



EMPLOYMENT TRIBUNALS (SCOTLAND)

5

Case Number: 8000411/2023

Hearing held in Glasgow on 14, 15, 16, 17 (deliberations) May 2024

10

Employment Judge M Whitcombe
Tribunal Member N Elliott
Tribunal Member J Haria

15

Mr Paul Ainsworth

Claimant
Represented by:
Ms Sophie David
(Counsel)

20

West Dunbartonshire Council

Respondent
Represented by:
Mr S Miller
(Solicitor)

25

JUDGMENT

30

The unanimous judgment of the Tribunal is that the claim for disability discrimination in the form of a failure to make reasonable adjustments fails and is dismissed.

REASONS

Introduction and background

35

1. This is a complaint of disability discrimination in the form of a failure to make reasonable adjustments. The claimant has been employed by the respondent local authority since 9 January 2013 and continues in that employment. His

current role is Supported Accommodation Team Leader, reporting to Joanne Sutherland (Homelessness and Homelessness Prevention Co-ordinator). He has been absent from work on sick leave since 29 March 2023.

- 5 2. It was previously ordered that this hearing would deal with questions of liability only, leaving all issues of remedy to a future hearing, should the claimant be successful. Since then, the claimant has begun to consider ill health early retirement so the potential impact of that decision on compensation is a further reason for splitting liability issues from remedy.

10

Issues

3. We will abbreviate references to the Equality Act 2010 to “EqA 2010”. References to the Disability Discrimination Act 1995 will be “DDA 1995”.

15

Disability and knowledge both conceded

4. On 20 November 2023 the respondent conceded that the claimant had been disabled for the purposes of s.6 EqA 2010 from May 2022 onwards by reason of anxiety, depression, insomnia and PTSD. Knowledge of disability initially remained in dispute but ultimately knowledge was also conceded during this hearing.

20

5. The remaining issues that we had to decide were set out in an agreed list of issues. One issue evolved during the hearing and two were dropped. We will redraft them slightly in this judgment for clarity, to reflect the burden of proof as explained in ***Project Management v Latif*** [2007] IRLR 579 and also because it is not necessary for a PCP to be “applied” by a respondent in a reasonable adjustments case (see e.g. ***Roberts v NW Ambulance Service (No.1)*** (2012) UK EAT/0085/11, and compare the differently worded s.4A DDA 1995 and s.19 EqA 2010). With added sub-headings, by the end of the case the issues we had to decide were as follows.

25

30

35

PCPs

6. Has the claimant proved the following provisions, criteria, or practices (“PCPs”):

5

a. either:

i. a requirement for Team Leaders to inherit the workload of absent Team Leaders; or

10

ii. a practice that Team Leaders like the claimant would have to do the work of absent Team Leaders;

b. a practice of unequally distributing work amongst Team Leaders following employee departures/absences.

Substantial disadvantage

15

7. Has the claimant proved that any of those PCPs (if established) placed him at a substantial (in the sense of more than minor or trivial) disadvantage in comparison with persons who were not disabled and, if so, what was the nature of that disadvantage?

20

Adjustments

8. If substantial disadvantage is established, did the respondent fail to make any or all of the following allegedly reasonable adjustments?

25

a. The appointment of a Senior Support Worker to assist the claimant in his duties as Team Leader.

b. Some of the claimant’s work could have been distributed among other Team Leaders.

30

Dispute about the first PCP

9. In closing submissions Ms David sought to reformulate the first PCP from that set out above in paragraph 6(a)(i) to that set out in paragraph 6(a)(ii). The

original formulation was faithful to that in the original grounds of claim and the list of issues contained in the bundle, but the latter formulation fairly reflected the way in which the case was argued by both sides and properly tested the alleged discrimination.

5

10. The respondent objected, so we decided to deal with it as a formal application to amend the claim. We allowed the amendment and the following reasons should be sufficient and proportionate, especially since the point makes no difference to the outcome of the case. Having applied the well-known principles in ***Selkent Bus Co Ltd v Moore*** [1996] ICR 836, EAT, ***Abercrombie and ors v Aga Rangemaster Ltd*** [2014] ICR 209, CA, and ***Vaughan v Modality Partnership*** [2021] ICR 535, EAT, we concluded as follows.

