EMPLOYMENT TRIBUNALS

Claimant: **Miss L Dench**

Respondent: **Barking, Havering, and Redbridge University Hospitals NHS Trust**

Heard at: **East London Hearing Centre**

On: **18, 19, 20 June (in public and by video)**
21 June (in chambers) 25 June 2024 (for judgment)

Before: **Employment Judge Moor**
Members: **Ms T Jansen**
Mr S Woodhouse

Representation
For the claimant: Represented herself
For the respondent: Mr D Patel, counsel

JUDGMENT

1. It is the unanimous decision of the Tribunal that:

    1.1. the Respondent did not directly discriminate against the Claimant (section 13 and section 39 of the Equality Act 2010);

    1.2. the Respondent did not fail to make reasonable adjustments for the Claimant (section 39(5) of the Equality Act 2010);

    1.3. the Respondent did not discriminate against the Claimant because of something arising in consequence of her disability (section 15 and section 39 of the Equality Act 2020);

    1.4. the Claimant has permission to amend her claim to include a claim for unfair dismissal;

    1.5. the Claimant was not constructively dismissed and therefore not unfairly dismissed.

2. In relation to the harassment claims:

    2.1. By a majority (EJ Moor, Ms Jansen), in relation to the Respondent's comment at the 12 July 2022 meeting that the Claimant's absence was

having an impact on the service, the Respondent did not unlawfully harass the Claimant.

2.2. The minority judge (S Woodhouse) decides that, by making the comment at the 12 July 2022 that the Claimant's absence was having an impact on the service, the Respondent unlawfully harassed the Claimant relating to disability contrary to section 40 of the Equality Act 2010.

2.3. Unanimously, all the remaining harassment claims do not succeed.

SUMMARY

1. The reasons for this decision are necessarily lengthy and complex given the number of claims and our need to decide a number of factual disputes.

2. While this summary section does not form part of our reasons it tells the parties in summary why we reached the decision.

3. We have enormous sympathy for the Claimant who copes with significant mental health disabilities. We recognise and have sympathy for the pressures on a clinician manager working in a very busy department with staff absences. Justice does not mean we should be swayed by our sympathies one way or another. It means we should coolly and with care reach a considered decision holding no candle for either side.

4. We decide the facts by asking what is more likely than not to have occurred. Memories are difficult beasts, influenced by all sorts of extraneous factors. We do our best to weigh the evidence we have read and heard and reach a decision on what was *more likely* to have occurred (not what did actually occur – no one will know this for sure, even witnesses – we only judge on probabilities).

5. Much of our decision is because we do have not found the facts as the Claimant remembers them. We do not think she is lying or trying to mislead us. Rather without any criticism, we find her evidence likely to be a misperception of what occurred or what was said. Specifically we have decided that:

    5.1.1. the Respondent did not fail to obtain Occupational Health ('OH') advice:

    5.1.2. the Respondent did not tell Claimant staff were unhappy with her or any words to that effect:

    5.1.3. the Respondent did not invite her to resign;

    5.1.4. the Respondent merely explored with her the question of ill health retirement ('IHR') as it was sensible to do in the case of long absences. It did not say she should retire on ill-health grounds.

    5.2. The failure in January 2022, to hold the return to work meeting any earlier, was not a failure to make a reasonable adjustment, because the

duty to make adjustments had not yet arisen because the Respondent did not know and ought not to have reasonably known about the disabilities before 17 Jan.

5.3. The Respondent had good reason for some of the matters complained about and therefore they were not a fundamental breach of contract and/or not an adjustment that was reasonable:

5.3.1. Even if the return to work meeting should have happened earlier there was good reason for the delay.

5.3.2. The OH decision not to provide therapy was a clinical one and reasonable.

5.4. There is just one matter on we have been unable to reach a unanimous decision on and that is the legal effect of the comment made to the Claimant at the 12 July meeting that her absence was having an impact on the service. The majority consider this comment did not reach the necessary thresholds for unlawful harassment; the minority disagrees.

5.5. While we amended the claim to include an unfair dismissal claim, we have found there to have been no dismissal because there was no fundamental breach of contract.

5.6. Thus all claims do not succeed.

REASONS

These written reasons are provided on the Claimant's request at the hearing on 25 June 2024 when she did not feel well enough to stay for the whole oral judgment.

1. The claimant was employed by the respondent hospital trust from 7 January 2018 to 7 October 2022, from July 2020 she worked as a receptionist administrator in the cardiology department of King George hospital. The claimant resigned on 9 September 2022 and her employment terminated on 7 October 2022. She had two sickness absences from work from October 2021-December 2021 and then soon after from mid-January 2022 to the end of her employment.

2. The claimant presented a claim to the Tribunal on 31 August 2022, alleging unfair dismissal and disability discrimination. This followed a period of ACAS early conciliation from 4-18 August 2022. The Respondent denies those claims.

Procedure

3. This hearing was held in person save that we gave permission for the evidence of Ms Labuschagne to be given by video.

4. We discussed what adjustments were needed for the hearing with the Claimant at the outset. She had requested regular breaks and after our explanation of the hearing day with 10 minute breaks mid-morning and afternoon and a full hour for

lunch, she indicated she would see how this went. EJ Moor encouraged her to inform us as soon as she felt she needed any more time or anything else to adjust the hearing. EJ Moor checked that the Claimant had prepared her questions for the Respondent's witnesses and explained that as she was representing herself, the Rules allowed the judge to assist her in order to 'level the playing field' but not to act as her representative. EJ Moor did this on occasion. On the second day, while the Claimant asked questions of witnesses and, because she was more tired than the first day, we extended the breaks to 20 minutes. We took a longer lunch break and broke early at 3.30pm. We started at 11am on day 3 to give the Claimant more time to prepare. The Claimant represented herself with care and intelligence: she gave clear evidence and asked structured and relevant questions and we are satisfied that with these adjustments she was able fully to participate. The Claimant attended with her mother who also provided her with support.

5. We set a generous timetable for the hearing bearing in mind the extra time the adjustments may require. We thank the parties for assisting us to meet this timetable.

Disability

6. The claimant said in her claim form that she was disabled because of 'mental health'. She explained this at the Preliminary Hearing ('the PH') as the effects of a ruptured brain aneurysm she sustained in 2009 namely her ability to cognitively process i.e. at times understand things. Upon being ordered to provide more information about her disability she identified: depression, anxiety, post-traumatic stress disorder ('PTSD') and emotional unstable personality disorder ('EUPD'). The Respondent conceded that from December 2021 to October 2022 she was a disabled person within the meaning of the Equality Act 2010 by virtue of them. At our hearing, the claim was amended by consent to include those disabilities. (We note until a diagnosis in April 2022, the Claimant did not know she had EUPD or PTSD.)

