having with the Claimant working from home. She gave several examples of her interpretation of the impact on the Claimant's work and the delivery of the service. A summary of her evidence is as follows:
    (i) He could not answer the volume of calls that they received when only one line could be diverted to him
    (ii) He could not book stroke appointments in coordination with the doctors and other medical staff – this was necessary because some appointments were time sensitive and being on site allowed those appointments to be made quickly thus ensuring patient safety
    (iii) He could not deputise for the team leader
    (iv) The rest of the team who worked on site had to stretch to cover the duties the Claimant could not do and that stretching was not sustainable long term.
    (v) The Claimant was making mistakes which could not be addressed properly as he could not be effectively monitored at home.

55. All of the respondent witnesses agreed that some tasks could be done remotely, but they also described the 'real time' aspect of much of the work that the department delivered. This meant that team members had to be present to speak to nurses and doctors who came in and out of the office, to patients who did the same and, on occasion, were irate and angry. They also said that colleagues required real time supervision and training from the Band 4 member of the team. Whilst they accepted some of the Claimant's work could be planned and people could call the claimant to ask him to do some of these tasks, the need for a lot of the work arose organically and could not be planned particularly when dealing with TIA patients who needed swift appointments.

56. The Claimant, by contrast, asserted that whilst these real time tasks did need doing they were not essential parts of his role every day, and that on his days working from home his colleagues could (and already had for some time) cover all of these situations and that he could provide supervisory support and book patient appointments remotely. He continually relied upon the fact that given that they were happy to allow him to work from home 2 days per week, he could not understand how they could therefore say no to 3 days per week. He refused to accept that each day worked from home increased the pressure on the service and colleagues in the same way that each day he had to come into the hospital, increased the pressure on his health and well-being.

Second Flexible working request

57. The Claimant went off sick after the rejection of his flexible working request. He was off work between 23 Jan 2023 and 21 March 2023 with stress and anxiety. Ms Chakraborty re-referred the Claimant to OH because he had been off sick and was now on a phased return to work.

58. He then commenced and a phased return to work. The phased return to work after 21 March 2023 built him up to full time hours with the aim of him returning to work 3 days per week in the office by week five. The phased return to work was confirmed by an email dated 3 April 2023 (p802). There were discussions between the claimant and the respondents regarding what he needed to return to work and the impact of his condition. We accept that there were various, ongoing conversations concerning the claimant's health and his return to work.

59. The Claimant was referred to OH by Ms Chakraborty because the Claimant had been off sick and was returning on a phased return to work. Her questions for OH focused on the Claimant's ability to do his role and what adjustments needed to be made.

60. The OH report dated 18 May 2023 (p833-834) said as follows:

I understand that Gabriel is currently attending work. There appears to be a strained relationship following the decline to work from home 60% of the week. I understand he lives with anxiety and depression
…
Gabriel advises he is able to manage his work duties from home and when on site with additional toilet breaks. May I suggest a review of the significant duties that need to occur in the office?

4. Are there reasonable adjustments/modifications that can be taken to improve attendance that can maintain fulfilment of the role's duties?

• I understand Gabriel is living with long term Gastric issues. Stress can impact on symptoms. Please consider a stress risk assessment if this has not already occurred, to view any work- related concerns.

• Additional toilet breaks are likely to be required throughout the course of the working day. I understand symptoms can be worse in the morning.

• Flexible working arrangements for medical appointment and for days when symptoms are worse

• Gabriel would prefer to work from home three days a week

61. Following the OH report there was a meeting between the claimant and Ms Rice on 25 May 2023. We think it likely that this meeting was prompted by the fact that the Claimant had contacted ACAS to commence Early Conciliation given the timing of the meeting and the language used in the outcome letter (14 June 2023) which stated that the respondent wanted to '*negotiate with you in order to reach a satisfactory outcome regarding workplace adjustments'* (p909) This letter confirmed that nearly all adjustments the Claimant had sought and had been recommended by OH, were agreed, including:

(i) A stress risk assessment would be undertaken

(ii) His toilet breaks wouldn't be timed but he was given guidance on how much time could be taken though it was subject to review
(iii) Any lateness due to his condition would not be treated as a timekeeping issue
(iv) He could take a 10 minute break every hour.

The only adjustment that was not agreed to was that he could work from home for 3 instead of 2 days per week.

62. On 16 June the Claimant then submitted another flexible working request. It did not raise any new issues that had not already been discussed either in his first request or in any of the subsequent meetings such as that on 25 May 2023.