10

15

20

25

30

a. The timing of the application, though late in the hearing, was not problematic since the application did not impair the fairness of the hearing from the perspective of either party. If anything, it enhanced the fairness of the hearing for the reasons set out below.

b. No issues arose in relation to jurisdictional time limits.

c. The nature of the amendment was minor, in that it involved a minor textual reformulation of the relevant PCP. It was neither a new type of claim nor an argument based on different facts.

d. The amendment helped rather than hindered the achievement of justice between the parties, since it removed the problematic word “inherit”, which cannot have been meant literally and which therefore generated uncertainty.

e. The reformulated PCP more accurately reflected the way in which the case had been developed during the hearing and was more apt for application to the evidence we heard. The essence of the case was that the claimant had been required to cover the work of another team leader in addition to his own work on a sustained rather than a short-term basis. That is the way in which the original PCP should be understood, but it is also better expressed by the reformulated PCP. That weighs in favour of allowing the amendment.

f. No prejudice was caused to the respondent since the reformulation did not require either party to call additional evidence or to recall any witnesses for further cross-examination.

5

g. Conspicuously, the respondent was both willing and able to make alternative submissions on each formulation of the PCP, demonstrating that no prejudice was caused. The submissions were substantially the same.

h. The balance of injustice and hardship favoured granting permission to amend.

10

11. Since we granted permission to amend the claim to reformulate the PCP, it was entirely just to depart from the original agreed list of issues to the same extent. No useful purpose would be served by setting out the many authorities on best practice in relation to of lists of issues since the point is obvious.

15

Evidence

12. We heard from the following witnesses in the following order:

20

a. Paul Ainsworth, the claimant;

b. John Kerr, an experienced housing professional who has held the role of Housing Development and Homeless Manager since 2014;

c. Kirsty Connor, a human resources professional normally working in Education Support, but who was involved in the claimant's grievance.

25

13. All of those witnesses gave their evidence on oath or affirmation and were cross-examined.

14. We were also provided with a joint file of documentary evidence running to 496 pages and a helpful joint statement of agreed facts.

30

Joanne Sutherland's attendance

15. We did not hear any evidence from Joanne Sutherland, Homelessness and

Homelessness Prevention Coordinator. She was and is the claimant's line manager. The respondent had intended to call her, but she objected on the basis that attendance would be detrimental to her health. The medical evidence to support that position was unsatisfactory and it was unclear that the wide range of supportive measures that can enable nervous and/or vulnerable witnesses to give evidence in courts and Tribunals had been fully considered. Further, our understanding was that she was declared fit to work in her demanding role and was attending work by the time of the hearing, and that it was only attending the Tribunal to give evidence that caused a difficulty. The respondent initially sought to compel the attendance of Joanne Sutherland by seeking and obtaining a witness order. In breach of that order, Mr Sutherland did not attend on any day of the hearing, and ultimately the witness order was revoked on the respondent's application on the second morning. The respondent elected not to instruct Joanne Sutherland, a current employee holding a management position, to attend the hearing to give evidence.

16. We were then invited to admit into evidence a witness statement from Joanne Sutherland. The proposal was that it should be read in her absence, without even being confirmed on oath or affirmation. The only one we saw failed to comply with the requirements of the Practice Direction and Presidential Guidance, although we were assured that a compliant alternative would be available if we granted permission to rely on it. Having heard submissions from both sides and having considered the applicable Practice Direction and Presidential Guidance, we declined to do so. Consequently, the hearing proceeded without any evidence at all from the claimant's line manager, who had primary responsibility for the making of any necessary adjustments.

17. We gave oral reasons for the rulings relating to Joanne Sutherland at the relevant times. At the end of the hearing Mr Miller confirmed that he did not require fuller written reasons for them.

Observations on the evidence

18. We thought that the claimant and Mr Kerr both gave us their honest view of the facts. We did not detect any contradictions, exaggerations or inconsistencies which undermined their credibility. While Mr Kerr's evidence contained a good deal of "management speak" and was not always as focussed on the question as might have been ideal, the important core facts were nonetheless clear and credible.

19. Kirsty Connor's evidence was not relevant to the issues we had to decide because the way in which the respondent handled the claimant's grievance had no bearing on its duty to make reasonable adjustments or breach of that duty.