List of Issues

7. At the PH the Claimant was allowed to amend her unfair dismissal claim to include a claim that at a meeting on 12 July 2022, the claimant was informed by the Respondent that they were going through the process of dismissing her, but that she should hand in her notice as she was not well enough to go through the dismissal process. We agreed, at our hearing, to amend by consent the dates of various allegations from the meeting on 26 June to that on 12 July 2022.

8. EJ Gordon Walker did not allow the Claimant to amend her claim to include reasonable adjustment allegations about working hours and the working environment.

9. We considered the list of issues prepared by EJ Gordon Walker at the PH and made amendments to it to reflect the claims and defences as now understood (those changes are set out in bold in the following list). For ease of reference we retain the original numbering. The claimant is making the following complaints:

1.1 Constructive unfair dismissal;

1.2 Direct disability discrimination;

1.3 Discrimination arising from disability;

1.4 Failure to make reasonable adjustments;

1.5 Disability related harassment.

1. Jurisdiction (time limits)

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 5 May 2022 **in relation to the discrimination claim** may not have been brought in time.

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

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

1.2.2 If not, was there conduct extending over a period?

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

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

1.2.4.1 Why were the complaints not made to the Tribunal in time?

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

1.2.5 The claimant presented her claim for unfair dismissal on 31 August 2022. The claimant resigned on 9 September 2022 and her employment terminated on 7 October 2022. Does the Tribunal have jurisdiction to hear the claimant's claim? The respondent says that it does not as the claimant had not been "dismissed" (as required by s.95(1)(c) Employment Rights Act 1996) at the time of submitting her claim?

2. Unfair dismissal

2.1 Was the claimant dismissed?

2.1.1 Did the respondent do the following things:

2.1.1.1 At a meeting on **12 July** 2022 did Manisha Joosamaria and Benazir Palmer of the respondent suggest to the claimant that she take ill health retirement?

2.1.1.2 At meetings with Manisha Joosamaria and Benazir Palmer of the respondent, which took place every four weeks between January 2022 and October 2022, was the claimant made to feel guilty that her work colleagues were unhappy with her?

2.1.1.3 Did the respondent fail to obtain occupational health advice about the claimant from the very onset, namely from 14 January 2022?

2.1.1.4 Did the respondent fail to provide the claimant with psychotherapy sessions?

2.1.1.5 Did the respondent fail to hold a return-to-work meeting with the claimant when she returned to work in late December 2021 or January 2022?

2.1.1.6 **Para 59.1 In a meeting of 12 July 2022 the Claimant was informed by the the Respondent that they were going through the process of dismissing her, but that she should hand in her notice as she was not well enough to go through the dismissal process.**

2.1.2 Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

2.1.2.1 whether it had reasonable and proper cause for doing so;

2.1.2.2 **if not,** whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

2.1.3 Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

2.1.4 Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

2.2 If the claimant was dismissed, what was the reason or principal reason for dismissal i.e. what was the reason for the breach of contract? **If, which the the Respondent denies, the Claimant was dismissed it will say the reason for the breach of contract some other substantial reason for not returning to her substantive post and/or ill-health capability due to long-term sickness absence.**

2.3 Was it a potentially fair reason?

2.4 Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

3. Remedy for unfair dismissal

3.1 If there is a compensatory award, how much should it be? The Tribunal will decide:

3.1.1 What financial losses has the dismissal caused the claimant?

3.1.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

3.1.3 If not, for what period of loss should the claimant be compensated?

3.1.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

3.1.5 If so, should the claimant's compensation be reduced? By how much?

3.1.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

3.1.7 Did the respondent or the claimant unreasonably fail to comply with it?

3.1.8 If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

3.1.9 If the claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?

3.1.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

3.1.11 Does the statutory cap apply?

3.2 What basic award is payable to the claimant, if any? Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

4. Disability

~~4.1~~ **The Respondent admits that the Claimant was a disabled person** ~~Did the claimant have a disability~~ as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? ~~The Tribunal will decide:~~

4.1.1 ~~Did she have a physical or mental impairment? The claimant says that she is disabled~~ by virtue of the following impairments: ruptured brain aneurysm and damage to communicating artery causing ongoing cognitive processing difficulty **and depression, anxiety, emotional unstable personality disorder ('EUPD') and post traumatic stress disorder ('PTSD').**

~~4.1.2 Did it have a substantial adverse effect on her ability to carry out day-to-day activities?~~

~~4.1.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?~~

~~4.1.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?~~

~~4.1.5 Were the effects of the impairment long-term? The Tribunal will decide:~~

~~4.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?~~

~~4.1.5.2 if not, were they likely to recur?~~

5. Direct disability discrimination (Equality Act 2010 section 13)

5.1 Did the respondent do the following things:

5.1.1 At a meeting on **12 July** 2022 did Manisha Joosamaria and Benazir Palmer of the respondent suggest to the claimant that she take ill health retirement?

5.1.2 At meetings with Manisha Joosamaria and Benazir Palmer of the respondent, which took place every four weeks between January 2022 and October 2022, was the claimant

made to feel guilty that her work colleagues were unhappy with her?

5.2 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.

The claimant says she was treated worse than: Comparators 1 2 or 3. The claimant alternatively relies on a hypothetical comparator.

5.3 If so, was it because of disability?

5.4 Did the respondent's treatment amount to a detriment?

6. Discrimination arising from disability (Equality Act 2010 section 15)

6.1 Did the respondent treat the claimant unfavourably by:

6.1.1 At a meeting on **12 July** 2022 did Manisha Joosamaria and Benazir Palmer of the respondent suggest to the claimant that she take ill health retirement?

6.1.2 At meetings with Manisha Joosamaria and Benazir Palmer of the respondent, which took place every four weeks between January 2022 and October 2022, was the claimant made to feel guilty that her work colleagues were unhappy with her?

6.2 Did the following things arise in consequence of the claimant's disability: the claimant's sickness absence.

6.3 Was the unfavourable treatment because of the claimant's sickness absence?

6.4 Was the treatment a proportionate means of achieving a legitimate aim? **The Respondent will rely on the legitimate aims of upholding policies and procedures; ensuring consistency in internal processes; ensuring fairness to all staff; and protecting the welfare of staff.**

6.5 The Tribunal will decide in particular:

6.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

6.5.2 could something less discriminatory have been done instead;

6.5.3 how should the needs of the claimant and the respondent be balanced?

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

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

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

7.2 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP: the requirement to attend work and work under her contract of employment.

7.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that she was not able to do this due to flare ups with her disability. This caused her to make mistakes at work and to become more impulsive.