63. Ms Chakraborty held a meeting with the Claimant on 29 June and Ms Chakraborty confirmed in that meeting that nothing had changed from the respondent's point of view and that the request was denied.

64. During that meeting she told the Claimant that she had done a 'deep dive' and spoken to various stakeholders, including doctors, as to what level of homeworking could be supported. We accept her evidence that she spoke to various relevant people about the staffing of the team and attempted to see if anything further could be accommodated. We accept that Ms Chakraborty looked again at the Claimant's request. She did not just rubber stamp the earlier decision.

65. This process was again done under the umbrella of the Flexible Working Policy as opposed to a reasonable adjustments request. The written response therefore primarily explained and relied upon the business needs of the Respondent to reject the request. However we find that in reaching its conclusions the Respondent was clearly bearing in mind the Claimant's health and weighing it up against the needs of the service. We do not consider that Ms Chakraborty would have spoken to the various stakeholders or even considered the Claimant's second request in any detail, had the Claimant not had the health conditions that he had.

<u>Email on 5 May 2023</u>

66. On 5 May the Claimant was away from his desk/office for a relatively long period of time. It is not in dispute that the reason for this was his need for a toilet break. It was also not in dispute that Ms Chakraborty called him on his mobile whilst he was on the toilet to ask him where he was. The Claimant was upset by this. Ms Chakraborty then spoke to the Claimant in person and told him that he needed to tell someone if he was going to be on a long break even if it was because he needed the toilet. She then followed that up with an email. The relevant passage of the email is as follows:

"You mentioned the effects of your medication, diarrhoea, dizziness, stress is resulting in you taking long breaks during your working hours. At this point I addressed the issue of timekeeping. Taking into consideration your illness, we are happy to discuss reasonable adjustments which can be accommodated without negatively impacting the business. However, its extremely important for

the team that we are able to define and agree on the breaks/time you will be away from desk. You indicated yesterday that you would want a further discussion with myself & HR about the adjustments made around your disability before you attend a monitoring meeting." (p 830).

67. Ms Chakraborty explained in her statement that her reference to time keeping was not her suggesting that he was late, she was referring to the time he was taking away from the office.

68. The Claimant's response to this, on the same day, indicates that he was upset by the situation. He says:
"I do not for record purposes take long breaks except if I am in the toilets and having to go toilet due to my diarrhoea which under Article 8 of the Human Right I have the right to go to toilet irrespective of how many minutes I spend in the toilet.

I feel that having to explain myself in this way shows that you do not understand my illness despite the fact the James Mckean acknowledged my disabilities.

Your email below seems geared towards just sickness monitoring and that my health is not prioritised which is frustrating in itself and stressing me.

I will not attend any further meeting until a Stress Risk Assessment referral and a meeting with the occupational health Doctor has taken place." (p 829)

69. We accept that the Claimant was genuinely upset by the incident as a whole. We do not consider that he was particularly upset by the email in isolation but that he considered that it was inappropriate for anyone to challenge him taking time away from his desk if it was because he needed the toilet.

70. We accept Ms Chakraborty's evidence that her intention was to ensure that whilst the Claimant was at work, he was able to do his job and that his team could operate properly.

Conclusions

Time

71. Given the date the claim form was presented (30 June 2023) and the dates of ACAS Early Conciliation (2 May 2023 – 13 June 2023), any complaint about something that happened before 3 February 2023 may not have been brought in time. The Respondent clarified at the outset of the hearing that they pursued this point in relation to the failure to make reasonable adjustments claim only.

72. In reasonable adjustments claim the time for bringing a claim starts to run from the point at which the employee ought reasonably to have known that there was a failure to make reasonable adjustments.

73. We find that the claimant knew that the respondent was not going to allow him to work from home 3 days per week at the point at which he received Mr

Cavalli's decision on 22 December 2022. There was however an appeal process and that was not completed until 20 January 2023.

74. Although the Claimant submitted a second flexible working request on 16 June 2023, he did not have any new reason to submit this request. He had no new information or evidence or health issues that prompted a new request and he had just had a meeting with Ms Rice on 25 May where she said that they would expect him to work back to working in the hospital 3 days per week. That was confirmed in the letter dated 14 June 2023 as were the other adjustments that the Respondent was going to make. Since the Claimant had returned to full time (in terms of hours) working he had not, at any stage, returned to working 3 days per week on site. At the point where the most recent phased return to work was coming to an end and he was going to have to come in 3 days per week, he submitted another flexible working request. He refused to accept the decision and wanted to delay the possibility of having to come in 3 days per week and saw this as a possible delaying tactic. This did not mean that he did not know that the respondent was refusing to make the request to work 3 days per week from home instead of 2.