Relevant facts

20. Where facts were disputed we made our findings on "the balance of probabilities", in other words, the "more likely than not" basis applicable in almost all civil courts and tribunals. Where we thought that a fact was more likely to be true than untrue, then for the purposes of our decision it was treated as being true. Nothing needs to be proved beyond reasonable doubt. Some of the undisputed facts were set out in the joint statement of agreed facts.

Structure of the Homeless Service at the relevant times

21. Structures are often more easily drawn than described in words, but the charts in the joint file of documents were not accurate or sufficient for present purposes.

22. The most senior role in the Homeless Service was that of John Kerr, Housing Development and Homeless Manager. He reported to the Chief Officer for Housing, who in turn reported directly to the Chief Executive of the respondent. Mr Kerr had 15 direct reports, including Joanne Sutherland,

referred to below.

23. Reporting to Mr Kerr was Joanne Sutherland, the Homelessness and Homelessness Prevention Co-ordinator, often abbreviated to Homeless Coordinator. Joanne Sutherland directly managed 5 Team Leaders at grade 8. The 5 Team Leader posts managed by Joanne Sutherland were as follows.

5

10

15

20

a. Team Leader Housing Options & Casework (in practice two full-time posts filled by 3 people: Gillian Robertson and a job share between Catherine Smith and Lee Pentland). The focus of the team was on the prevention of homelessness.

b. Team Leader Supported Accommodation (filled by the claimant, Paul Ainsworth). The focus of the claimant's team was to provide person-centred support to ensure that clients were able to sustain a tenancy.

c. Team Leader Resettlement/SOLO (filled by Madeline Russell also known as Madeline Slaven). This team dealt with the resettlement of offenders who had served a prison sentence. It also covered the statutory role of Sex Offender Liaison Officer.

d. Team Leader Ashton View (filled by Gary Whyte until May 2022). More details of the nature and function of the Ashton View facility are set out below.

e. Refugee Resettlement Team Leader (filled by May Abdul Rehman).

The claimant's role

25

30

24. The claimant's role as Team Leader Supported Accommodation (grade 8) required him to manage a team of 13 "supported accommodation workers" (grade 6). They are all support workers registered with the Care Inspectorate. The claimant also managed Shari Law, the Senior Homeless Accommodation Worker (grade 7). Shari Law managed a sub-team of 4 Homeless Accommodation Workers (grade 6). Those workers did not offer person-centred support and were not registered with the Care Inspectorate. Although the claimant did not line manage those Homeless Accommodation Workers

directly, he had overall responsibility for the service they provided.

25. In about 2021 the workload of the claimant's team grew by around 30% when two teams were merged and the units for which they were responsible rose from 217 to around 280. That adversely affected the level of support that staff could give to clients. The claimant's personal workload increased because of the need to supervise staff who were dealing with a larger number of cases, the need to ensure that cases were closed and the need to keep the system moving smoothly. Additionally, the claimant had to do a lot of extra administration including reviewing and authorising credit card spends, replying to correspondence from local MSPs and dealing with complaints from staff who felt that their workloads were too high.
26. The claimant felt that the reactive part of his job conflicted with structured support work. That caused him stress because he was aware of the need to meet certain professional standards as a registered manager.
27. On 12 January 2021 the claimant was signed off sick with work related stress. He rapidly completed a stress risk assessment form and was referred to Occupational Health ("OH"). He subsequently undertook a course of CBT before returning to work on a phased basis on 2 July 2021.

Gary Whyte's Suspension and Ashton View

28. Ashton View is a 22-bed emergency accommodation hostel. It is a regulated facility and requires a manager who is qualified to at least SVQ Level 4 in social care and SSSC registered.
29. In May 2022 Gary Whyte, Team Leader Ashton View (grade 8), was suspended from his role. He never returned to it. It is not necessary to record any further details about that process. Gary Whyte had a full-time role. In addition to line management responsibility for the staff working at Ashton View, Gary Whyte also had line management responsibility for 8 Housing

First Support Workers (grade 7), effectively acting as their Team Leader too. Housing First Support Workers helped people with chaotic lives who could not sustain a tenancy.

- 5 30. Overall, at the time of his suspension, Mr Whyte directly managed one Senior Project Worker (Sarah Weed, grade 7), 5 Ashton View Project Workers (grade 5), 3 Project Support Workers (grade 5) and 8 Housing First Support Workers (grade 7). The Senior Project Worker Sarah Weed managed 5 more Project Workers (grade 5).