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

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

7.5.1 Obtain occupational health advice from 14 January 2022;

7.5.2 Provide psychotherapy sessions;

7.5.3 Conduct a return-to-work meeting in late December 2021 or January 2022.

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

7.7 Did the respondent fail to take those steps?

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

8.1 Did the respondent do the following things:

8.1.1 At a meeting on **12 July** 2022 did Manisha Joosamaria and Benazir Palmer of the respondent suggest to the claimant that she take ill health retirement?

8.1.2 At meetings with Manisha Joosamaria and Benazir Palmer of the respondent, which took place every four weeks between January 2022 and October 2022, was the claimant made to feel guilty that her work colleagues were unhappy with her?

8.2 If so, was that unwanted conduct?

8.3 Did it relate to disability?

8.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

8.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

9. Remedy for discrimination

9.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

9.2 What financial losses has the discrimination caused the claimant?

9.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

9.4 If not, for what period of loss should the claimant be compensated?

9.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

9.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

9.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

9.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

9.9 Did the respondent or the claimant unreasonably fail to comply with it? If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

9.10 Should interest be awarded? How much?

10. At the end of submissions I checked with the parties whether the Issues should include an allegation of unfair dismissal as an allegation of disability discrimination. This was because some of the facts relied upon as fundamental breaches were also relied upon as discrimination. I said I had in mind a case decided last year by HHJ Tucker (I could not remember the name). I asked counsel to provide written submissions and he did. Unfortunately counsel referred to a different case decided this year by a different judge. The case I had in mind was Moustache v Chelsea and Westminster Hospital NHS Foundation Trust EAT 15 June 2023. In the event, we have not had to deal with this question because we have decided the Claimant was not dismissed (we will explain this below). Had we had to do so we would have sought further submissions on it.

Findings of Fact

11. Having heard the evidence of the Claimant, Miss Trehearne, the Claimant's mother, Mr Basstoe, the Claimant's partner, Mrs M Joosamaria, the Claimant's line manager; Miss B Palmer, of HR; and Ms V Labuschagne, of HR, and having read the 5 written statements provided by the Claimant in support from Ms R Dench, Ms C Lloyd, Ms D Djaoud, Mr H Liska and Ms F Jackson, we make the following findings of fact.

12. In 2019 the Claimant had an episode of anxiety and attended OH and had 12 sessions of individual psychological therapy to manage 'symptoms of anxiety and low mood'. This therapy was successful. Her manager at the time will have seen the OH report referring to those sessions. This OH report was not sent to later managers – it being the practice not to do so unless there were ongoing issues and it was necessary to do so.

13. The Claimant then moved to part time work to better manage her work life balance, her anxiety and at the time her caring responsibilities.

14. The Claimant applied for the job of receptionist/administrator and was interviewed by Mrs Joosamaria. She was successful and started in July 2020 as a part time band 3 receptionist administrator in the cardiology department at 22.5 hours a week Monday, Wednesday and Friday.

15. Did the Claimant refer to her mental ill health as reason for part time working at interview or later? (The Claimant remembered stating she had mental ill health at the interview as a reason for part time working. Mrs Joosamaria's evidence is that she did not.) On balance we find the Claimant is unlikely to have done so given the resolution of her symptoms so far as work was concerned did not require it. Further we take into account that at the first opportunity of an OH referral with Mrs Joosamaria in November 2021, the Claimant did not refer to any mental ill health problem or history (see below). She was perfectly understandably not as open with this information as she now remembers herself to have been.

16. Mrs Joosamaria her line manager as a lead cardiologist physiologist. She had clinical and management duties in a busy department.

17. In late September 2021, errors came to the attention of Mrs Joosamaria that she reasonably believed were the Claimant's (she gave four examples in her witness

statement). (The Claimant says some of these errors were not hers – this could not have been seen by Mrs Joosamaria who relied on the log in details on the system. We have not had to decide this factual question.)

18. The mistakes described by Mrs Joosamaria were serious in that they involved either not arranging patient transport which risked them missing valuable appointments or putting cancer patients in routine list rather than urgent list which had the potential to affect the timely progress of their treatment.

19. On 4 October 2021 the Claimant was off sick with migraine for one day.

20. On her return to work, the Claimant told Mrs Joosamaria that she had a history of neurological problems, she did not elaborate. Mrs Joosamaria understood that to be a reference to why she had had the migraine.

21. The Claimant made a further mistake on 6 October 2021. Mrs Joosamaria decided she needed to invite Claimant to a meeting to discuss the mistakes and did so by email on 7 October 2021. She intended to address them formally on 11 October. It was reasonable for her to do so – as it turned out the absences have meant those matters have not been investigated.

22. The Claimant replied that her health likely to be the reason for any errors. She said her blood pressure was low and thought it the likely cause of '*lack of concentration, light headedness, shaky, visual disturbances, confusion and extreme fatigue'*. This was new information and Mrs Joosamaria felt that the Claimant may be making excuses for her mistakes to avoid performance management.

23. The Claimant was off sick from 11 October 2021 which absence lasted until the last day of December 2021. All sick notes for it relate to low blood pressure.

24. In November 2021 Mrs Joosamaria made an OH referral on the basis of chest pain, dizziness and fluctuating blood pressure. None of this related to mental ill health. We find it therefore unlikely that Claimant told her about mental ill health.

25. OH reported on 12 November 2021 stating that the Claimant's conditions were being investigated and she would return once she was feeling well enough. OH did not want to see her again. The OH physician made no reference to any long term or other mental ill health. (In making this finding we are not saying that the Claimant is misleading us about her disabilities – we make these findings because it is necessary for us to consider what the Respondent was told about them and when.)

26. At a telephone meeting on 19 November 2021 about her sickness absence with Mrs Joosamaria, the health issues identified by the Claimant related to her blood pressure and a possible breast lump and frustration because she was not able to drive. A formal long term sickness absence meeting was to be arranged. Again there was no reference to mental ill health.

27. The Claimant explained to the Respondent in early December 2021 about the various tests she was having – all physical – and that she was not ready to return.

28. On 23 December 2021, the Claimant wrote to Mrs Joosamaria to ask return to work because she stated, '*I am still experiencing symptoms however my mental health well-being is being affected staying at home'*. Mrs Joosamaria agreed a phased return: first week 50%, the second week 60%; the third week 80%. By week 4 the aim was a normal working pattern. It is fair to say Claimant did not ask for any specific support prior to return other than this. She had an opportunity to discuss it with her GP and it could have been stated on fit note.

Return to Work

29. The Claimant returned to work on Wed 31 December 2021. She must have seen her manager on the first half day back because Mrs Joosamaria suggested getting her mandatory training up to speed and not to work on the reception window. There was a dispute in recollection about how much contact they had in the first 7 working days: we find some, but not significant because Mrs Joosamaria was very busy. At their ultimate meeting Mrs Joosamaria's rough notes refer to the Claimant thanking the department for their support. Mrs Joosamaria was not helped in managing her responsibilities by staff absences in a very busy department. We do not find she paid as much attention to the Claimant as she suggests in her witness statement. On balance we find the contact likely amounted to Mrs Joosamaria checking in with the Claimant when saying good morning.