75. We therefore consider that the claim has been brought out of time as the latest date on which the Claimant knew that the respondent was not going to adjust its policy in relation to his attendance was 20 January 2023.

76. We must therefore consider whether it was submitted within such additional time as we consider just and equitable. The first question in deciding whether to extend time is why it is that the primary time limit has not been met and the burden to explain that is on the Claimant.

77. The Claimant says that he was not aware of the deadlines and whilst he was asserting that he had access to lawyers to the respondents he has now stepped back from those assertions and said that he was telling the respondent that he had lawyers because he thought that it would make them take him more seriously. He says that he had been speaking to a family friend who was a lawyer.

78. We conclude, on balance, that the Claimant did have access to legal advice at this time. He makes reference to legal advice in an email dated 29 April 2022 (p535) and during a phone call on 3 February 2023 (p745) and in another email dated 6 April 2023 (p 793) where he asks who his lawyers should serve court documents on from the employment tribunal. We do not think that he was making empty threats given that he went on to bring proceedings and we do not think he was referring to lawyers simply because he wanted to be taken seriously.

79. He has not explained with any clarity why he did not submit a claim until June 2023 when he was able to engage with ACAS Early Conciliation during this time and had access to legal advice which on balance of probabilities would have involved advice regarding possible deadlines.

80. Whilst we accept that there is only a 13 day gap between 20 January 2023 and the date that the claim might be in time (3 February 2023) we do not consider that it is just and equitable to extend time in all the circumstances. The Claimant has not explained to us why it would be just and equitable to extend the time. He had been discussing his return to work and his reasonable adjustments over many months with the respondent. He knew their likely position from December 2022 and he knew with certainty that they were not going to change that position when he got the appeal outcome in January. Despite knowing this, and having access to legal advice, and being well enough to engage with the ACAS process and submit another flexible working request, he did not submit a Tribunal claim and has not satisfactorily explained why. We therefore consider that the Claimant's claim regarding reasonable adjustments is out of time, that it is not just and equitable to extend time and that we therefore do not have jurisdiction to consider it.

81. If we are wrong in that assessment. We have nevertheless considered the merits of the Claimant's reasonable adjustment claim.

82. The provision, criteria or practice relied upon was that the Respondent required employees to attend the office at least 3 days per week. During submissions Mr Downey wanted to reframe this as being that the Respondent required the Claimant to attend the office at least 3 days per week. The Respondent's submissions say that the correct PCP ought to be framed as being a requirement for employees to attend the office five days per week because this was their normal practice and they had adjusted that for the Claimant to allow him to come in only 3 days per week.

83. We consider that consider that requiring employees to attend the office <u>at least</u> three days per week captures the respondent's position of normally requiring someone to come in 5 days per week and captures the fact that the Claimant was an employee who was expected to come in at least 3 days a week.

84. If it is framed in the way the Respondent seeks to frame it the claim must fail because the Claimant was not required to come in 5 days per week, and so the PCP was not applied to him.

85. We consider however that requiring employees to come in at least 3 days a week was a practice applied to the Claimant and it did put him at a substantial disadvantage when compared to someone without his disability. We accept the medical evidence which demonstrates that travelling to and from work was difficult given his IBS, as was working in the office. The fact that he could do it does not mean that it did not disadvantage him to do it.

86. However, we conclude that it was not reasonable for the Respondent to adjust the requirement by reducing the number of days he was required to attend the hospital from three to two.

87. The Respondent made several adjustments for the Claimant. They allowed him to take untimed toilet breaks, to take 10 minute breaks every hour and to take time off to attend any and all medical appointments. They had already adjusted

their position of asking him to come in 5 days per week and could not reduce the Claimant's time on site further because of the significant negative impact it had on the following:

(i) The team's ability to deliver the service to the doctors, nurses and patients who needed it
(ii) The team morale and the impact on colleagues' ability to do their job
(iii) The training and supervision of junior staff members
(iv) The training and supervision of the Claimant