10

Additional responsibilities assigned to the claimant

- 15 31. The Job Profile for the claimant's role as Supported Accommodation Team Leader included a bullet point indicating that one of the "*Key Activities, Responsibilities and Outcomes*" was "*to undertake any other duties commensurate with this post, as directed by the line manager*". Similarly, part 14 recorded that "*The duties and responsibilities contained within this Post Descriptor are neither exclusive nor exhaustive as the postholder may be required to undertake other reasonably determined duties commensurate with the level and grade of the post without changing the general character and nature of the post.*"

20

- 25 32. The claimant received an unexpected call from Joanne Sutherland asking if he could base himself at Ashton View. The claimant satisfied the requirements of having at least a SVQ Level 4 qualification in social care and registration with the SSSC. For a short period, the claimant took responsibility for the whole of Ashton View, the whole of the Housing First Support Workers, his own existing team of Supported Accommodation Workers and the Senior Homeless Accommodation Worker.

30

33. We accept Mr Kerr's evidence that both he and Joanne Sutherland regarded the claimant as the "best fit" for the role of covering Ashton View "for a period of time". The claimant had the right skills because he was a well-established professional in the support field, and that is where his strengths lay. He held

the necessary SVQ Level 4 qualification and SSSC registration. The claimant had a good working relationship with Sarah Weed who was the Senior Project Worker at Ashton View. The claimant had also once been the co-lead of Ashton View.

5

34. We also accept Mr Kerr's evidence regarding the relative suitability of some other SVQ4 qualified people, who the claimant suggested could have taken on Ashton View responsibility instead of, or as well as, him.

10

a. Sarah Weed could not have provided additional support as early as May 2022 (though she did in November 2022) because she could not have fulfilled the Team Leader role as well as her Senior Project Worker role at that stage. She needed time to develop her abilities as a team leader.

15

b. An employee who we will refer to as VX (not the real initials) lacked sufficient experience of management responsibility at the relevant time. They were a Housing First Support Worker.

20

c. Someone we will refer to as WV (again, not the real initials) was not considered an appropriate appointment given concerns about their performance as a Housing Support Worker. Further, they did not have sufficient management experience.

25

35. The claimant had to manage a lot of conflict within the Ashton View Team and the Housing First Support Teams. The claimant received complaints about the practices of the Housing First Support Workers and witnessed bullying within that team, although that incident was dealt with by Joanne Sutherland because the claimant was a witness. The management of the Housing First Support Workers was difficult not only because of those issues, but also because they were mobile workers who initially attended the office only very rarely. About 6 of them challenged the claimant's management style and even his morals. One of them alleged that the claimant was in breach of his duty of care towards clients and that he was a poor manager and a bully. The claimant found the Housing First Team to be made up of very challenging people who were not willing to take instruction. The claimant soon informed

30

Joanne Sutherland that he was struggling with the behaviours and practices of the Housing First Team.

5 36. The period for which the claimant would have to assume those additional responsibilities was not made clear to him, but both he and Mr Kerr initially expected it to be around 3 months (i.e. until about July or August 2022).

10 37. By July 2022 the claimant was reporting to Joanne Sutherland that he had problems with sleep, felt generally unwell and needed a further course of CBT. His energy levels were low and he felt exhausted. Joanne Sutherland instructed the claimant to “take a flexible approach to his day”, but the claimant found that impossible because he was working between a laptop and two phones from early in the morning until about 6pm. The claimant had been working in the Ashton View project a lot and, once there, it was difficult not to get involved. Most of his time was being spent on Ashton View and Housing First issues.

15 38. On 6 September 2022 the claimant emailed John Kerr, copying in Sarah Weed, saying, “*we are both very stressed and need assurances that we will be supported*”.

Arrangements from Autumn 2022 onwards

25 39. By this time, Gary Whyte’s suspension had continued for longer than the 3 months originally anticipated. The respondent made some changes to the arrangements for covering Gary Whyte’s responsibilities.

- a. The claimant would fulfil some of the elements of responsibility for Ashton View.
 - b. Sarah Weed would fulfil her own role as Senior Project Worker and also some of the management responsibilities for Ashton View. She would also have line management responsibility for some of the Housing First Support Workers.
 - c. Brian Kerr, Senior Support Worker, was put in place to support the claimant in the Supported Accommodation Service, although we
- 30

accept the claimant's evidence that this was only for a relatively short period.

d. Shari Law, Senior Accommodation Worker, began to report direct to Joanne Sutherland rather than the claimant.