30. We find on balance the Claimant did not ask multiple times for a return to work meeting – this is inconsistent with her saying she never saw her manager; we find if she had done so but not obtained one she would have followed this up in email and she did not.

31. The Claimant worked half of Wednesday 5 January when Mrs Joosamaria on annual leave; half of Friday 7 January when Mrs Joosamaria was covering for sickness and had to prioritise clinics; she worked 60% of Monday 10 January and Friday 14 January when Mrs Joosamaria was covering for sickness and had to prioritise clinics; and 60% on Wednesday 12 January when Mrs Joosamaria was on annual leave.

32. On Monday 17 Mrs Joosamaria wrote to Claimant asking about why 2 matters had no 'outcomes' – outcome input was necessary in order to obtain funding for the appointments. In reply the Claimant asked for her return to work meeting stating, 'I really need to speak to you'. The meeting followed soon after.

33. At the return to work meeting on 17 January we have balanced all of the evidence and find:

    33.1. It is unlikely Mrs Joosamaria said I'm sending home because colleagues say you are too quiet. She is more likely to have said words to effect that colleagues are worried about you (as she mentioned in writing in subsequent OH reference).

    33.2. The Claimant told Mrs Joosamaria that she felt overwhelmed and anxious and had had an attempt to take her own life.

33.3. The Claimant asked for a referral to OH. Was this granted only on condition she went home? We do not think so. We find it more likely that Mrs Joosamaria said something along the lines, 'Yes, but you need to go home' because it was clear to her that the Claimant was too unwell to stay. It is not a surprise to us that Mrs Joosamaria told the Claimant to go home given her upset state. She was plainly not in any state to work. Mrs Joosamaria may not have expressed this with a great deal of style but it was the correct decision.

33.4. By this stage it will have been clear to Mrs Joosamaria that the Claimant was anxious and overwhelmed and had mental ill health.

33.5. It was a natural outcome of being overwhelmed and talking about her anxiety that the Claimant began to cry. We do not find Mrs Joosamaria somehow drove the Claimant to tears.

33.6. It was not possible to complete the formal return to work document.

34. From 18 January 2022 the Claimant was off sick with a fit note stating anxiety and 'not concentrating at work'.

35. Mrs Joosamaria made an OH referral the same day referring to anxiety, staff being worried about the Claimant's wellbeing and a change in behaviour, and that Claimant had told Mrs Joosamaria about attempts on her life.

36. The 7 February 2022 OH report told the Respondent there had been a 'history of mental health conditions for a number of years' and that, because of the blood pressure symptoms, she had had to stop anxiety medication and as a result her mental health had deteriorated. This report refers to anxiety as the long term mental health condition. OH stated the aim was to get the Claimant back to her baseline stable state. Its suggestions were facilitating therapy; and a regular dialogue on well-being. The OH doctor described some difficulty with day to day activities as well as clear lack of concentration and emotional lability.

37. The next sick not was for anxiety panic attacks.

38. By 14 March 2022, OH reported that there had been a deterioration in Claimant's state. She was having erratic/impulsive episodes, anxiety spells, and harming attempts. She had been to Mental health hospital for a review. She was with the Crisis team who did daily visits for medication. She had had a psychiatry specialist review over the phone. '*She has been told of the potential diagnosis of borderline personality disorder'*, but with no formal diagnosis. OH stated the Claimant needed a period of stability before a return to work could be considered. At this stage we find the Claimant was clearly very unwell.

39. Once the Claimant was under the care of the crisis team, OH therapy could not be offered because to do so, in their opinion was unethical and clinically appropriate.. We do not find there was any unreasonable delay in offering OH therapy during this period: the time for referral and assessment and organisation of therapy would be likely to have taken a few weeks and was overtaken by the deterioration in the Claimant's condition and the need for the crisis team.

40. On 14 March the Claimant discussed the possible diagnosis of personality disorder with the Respondent and said she was awaiting further tests and diagnosis. Mrs Joosamaria said wanted to talk about adjustments but the Claimant was not yet ready to return to work.

41. The next sick note was for depression and anxiety.

42. On 12 April 2022 the Claimant was still with the crisis team. OH support psychologist team felt she needed to be more stable before they could assess her suitability. They explained later that it was not appropriate to ethical or appropriate for OH to provide therapy at same time.

43. The Claimant told the Respondent about another impulsive behaviour incident and that she had the diagnosis EUPD and PTSD on 13 April 2022.

44. On 28 April 2022 the Claimant was discharged from the crisis team. She was referred to the access team within the NHS for assessment.

45. The Claimant explained to us that someone with EUPD responds to things in an exaggerated way. The way it was expressed to her made sense about her life. Somebody with EUPD will experience will things more magnified in emotion. For example if something were to scare someone it would scare her a lot more. If something upsets someone it would really upset her. Also it came with a lot of impulsive behaviour. It could cause her to speak before she thought. Depending on her reactions, she could put herself in danger. And a big part of the condition is that it creates anxiety.

46. On 4 May OH support services decided that it was not able to provide support therapy to the Claimant. The informed her by letter, which came as a shock to Claimant who was banking on OH support because she had found it beneficial in the past. OH psychologists thought her needs were more complex than they could cater for and her needs would be better met in a secondary mental health setting. A later OH report explained that the Claimant needed BPT therapy for EUPD - a specialist therapy. The Claimant reached out to her manager who explained to her that, if psychologists thought she needed intense help, she needed to explore it.

47. The OH report on 16 May 2022 stated the Claimant remained debilitated with anxiety on most days, with poor sleep and poor concentration and attention fatigue and impulsiveness. The only adjustment suggested was regular dialogue. Plainly the Claimant was still too unwell to work. Dr Chowdary expected a recovery but after psychological/psychiatric intervention.

48. At the review meeting of 25 May 2022, the Claimant told the Respondent she was under the access team at Goodmayes hospital with daily visits to assess her condition. She referred to the formal diagnosis of condition of EUPD and that she would need BPT therapy to control her emotions but she understood there was a long waiting list.

49. By the review meeting on 29 June 2022 it appears that the Claimant was back under the active management of the crisis team after a further impulsive episode. Therapy would not start until she was discharged from it.

50. A further sickness review meeting took place on 12 July 2022. Miss Palmer of HR and Mrs Joosamaria attended. It is agreed that at this meeting the Respondent explained to the Claimant that the next step was likely to be a 'stage 3' formal meeting – this refers to the stage in the sickness absence procedure where the Respondent would consider whether or not to terminate employment.