88. The Respondent's evidence clearly demonstrated that were they to reduce the Claimant's attendance on site further, the position became unsustainable because the Claimant's role could not be done properly or to the level that was required when done from home. The fact that they had previously enabled him to work exclusively from home, does not mean that it was automatically reasonable for them to continue. In fact we find the contrary is true; the significant negative impacts of the Claimant's role having been done exclusively from home gave them evidence that it was not a role that leant itself to being done remotely and that whilst they could adjust that to an extent and allow him some home working – they could not adjust it to the extent that the Claimant was requesting without reducing the Claimant's work efficacy to such an extent that it was at best a lower banded role and a worst a drain on the operation of the entire department. To that end they offered to consider redeploying the Claimant to a different role that could be done more from home but he refused to consider that possibility. The Claimant considered that it was his right to work in such a way that wholly suited him. He was not willing to consider that the Respondent had to deliver a service and that they could only compromise on that service to a certain extent. His argument was that they had drawn an arbitrary line between 2 and 3 days and that if they could sustain 2 days from home they must be able to sustain 3. We disagree. The Respondent has clearly demonstrated that even allowing 2 days impacted on the service delivery but that they were willing to make that adjustment in order to support the Claimant remaining in work. However to work 3 days a week was not sustainable for all the reasons outlined above.

89. The Claimant argued that the fact that they looked at his request to work 3 days from home through the lens of their flexible working policy meant that they did not properly consider it as a reasonable adjustment. We disagree. It is integral to any reasonable adjustments consideration for the Respondent to consider whether an adjustment is reasonable taking into account the size and resources of the employer. The Respondent can be criticised for approaching this through their flexible working policy and therefore having outcome letters which focused on their business needs as opposed to expressing the decision in language that reflected the Claimant's disabilities and the need for adjustments. Nevertheless the important aspect of a reasonable adjustments claim is not the motivation for making (or not making) an adjustment, but the end result. If a PCP has been adjusted then motive is irrelevant. In any event we consider that it is clear from the evidence that we have seen that the reason the Claimant's role was adjusted from five days in the office to three (as well as the other adjustments outlined at paragraph 61), was because the Respondent

was considering the Claimant's disabilities and the medical evidence that they had and that this was central to their decision making process. Here the end result was that the Respondent adjusted the Claimant's role to the extent that it could sustain in an effort to ensure that he remained in the role. It made reasonable adjustments. The adjustment the Claimant is asserting for the purposes of this claim was not reasonable.

90. For these reasons the Claimant's claim for reasonable adjustments is not upheld.

Harassment related to disability (Equality Act 2010 section 26)

91. An objective reading of Ms Chakraborty's email dated 5 May 2023, does not reveal any language or tone that suggests that the Claimant is being berated for taking long toilet breaks. Whilst the email clearly relates to the Claimant's disabilities because it is discussing his toilet breaks, we accept that Ms Chakraborty did not intend to violate the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. We also do not consider that it is reasonable for the Claimant to perceive the email as violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment

92. The Claimant's claim was that this email had to be taken in context. That context was the fact that Ms Chakraborty had called him whilst he was in the toilet and then had a conversation with him about being away from his desk for long periods of time whilst on the toilet. He says that this meant that sending the email as a follow up amounted to him being berated particularly when it referred to time keeping. We disagree.

93. Ms Chakraborty did call the Claimant but she did so because she did not know where he was and was told by team members that he had been absent for some time and they did not know where he was. In those circumstances, it was reasonable for her to call him to see if he was alright (he had recently returned from a period of sick leave) and to ascertain his whereabouts. It was also reasonable for her to speak to the Claimant afterwards, to ensure that where possible, such a situation did not arise again by asking the Claimant to, when possible, let people know if he was going to be away on long breaks. Whilst the email refers to time keeping, it was in the context where the time the Claimant was spending away from his desk could have been problematic, particularly if it was not covered by colleagues because they did not know either that he had gone on a break or that he would be gone for a significant period of time. It was clearly Ms Chakraborty's intention, both in the lead up to and in the sending of this email, to try to manage the situation so that she could enable the Claimant to take the breaks he needed whilst also ensuring that his team could provide the service needed to the various stakeholders and to make sure that the Claimant was sufficiently able to carry out his role. The tone of the email was professional and polite. As the case law has pointed out, the statutory language should not be trivialised or cheapened. The wording of the email was reasonable and professional and did not berate him. In all the circumstances, it

was not reasonable for the Claimant to perceive it as violating his dignity or creating intimidating, hostile, degrading, humiliating or offensive environment .

94. Therefore the Claimant's claim for harassment related to disability is not upheld.

Employment Judge Webster

Date: 17 May 2024

JUDGMENT and SUMMARY SENT to the PARTIES ON

7 June 2024

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FOR THE TRIBUNAL OFFICE