5 e. Joanne Sutherland took on responsibility for recruitment, managing Shari Law (see above) and various other operational tasks that would otherwise have been done by Team Leaders, who were felt to be spread thinly. Examples of those other tasks included the preparation of statutory returns to the Scottish Government, preparing
10 performance information and carrying out shortlisting and interviews for grade 5 posts.

40. On 25 November 2022 Sarah Weed took over Team Leader Ashton View responsibilities from the claimant. She was inexperienced as an acting Team
15 Leader and so the claimant helped her to settle into that role. Sarah Weed was paid an additional "Responsibility Allowance". Her additional responsibility and the associated allowance were both extended in June 2023.

20 41. Sarah Weed's additional responsibilities left the claimant with continuing line management responsibility for 3 members of Ashton View, 13 Homeless Accommodation Workers, the Senior Homeless Accommodation Worker Shari Law and some of the Housing First Support Workers.

25 42. The claimant took planned sick leave from 6 December 2022 until 16 January 2023 for a hernia operation. On 18 January 2023 OH advised that the claimant was fit to return to work but with home working for the first 4 weeks. That recommendation was implemented by the respondent.

30 43. The arrangements made to cover the claimant's absence during the above period were as follows.

a. Effectively, Sarah Weed managed the whole of the Ashton View project and its staff, even though that was not reflected in her job title.

b. Shari Law and Gillian Robertson provided supervision to the staff working in the support teams.

i. Shari Law provided supervision to Housing Support Staff in Supported Accommodation, effectively becoming a temporary Team Leader for Supported Accommodation Workers, just as she was for Homeless Accommodation Workers.

ii. Gillian Robertson carried out some 1:1 meetings with Supported Accommodation Workers and Housing First Support Workers, although she did not assume any formal line management responsibility for them.

44. At a meeting on 2 February 2023 the claimant was recorded as saying that morale within his team was very low, that staff were frustrated, and that there might have to be a stress risk assessment. The claimant's original team were facing difficulties at least partly because he was not available to support them to the same extent as before.

45. The claimant commenced another period of sick leave on 29 March 2023 because of work related stress. He told Joanne Sutherland that he was overwhelmed by the pressure of his work. The claimant was assessed by OH on 3 May 2023. The report confirmed that the claimant was not fit for work. The OH assessor could "*not identify any adjustments which could facilitate his return to work at this time*". OH advised that the claimant should complete a stress risk assessment ("SRA") and that reaching an agreement regarding his concerns could be "*the key steppingstone*" to a return to work. The claimant completed a stress risk assessment the next day, 4 May 2023.

46. On 25 May 2023 the claimant submitted a grievance. The respondent declined to consider it, describing it as "not competent", because the claimant had failed to indicate what resolution he was seeking. We are surprised by that approach, since it appears either to place the burden on the employee to devise a detailed solution, or else to overlook the obvious implication that in broad terms the claimant was simply seeking a reduction in the stress that he encountered at work. The gist of the grievance was not mysterious. It is not

necessary for the purposes of this claim to consider the grievance process further, but the respondent might nevertheless wish to reflect on its approach.

47. As the claimant's sickness absence continued, Sarah Weed was formally appointed Team Leader for Ashton View and she took on all responsibilities for that project. Scott Morris was appointed a Senior Project Worker at Ashton View, backfilling the vacancy created by Sarah Weed's promotion. Line management responsibility for Shari Law was transferred more permanently to Joanne Sutherland.

Legal principles

Reasonable adjustments

48. By virtue of s.20(3) EqA 2010, where a provision, criterion or practice ("PCP") 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, then A is under a duty to take such steps as it is reasonable to have to take to avoid the disadvantage. For this purpose, "substantial" simply means "more than minor or trivial" (s.212(1) EqA 2010).

49. Section 21 EqA 2010 provides that a failure to comply with any of those duties is a failure to comply with a duty to make reasonable adjustments, and that A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

50. The following principles can be derived from ***Environment Agency v Rowan*** [2008] IRLR 20, EAT and ***Secretary of State for Work and Pensions v Higgins*** [2014] ICR 341, EAT. It is necessary for the Tribunal to make clear and reasoned findings on:

- a. the relevant PCP(s);
- b. the identity of non-disabled comparators (where appropriate);
- c. the nature and extent of the substantial disadvantage suffered by the

claimant;

- d. any step or steps which it would have been reasonable for the employer to take to avoid the disadvantage.