51. A number of facts are disputed at this meeting. We balance what each witness wrote and told us and make the following findings.

52. On balance we do not find Miss Palmer suggested to the Claimant that she hand in her notice:

    52.1. the numbered points in chronological order in the summary letter state it was the Claimant who raised this as an idea first.

    52.2. The claim form on 31 August, written quite near time, does not say the Respondent told her to consider handing in notice.

    52.3. We think it likely Claimant probably did say, as Miss Palmer recollects, that she was considering handing in her notice and it is this comment that Miss Palmer picked upon for point 7 in the letter (that this would avoid the tedious process of the stage 3 meeting). It makes sense to us that the Claimant likely said this because her sick pay was about to run out. We accept that it was in response to the Claimant's idea of resignation that Miss Palmer explained stage 3 would be avoided by resigning.

    52.4. In her claim form the Claimant states: 'the suggestion that I was going to be dismissed'. We find that it was explained to her that one outcome of the Stage 3 meeting could be dismissal. It is important practice in fairness to explain this to an employee. It is also inconsistent with the idea that Claimant had been told to give notice.

53. The Claimant claims she was told she should take IHR. We find this is her misperception of what was said. The Respondent raised IHR as an option to explore in accordance with the policy. It was not in the manager's power to make a Claimant take IHR. We find there was likely therefore no pressure or statement that the 'ought' to IHR, because OH must explore first whether she were eligible. Even if she were, IHR depended upon an application by the employee. The Respondent's is to explore IHR as an option before stage 3: that is all that the managers were doing.

54. We decide on balance Mrs Joosamaria did not say that colleagues were unhappy with the Claimant:

    54.1. while this is referred to in the claim form and therefore has more weight as an allegation, we find this arises as a perception from what managers did say about impact of absence on service.

    54.2. this was a formal meeting we find it unlikely having heard their evidence that Mrs Joosamaria said something so cutting. Miss Palmer would definitely have brought it up with her afterwards and did not do so.

54.3. In answer in questions about this the Claimant first said 'I was told in many different ways that my colleagues struggling, the department was struggling because I was off poorly. I was told having an impact on whole of cardiology dept.' We find this is qualitatively different from the managers saying your colleagues are unhappy with you.

54.4. Further we do not find it likely that reference to the impact of the service was raised many times. We find it likely that Mrs Joosamaria raised it with the Claimant because the procedure required her to do so before moving to a stage 3 formal meeting. This was the meeting at which dismissal was to be considered and the reasons for that needed to be explained namely the impact of absence on the service.

54.5. We do not read much into the differing recollections of Mrs Joosamaria and Palmer – so long after meeting. They were each doing their best to remember. Mrs Joosamaria has a particular formulation that she uses in such meetings – 'we miss you, we want you to get better and come back to work' and thinks she likely said that. Miss Palmer thought the words Mrs Joosamaria used words about the impact of absence on the service, along the line of HR template letter.

54.6. After the 12 July meeting the Claimant attended OH. The OH referral form stated that 'Lisa has been off sick with no foreseeable return date the department cannot afford her absence any longer. Possible sickness panel meeting options have been discussed'. The OH report by Dr Claimant states that 'the employee is aware that management have indicated her sickness absence is largely unsustainable'.

54.7. We also take into account how the Claimant summarised the comment in her resignation letter (see below).

54.8. Taking all of these matters into account we find that Mrs Joosamaria is likely to have said no more than that the Claimant's absence had had an impact on the service.

54.9. We find this comment the Claimant probably already felt guilty and embarrassed about the impact her absence was having on her colleagues. We find this comment likely made her feelings worse. The effects of EUPD on the Claimant mean her reactions were magnified**.**

55. In her complaint letter on 27 July 2022 the Claimant said she had understood from Dr Chowdary of OH that the Respondent intended to dismiss her. We find this is likely to have been the Claimant's perception of what the Doctor said: that a stage 3 meeting was imminent at which a dismissal was an option and that absence was unsustainable.

55.1. The Claimant complained about the lack of intervention from OH in the form of support.

55.2. She compared herself to other colleagues with extended illnesses and absences and states discriminated against.

55.3. She said she did not intend to resign. We find this was to correct the suggestion she had made in the 12 July meeting.

56. On 16 August in correspondence with Miss Palmer the Claimant said she was not intending to resign again.

57. As a result of her complaint, the next sickness review meeting was cancelled while her grievance was dealt with.

58. Nevertheless on 9 September 2022 the Claimant resigned setting out her reasons in a letter they included that:

58.1. She had not been provided with support;

58.2. She had a failed return to work with no return to work meeting and was asked to leave;

58.3. OH had delayed and rejected help;

58.4. Managers had reminded her about the impact of her ill health on work colleagues;

58.5. the Respondent had suggested that it would be a good thing if she resigned

58.6. the Respondent had suggested that she retire due to IHR

58.7. she also referred to the matters set out in her earlier complaint (see above) i.e. the comparison with others.

59. We find these were the reasons for the Claimant's resignation.

Procedures/Policies

60. The sickness policy requires a return to work meeting, at para 4.9 'it is mandatory for line managers to conduct a return to work meeting following each episode of sickness absence as soon as possible after the return to work. This is to explore the reasons for the sickness at the earliest opportunity, review previous sickness absence and identify and provide any support needed.'

61. The Respondent's sickness absence procedure states that 42 days of absence must elapse before a stage 3 meeting at which termination would be considered. Plainly therefore this had been extended: the Claimant had 175 working days of absence in the second period alone.

62. In the case of long term absence, the procedure tells the Respondent to 'identify whether the member of staff may wish to make an application for ill-heath retirement'.

63. The contract states 'conditions of service states the employment is governed by a range of employment policies and procedural agreements applicable to all employees'.

Legal Principles

64. For ease of reference we will put our summary of the legal principles at the start of each claim. But we note here the important point about our general jurisdiction which derives from section 120 of the Equality Act 2010 ('EqA'). The Tribunal has jurisdiction to determine a complaint relating to employment under Part 5 of the Act. This means we must look not only at the separate definitions of the types of discrimination in Part 1 of the Act but also how section 39/40 in Part V of the act establishes the legal liability of employers.

    64.1. For section 13 (direct) and section 15 (discrimination arising); the claimant must also show (as far as is relevant for this case) that she was subject to a detriment (or depending on the amendment of the issues, dismissed), section 39(2)(d)

    64.2. A failure to make reasonable adjustments comes within section 39(5).

    64.3. Harassment relating to disability comes within section 40.

Application of Facts and Law to Issues

Reasonable Adjustments

Legal Principles

65. First, the employer must know (or ought reasonably to have known) that the Claimant is a disabled person. Knowledge the impairment is insufficient: it needs also to know of the substantial adverse effect on day to day activities and that this effect is long term i.e 12 months (or likely to be) or that it was likely to recur.

66. An employer is fixed with information in prior OH reports, even if she herself has not seen them. This is because the knowledge is the employer's not simply that of each individual manager.

67. If there is knowledge then the duty to make reasonable adjustments arises:

    '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. …' (section 20, EqA)

68. The Tribunal must first identify the provision, criterion or practice ('PCP').

69. It must then consider whether that PCP put the employee to a comparative substantial disadvantage.

70. It must then consider how the proposed adjustment would have addressed the substantial disadvantage in question. It is well established that this is an objective question the focus being on the practical result and it does not require a definitive answer. What must be shown is 'a' prospect of avoiding the disadvantage.

71. The Tribunal considers a wide variety of factors in deciding reasonableness including: the size and resources of the employer; what proposed adjustments might cost; the availability of finance or other help in making the adjustment; the logistics of making the adjustment; the nature of the role; the effect of the adjustment on the workload of other staff; the other impacts of the adjustment; the extent it is practical to make).

72. A failure to consult about adjustments does not itself constitute a breach of the EqA, although obviously it is good practice to do so.

73. We also note that just because the employer has already made adjustments does not necessarily relieve it from a duty to make others.

Analysis

74. Did the Respondent know Claimant was a disabled person under the Act? We look at this at different times in relation to each impairment.

75. The knowledge case law and guidance means that while we have found Mrs Joosamaria did not know about the earlier anxiety episode and therapy sessions – the Respondent did. We understand why employee health information is shared only where reasonably necessary and we wonder at the effect of this legal principle here – given the anxiety was not necessarily indicative of disability at that time and that it was resolved. But, given the legal principle, we impute knowledge of that previous anxiety event to Mrs Joosamaria.

76. (We digress to say that this is why health passports are more common now. The cost of ETs are such that the Respondent should always try to learn lessons – the lesson from this case that although it was not determinative here, the Respondent should consult with the trades unions and consider how information about prior illnesses/OH reports is made available to new managers after appointment to new roles or a change in manager.)

77. In December 2021 up to 16 January 2022.

    77.1. The Respondent plainly did not know and ought not to have reasonably known of Depression, EUPD or PTSD. There is no evidence that anything in the prior history suggested it. And there was nothing in Claimant's conduct that ought to have raised questions about it. In November 2021 the concerns were physical – blood pressure and breast lump. No reference was made to mental ill health. The Claimant herself did not know EUPD and PTSD until much later. So no knowledge of these impairments or of adverse effects on day to day activities created by them.

78. On anxiety the facts are that through OH the Claimant had 12 sessions of therapy to help with anxiety and low mood in 2019. This was over 2 years previously to December 2021. There is no evidence of any incident of anxiety since them. Mrs Joosamaria is fixed with that knowledge. There was brief reference to neurological problems as an explanation for migraine but even with knowledge about the earlier anxiety episode, it could not reasonably be linked to anxiety: the Claimant herself says her aneurism is about cognitive functioning. All that can be

said is there was some knowledge of the impairment of anxiety more than 2 years before.

79. There is evidence through the 12 therapy sessions that it as likely the Claimant had experienced substantial adverse effects on her ability to day to day activities by anxiety in 2019: the fact of needing therapy would suggest this.

80. Then we ask whether the Respondent knew that those substantial effects were long term or likely to be (i.e. might well last 12 months). Since there had been no other episode to the Respondent's knowledge we find it did not, in December – 16 January 2021 have knowledge of a long term adverse effect on day to day activities or one likely to be. Nothing could reasonably be read into the original incident to this effect: some anxiety impacts are long term; some are not. We have found that Claimant did not tell Mrs Joosamaria at interview or any other time that she had had mental health issues.

81. Nor is there any information from which the Respondent could conclude that the anxiety may well or was likely to recur: similarly no recurrent or information about that. The neurological issue was about migraine as far as the Respondent was reasonably aware. Nor did it know about medication.

82. Equally in our view no constructive knowledge that anxiety adverse effects were or likely to be long term or likely to recur. There had been no other problem to put the Respondent or Mrs Joosamaria reasonably on notice about having to ask. We take into account that until 17 January 2022 the latest issue was physical – blood pressure problems; that in the November 2022 reference OH did not refer to prior mental health history. It was not reasonable in the light of all of those facts for the Respondent to have constructive knowledge of any substantial adverse effect of anxiety as long term or likely to be long term or likely to recur. The manager could have expected OH to mark this up without further question.

83. We find therefore the Respondent did not know and did not reasonably ought to have known that the Claimant was a disabled person by reason of anxiety to 16 January 2021.

84. By the 17 January, at the meeting Mrs Joosamaria knew:

    84.1. The Claimant felt overwhelmed and anxious;

    84.2. Staff were worried about her because of a change in behaviour.

    84.3. The Claimant had had an attempt on her life.

85. At that point we find Mrs Joosamaria knew that anxiety as having a substantial adverse effect on the Claimant's ability to do day to day activities. This level of anxiety – being overwhelmed - likely to have more than a minor effect on things like concentrating, sleep, being able to socialise and so on. Especially so if it was affecting the Claimant's emotions enough for her to attempting to take her own life.

86. Should the Respondent have known that this adverse effect was long term or likely to be or likely to recur at this stage because of the presentation of the

Claimant at this meeting added to the episode in in 2019? We find not on that day. Mental ill health is complex. The Claimant herself had not linked how she felt on this day to the 2019 episode and it was not possible in meeting to ask more questions of her given her fragile and overwhelmed state. It was appropriate to start the process of questions by referring to OH which is what Mrs Joosamaria did. This was the stage at which it was reasonable to ask questions but there was not enough for knowledge of a likely long term condition or one recurring without more. Mrs Joosamaria made an OH reference to find out more: until she received the answers to that reference she did not have knowledge of a long term condition or one likely to be long term or one likely to recur.

87. By the time of receipt of the 7 February OH report we find the Respondent had knowledge of anxiety as a disability because:

    87.1. The report refers to the adverse effect on day to day activities and this was more than minor.

    87.2. It was now described as an underlying long term problem.

    87.3. For the first time the Respondent discovered that the Claimant's anxiety had been managed by medication but was no longer being managed because the blood pressure issue had caused it to stop. The effects of anxiety (minus medication) were not apparent and described.

On knowledge of remaining disabilities – dates

88. On the difficulty of cognitive processing because of the brain aneurysm we find that up to 17 January 2022 the Respondent did not know that she was a disabled person. The Claimant had only briefly referred to having a neurological problem to explain 1 day of migraine. The Respondent knew nothing else.