5 51. The terms “provision, criterion or practice” (“PCP”) are not defined in the Act but paragraph 6.10 of the EHRC Code of Practice on EqA 2010 states that they should be construed widely. They are ordinary English words, not terms of art. The judgment of Simler LJ (as she then was) in ***Ishola v Transport for London*** [2020] EWCA Civ 112 is key. However widely and purposively
10 PCPs are construed, they do not include every act of unfair treatment of a particular employee. They must be capable of being applied to others. The comparator could be hypothetical – someone to whom the PCP could or would apply. All three words connote a state of affairs indicating how similar cases were generally treated or would be treated. A one-off decision or act
15 *can* be a practice, but it is *not necessarily* one.

52. It is generally unhelpful and unnecessary to analyse whether an alleged PCP is a provision, a criterion or a practice as long as it is at least one of them (***Harrod v Chief Constable of West Midlands Police*** [2017] ICR 869, CA).

20 53. Reasonableness is to be determined objectively (confirmed by too many cases to list, but a classic passage appears in ***Smith v Churchills Stairlifts plc*** [2006] ICR 524, CA, paragraphs 44-45). To achieve substantive equality and to assist with integration into the working environment a degree of affirmative action or *more favourable treatment* of the disabled employee may
25 be necessary (***Archibald v Fife Council*** [2004] ICR 954, HL).

54. We have considered paragraph 6.23 of the Code of Practice, which largely replicates the former s.18B DDA 1995. We need to assess the extent to which
30 the step would prevent the effect in relation to which the duty is imposed. The extent to which it is practicable for the employer to take that step is also important. So are the financial and other costs of taking it, including disruption of other activities. The extent of the employer’s financial and other resources

must be borne in mind. So must the availability of financial or other assistance, if any. Finally, the nature of the employer's activities and the size of the undertaking are relevant.

5 55. So far as cost is concerned, there is no objective measure by which the disadvantage to the employee of not making the adjustment can be balanced against the cost to the employer. Ultimately, it is an "industrial jury" question (***Cordell v FCO*** [2012] ICR 280, EAT).

10 56. An adjustment does not have to be wholly effective, or certain to make any positive difference, to be reasonable. A prospect that the adjustment would prevent the relevant disadvantage may be sufficient, it is all part of the overall assessment of reasonableness (***Leeds Teaching Hospitals NHS Trust v Fowler*** (UKEAT/0552/10), ***Griffiths v SSWP*** [2017] ICR 160, CA).

15

Burden of proof

157. In ***Project Management Institute v Latif*** [2007] IRLR 579 the EAT explained that the claimant must establish not only that the duty to make adjustments has arisen, but also that there are facts from which it could be inferred, absent
20 a lawful explanation, that the duty had been breached by the respondent. Therefore, there must be evidence of some apparently reasonable adjustment that could have been made. Once a potentially reasonable adjustment has been identified the burden shifts to the respondent to prove
25 that the adjustment could not reasonably have been achieved.

Submissions

58. The representatives made their submissions orally. We will not set them out
30 or even summarise them separately. Instead, we will deal with the main points while setting out our reasoning below.

Reasoning and conclusions

PCPs

5 59. The first PCP under consideration is “*a requirement for Team Leaders to inherit the workload of absent Team Leaders*” or “*a practice that Team Leaders like the claimant would have to do the work of absent Team Leaders*”.

10 60. In *Ishola* Simler LJ explained that the function of the PCP in a reasonable adjustments context is to identify what it is about the employer’s management of the employee or its operation that causes substantial disadvantage to the disabled employee (*Ishola*, para 36). It must be *capable* of being applied to others, though it need not *actually* be applied to others.