    88.1. Thus, the Respondent probably knew of a long term neurological because Claimant had said she had 'a history' of neurological problems.

    88.2. But the Respondent had no actual knowledge of whether this had a substantial (i.e. more than minor) adverse effect on her ability to carry out day to day activities by the mere fact that it explained 1 day of migraine. This is too minor an effect in our view. There was certainly not enough for the Respondent to know that the aneurysm had had a substantial adverse impact on cognitive processing. She did not put the mistakes down to this issue. Further the reasons for the longer absence were physical and related to blood pressure. Then in 2022 OH identified anxiety and later EUPD/PTSD were diagnosed. We find the Respondent did not have knowledge of brain aneurysm leading to cognitive impairment as a substantial adverse effect on day to day activities at any point.

89. In relation to depression we consider nothing turns on this particular condition as a separate impairment after January 2021. We find there was no knowledge or constructive knowledge of any adverse effects on day to day activities arising from depression prior to 17 January 2021 because it had not been drawn to the

Respondent's notice and there was nothing until 17 January 2021 that meant the Respondent reasonably ought to have asked.

90. Re EUPD and PTSD. Plainly the Respondent knew by time of being told of the formal diagnosis but not before. They had asked appropriate questions of OH and had not been informed before this. While behaviour a concern on 17 January, EUPD is a complex personality disorder, there was nothing on facts to non-psychiatric health professions to suggest it. By the time of the diagnosis it was known to be life long and therefore long term. The Respondent also knew by virtue of the diagnosis that as a personality disorder there would be a substantial effect on the Claimant's ability to carry out day to day activities: if not treated it included for example, impulsive behaviour that could lead the Claimant to putting herself in danger.

91. There was plainly a PCP of being at work or having to attend work. We agree the Claimant was put to a comparable substantial disadvantage by anxiety and that occasioned by her EUPD and PTSD by likely having more absences occasioned by flare ups in anxiety than a non disabled person would have. We also find it likely that her concentration was likely to be affected at work more often than non-disabled persons so she was likely to make more mistakes.

92. Once the Respondent knew of the disability they likely knew about those disadvantages: the absence in question showed how more frequent absences could occur. Low blood pressure had led to the change in medication, which had led to a flare up of anxiety and absence.

93. As for the adjustments suggested:

Issue: 7.5.1 – obtaining OH advice

94. This issue fails on the facts we have found because the Respondent did obtain OH advice on 17 January and regularly thereafter. There was no knowledge prior to that date, so this issue fails in so far as it relates to 14 January and before.

Issue 7.5.2 On the suggested provision of provide psychotherapy sessions (via OH)

95. One step to help reduce anxiety so as to reduce absence from work would have been talking therapy through OH, but we judge that was not a reasonable step to take:

    95.1. sometime before 14 March the Claimant deteriorated and was allocated to the crisis team. On 7 February the recommendation for OH therapy was made. Between these two dates the Claimant's state had deteriorated. We do not find there was any unreasonable delay in offering OH therapy during this period because the time for referral and assessment and organisation of therapy would be likely a few weeks.

    95.2. Once with the Crisis team it was not appropriate for OH to offer therapy. This was there clinical judgment and was reasonable. In essence the first step is through the crisis team is to help the Claimant to regain some stability. It can only be once the Claimant is stable that therapy

can start. From the Claimant's point of view this looks like a delay but in fact up to the point she is discharged from the crisis team it was for good reason.

95.3. Then the Claimant was with the access team, a secondary care model. It was reasonable at this time for OH to decide not to offer her therapy in addition. It was reasonable for them to conclude that she now presented with a more complex picture than underlying anxiety. This is because in the meantime EUPD and PTSD had been diagnosed. In the clinical judgment of OH these conditions were better dealt with in the secondary care team. We note that for EUPD, specialist BPT therapy was required. We judge this decision by OH to have been a reasonable clinical decision and the adjustment was not therefore reasonable in those circumstances.

Issue 7.5.3 – the delay in organising the return to work meeting

96. This issue fails on knowledge. The Respondent did not know at the relevant time that the Claimant was a disabled person and the duty to make adjustments therefore did not apply.

97. Even if we are wrong about knowledge on 17 January itself, that was when the return to work meeting was attempted, so on that day there was no failure to make adjustment.

98. This is not to say we do not have enormous sympathy with the Claimant – the ultimate delay was about NHS resources and long wait lists for BPT.

99. We equally criticise, as the Respondent did internally, the way OH informed the Claimant it could not offer her therapy through its service on that occasion. A telephone call to a person experiencing such significant ill-health would probably have been more compassionate, with a follow up letter.

Direct discrimination section 13 section 39

Legal principles

100. Direct discrimination contrary to section 13 of the EqA requires the Tribunal to find that the Claimant has been treated less favourably because of disability and section 39(2)(d) requires that less favourable treatment to have subject her to a detriment

101. Less favourable treatment calls for a comparison - than it would have treated someone without the protected characteristic but whose circumstances are not materially different. The Code puts it this way '*direct discrimination occurs when the employer treats someone less favourably because of disability itself*'. Where the comparison is made the relevant features must be the same or not materially different to show different treatment with the comparator. If there are comparators who are in some ways in similar circumstances they may be evidential comparators.

102. In Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11 (para 34) detriment was defined as something a reasonable worker would or might consider to be to their disadvantage in the circumstances in which they would thereafter have to work. It does not have to have financial or other consequences. An unjustified sense of grievance is not sufficient.

Issue 5.1.1 – suggesting Claimant take IHR

103. This issue fails on the facts. The Respondent did not tell the Claimant she should take IHR. The managers at the meeting merely raised it as one option for exploration prior to the stage 3 meeting, given the long absence.

104. The reference to IHR at the meeting did not subject the Claimant to a detriment. A reasonable employee would not see the exploration of IHR as a disadvantage as it was merely a question to be asked of OH and depended in the end on the employee's decision to apply.

105. In any event, this could not have been different treatment because of disability because it was the Respondent's practice to explore in the case of long absence, whether disability-related or not.

Issue 5.1.2 – being made to feel guilty that work colleagues were unhappy with her

106. First this issue fails on our findings of fact: the Respondent did not tell the Claimant that colleagues were unhappy with her.

107. Second in the January referral the Respondent did say to OH that colleagues were worried about her wellbeing. If this had been said to the Claimant it was not a detriment because any reasonable employee would understand that it was a statement of concern not criticism.

108. The Claimant also felt guilty by the Respondent's comment about the impact of her absence on the service made at the12 July meeting. Did this comment subject her to a detriment? We judge not because a reasonable employee on a lengthy absence from work would know that this absence inevitably had an impact on the service and the mere statement of that as the position would not be regarded by a reasonable employee as disadvantageous to them. A reasonable employee would also want to know why the employer was moving to stage 3 and the reason the Respondent made this statement was to inform them of the reason, namely the impact of their absence on the service.