15 61. In our judgment the claimant has proved that PCP whichever wording is adopted. We attach no real significance to the word “inherit”. It cannot be understood literally, in the sense of receiving money, property or a title upon the death of another. We reject the respondent’s submission that it has a connotation of permanence, it is simply a slightly clumsy expression that, with hindsight and following minute analysis, the claimant’s representatives wish to rephrase. We see little useful purpose in analysing the term further, since to do so would risk treating some inelegant drafting as having more importance than the statutory wording. Understood in a practical way, against
20 the background of the evidence in this case, both versions of the wording amount to much the same thing. As an issue of fact, the claimant clearly did take on the Team Leader work previously done by Gary Whyte, and it adds nothing helpful to ask whether that is correctly regarded as “*inheriting*” it.

30 62. The second PCP was, “*a practice of unequally distributing work amongst Team Leaders following employee departures/absences*”. On behalf of the respondent Mr Miller makes the very reasonable point that we heard no evidence that would enable us to carry out a comparative quantification of the workloads of the different team leaders. However, that is not the only way in

which unequal distribution of work might be established. We are required to make findings based on likelihood, and it is not necessary to be able to quantify inequality to find that it most likely existed.

5 63. The likelihood is that prior to Gary Whyte's suspension the workload of the Team Leaders was broadly similar. No witness suggested otherwise. If that was the case, then the assumption of Gary Whyte's responsibilities by the claimant in addition to his own pre-existing responsibilities is highly likely to have resulted in an unequal distribution of workload between Team Leaders.
10 Gary Whyte's work was initially concentrated in the hands of just one Team Leader (the claimant) and was not distributed in parcels between all or several of the remaining Team Leaders. Therefore, the likelihood is that the approach adopted by the respondent resulted in the claimant have a greater workload than the other remaining Team Leaders. The second PCP is also
15 established on the facts.

64. While we have found both PCPs to be established on the facts, it remains for us to check that they are capable of being PCPs in the statutory sense at all. In other words, are they *Ishola*-compliant?

20 65. The claimant was selected to undertake the suspended Gary Whyte's duties because he was "the best fit", in terms of skills, experience and qualifications. That approach was certainly capable of being applied to someone else, had they been regarded as a "good fit" instead of, or as well as, the claimant. If a
25 hypothetically similar situation had arisen then it is likely that the alleged PCP would also have been applied to a non-disabled comparator with the necessary skills, experience and qualifications. That comparator would also have been required to cover Gary Whyte's workload.

30 66. The requirement for the claimant to cover the role of an absent Team Leader was not a one-off or short-term occurrence. It was always expected to last for several months and in practice it was ongoing for longer than that. The claimant was required to do it day after day, week after week. It was properly regarded as a practice as well as a requirement. We find that the situation

comfortably fell within the concept of a PCP as explained by Simler LJ in *Ishola*, of “a state of affairs...indicating how similar cases are generally treated or how a similar case would be treated if it occurred again” (*Ishola*, para 38).

5

67. In summary, we find that the claimant has established both PCPs on the facts, and that both are *Ishola*-compliant as a matter of law.

Substantial disadvantage in comparison with persons not disabled

10

68. The claimant has satisfied us that the PCPs both caused him substantial disadvantage in comparison with people who were not disabled. His disability meant that he was more vulnerable to stress and anxiety and more likely to suffer ill health and absence because of the stress of a significantly increased workload. We base that conclusion on the claimant’s own persuasive evidence of suffering, supported also by the OH evidence. Work was identified as a stressor, and the claimant was at risk of recurrence of symptoms of anxiety and depression. While Mr Miller argues that the claimant’s grievance also concerned many other matters not under consideration in this claim, we do not think that undermines our reasoning. The evidence easily satisfies us of the likelihood that the PCPs put the claimant at a more than minor or trivial disadvantage when compared to a non-disabled person. As long as that test is satisfied then it is not important that matters other than the PCPs caused further disadvantage.

15

20

25

Reasonableness

30

69. The upshot of our findings so far is that the duty to make reasonable adjustments arose. Two potentially reasonable adjustments are under consideration.

- a. The appointment of a Senior Support Worker to assist the claimant in his duties as Team Leader.

- b. The redistribution of some of the claimant's work among other Team Leaders.

5 70. The claimant's case as to *when* the respondent's actions became unlawful changed during submissions. Initially, the argument was that the respondent was in breach of its duty from June 2022, in which case jurisdictional time limit issues might well have arisen (see s.123(4)(b) EqA 2010). The revised submission was that adjustments ought reasonably to have been made within about 2 weeks of the OH report dated 3 May 2023, although we note that this 10 OH report was unable to identify any potentially reasonable adjustments and contemplated that a process of discussion leading to a return to work might have commenced 4 to 6 weeks later.

15 71. The respondent's argument is essentially that the first of those adjustments was made. We accept that argument. Shari Law did not represent additional resource because she was present in the claimant's original team. However, Sarah Weed and Brian Kerr *did* represent additional resources that served to reduce the claimant's own workload. Brian Kerr did so in relation to Supported Accommodation and Sarah Weed did so in relation to Ashton View Team 20 Leader responsibilities and the Housing Support Workers. She began to do so as a Senior Project Worker and was eventually promoted to Ashton View Team Leader during the claimant's continuing sickness absence. We think that those were meaningful adjustments which reduced the claimant's workload. That in turn alleviated the disadvantage to which the claimant was put by the combination of the PCPs and his disability. The most important 25 step was the progressive increase in Sarah Weed's responsibilities, but it must be seen as part of a package of measures.

30 72. The claimant argued that those measures should have been implemented earlier than they were. We accept the respondent's evidence as to why Sarah Weed could not reasonably have taken on that additional responsibility immediately following Gary Whyte's suspension, and we think that the timing of the increase in her responsibilities was reasonable in all the circumstances.

We also think that it was reasonable for the respondent to think at first that Gary Whyte's suspension might have been resolved within about 3 months, and to contemplate other measures only at the point when it became clear that the situation would not be resolved within that timeframe.

5

73. In relation to the second proposed adjustment, some of the claimant's work was taken on not by another Team Leader, but by a more senior manager. Joanne Sutherland took on the line management of Shari Law and certain other responsibilities connected with recruitment, the preparation of performance information and the preparation of statutory returns to the Scottish Government. We find that those were all relevant matters going to the reasonableness of the adjustments made by the respondent since they served to alleviate the disadvantage to which the claimant was put by the PCPs in comparison to persons who were not disabled.

10

15

74. Mr Miller submitted that other Team Leaders did take on some of the claimant's responsibilities, and highlighted Gillian Robertson's activities in taking on 1:1 meetings and some supervisions in Supported Accommodation. However, we understood that to be confined to the period of the claimant's planned absence for a hernia operation rather than an ongoing adjustment. More relevantly, we accept Mr Kerr's evidence that the other Team Leaders had no capacity to absorb any of the claimant's duties on a longer-term basis, and that the answer was ultimately to recruit a new Team Leader pending a more general restructuring exercise. Sarah Weed became that additional Team Leader. Against that background, we find that the respondent did all that it reasonably could at a time when the other team leaders were thinly spread and lacked long-term capacity to take on more work.

20

25

75. It is important to look at the overall picture. The respondent did several different things in response to Gary Whyte's continuing absence and its effect on the claimant's workload. The provision of additional help from Senior Project Workers and the transfer of certain other responsibilities to Joanne Sutherland represented a package of adjustments that was reasonable in all

30

the circumstances. It would not have been reasonable to go further still, and to reassign some of the claimant's duties to other Team Leaders who at that time lacked the capacity to absorb extra work and responsibility.

5 76. As ***Cordell v FCO*** reminded us, this is essentially an industrial jury question. Our assessment of reasonableness drew on the valuable specialist industrial experience of the Non-legal Members of the Tribunal as well as that of the Employment Judge.

10 77. For those reasons, we find that the respondent discharged its duty to make reasonable adjustments. We understand that our conclusion will greatly disappoint the claimant who is a talented, conscientious and dedicated manager whose health has suffered because of his experiences at work. He is not to blame for that, but nor has the respondent breached the duty to make
15 reasonable adjustments which arose. The adjustments made were reasonable in all the circumstances.

78. The claim must therefore be dismissed. However, the claimant continues to be absent from work on sick leave and that will concern both sides. The
20 workplace has changed since that sick leave began and a new Team Leader has been appointed. A restructure of the service is anticipated but has not yet begun. We hope that the parties will now work constructively and flexibly to bring about the claimant's return to work, if that is what he wants to pursue. There is no longer any doubt that the claimant is a disabled person or that the
25 respondent has knowledge of that disability. It might wish to take advice on matters which might once again trigger the duty to make adjustments and, if so, what reasonableness might then require.

30

Employment Judge: M Whitcombe
Date of Judgment: 18 June 2024
Entered in register: 19 June 2024
and copied to parties

35