109. We have been alive to the difficulty here:

    109.1. On one hand – sensitively in dealing with a very unwell, anxious person whose disability affects her perception. Just because something is required in the procedure or template letter is not always the answer. Respondent managers should not slavishly follow procedures where it is inappropriate to do so.

    109.2. On the other hand fairness generally requires that an employee is told why a stage 3 meeting at which termination will be considered is

required. That will involve the need to talk about the impact her absence is having on the service briefly.

109.3. On balance we consider that the employer did need as a matter of fairness and honesty to air the nature of the impact of the absence to explain the move to stage 3 of the procedures and did so in a relatively neutral way which was not a detriment.

110. We do not therefore need to go on to consider whether this was less favourable treatment. If we had had to do so, we would have found that it was not because of disability because this comment was in the Respondent's template letter and therefore applied to all absences whether disability-related or not.

111. We note that the length of absence went far beyond the Respondent's standard triggers for a Stage 3 meeting. In this case they did make adjustments to the standard procedure to allow for a far longer absence than was usual.

112. Because of our earlier findings we do not need to consider comparators on these issues. And because we have found below no dismissal (see below), we do not need to consider them on that issue.

Section 15 discrimination arising from

Legal Principles

113. Section 15(1) of the EqA provides that:

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

114. Section 15 therefore does not require the like for like comparison. It recognises that a disabled employee may be adversely treated for something that other employees would be adversely treated for but where that something arises 'i*n consequence of their disability'* the disabled employee is afforded greater protection. There is no need for the employee to point to a comparator. Para 5.9 of the Code states that the consequences of a disability include anything that is the result, effect or outcome of a disabled person's disability. They will be varied and will depend upon the individual effect.

115. Unfavourable treatment is not defined in EA but some guidance is given in EHCR Code para 5.7. Unfavourable treatment is where an employee is put at a disadvantage. There is an interesting unanswered question in the case law whether test for unfavourable is subj/objective – ie from point of view of the employee or a reasonable employee) but we do not need to deal with it in this case because it is a detriment case too. In other words under section 39(2)(d), the Claimant needs to show both unfavourable and detrimental treatment before

she succeeds. The Shamoon definition applies to 'detriment' requiring the objective standard of a reasonable employee.

Analysis

Issue 6.1.1 – suggesting the Claimant take IHR

116. This claim fails on facts, as set out above.

117. This claim also fails because it is our judgment that it did not subject the Claimant to a detriment, as set out above.

Issue 6.1.2 - being made to feel guilty that work colleagues were unhappy with her

118. This claim fails on facts, as set out above.

119. This claim also fails because it is our judgment that it did not subject the Claimant to a detriment, as set out above.

Harassment relating to disability

Legal Principles

120. Section 26 EqA provides so far as is relevant to this case:

> *'(1) A person (A) harasses another (B) if—*
> *(a) A engages in unwanted conduct related to [disability], 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.'*

121. We must ask each of the questions posed by the statute.

122. To establish that the unwanted conduct is 'related to' disability the Claimant does not have to show that the unwanted conduct was directed to her 'because' he was disabled, but that there was a connection between the conduct and his disability, see para 7.9 of the Equality Act Code of Practice (ECHR), and Hartley v Foreign and Commonwealth Office Services 2016 (para 23-24). In that case the EAT held that whether the conduct is 'related' to the protected characteristic is a broad test, requiring an evaluation by the Tribunal of the evidence in the round. The alleged perpetrator's and victim's perceptions of whether it is related

are not conclusive. The precise words and the context are important. It is also open to us to draw inferences if necessary.

123. The question of whether an act is 'sufficiently serious' (to quote from the Code at para 7.8) to support a harassment claim is essentially a question of fact and degree.

124. In Weeks v Newham College of Further Education EAT 0630/11 Langstaff P considered that '*environment'* means a state of affairs, which may be created by one incident where the effects are of longer duration (para 21). But at paragraph 17 he observed:

> '*Thus, although we would entirely accept that a single act or a single passage of actions may be so significant that its effect is to create the proscribed environment, we also must recognise that it does not follow that in every case that a single act is in itself necessarily sufficient and requires such a finding.'*

The context of words used is very important.

125. Whether the conduct violates a person's dignity is also a question of fact and degree. We note the observations of Underhill P (as he then was) referred to us by Mr Caiden in Richmond Pharmacology v Dhaliwal [2009] ICR 724 (EAT) at paragraph 22 (in a harassment related to race claim):

> *… We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments [relating to disability] it is also important not to encourage … the imposition of legal liability in respect of every unfortunate phrase…*

Issue 8.1.1 – suggesting IHR

126. This issue fails on the facts, as above.

Issue 8.1.2

127. This issue fails on the facts that the Claimant was not told that 'unhappy' being said.

128. Nevertheless we have gone on to consider whether the statement 'your absence has an impact on the service' which made the Claimant feel more guilty was itself harassment relating to disability.

129. Unanimously we do not find the comment had the **purpose** of violating dignity or creating proscribed environment. It was a neutral statement of fact that the Respondent considered it needed to state to explain reasons for moving to stage 3. It had no other purpose.

130. But what about the **effect** of the comment? We take into account the Claimant's perception; whether it was reasonable to have that effect and all the circumstances.

131. The majority decide:

131.1. this comment does not reach the threshold of violating dignity because it is a statement of fact and was neutrally said. While it did increase the Claimant's guilt and emotions about the effect of her absence on the department, that increase was not such as to violate her dignity. This was one remark, and even in her vulnerable state, we find the increase in emotions was insufficient. We take into account that it was not reasonable to have that effect because it was not a surprising or hurtful remark. We also take into account that not all of the Claimant's heightened emotions can be related to this remark: she will have been aware of the absence and we consider the bulk of her emotions related to her own knowledge of the likely impact on others.

131.2. Similarly the effect of the Claimant feeling more guilty/more anxious was not such as to have the effect of creating a humiliating environment. We make this finding first because it did not create the state of affairs required for an 'environment'. It was one comment. In reaching this finding we have also taken into account the circumstances and whether it was reasonable that the comment had that effect: the Claimant was aware of the absence and the likely consequences of a lengthy absence on the department. It is not reasonable that the mere statement of this by her employer rendered what was already a difficult situation for all a humiliating environment for the Claimant. We consider the Claimant's perception that this comment was about her colleagues being unhappy with her was not reasonable – the impact of absence weighs regardless of how sympathetic or otherwise colleagues might be.

131.3. We have considered for the same reasons that the comment was not objectively or subjectively intimidating; hostile, degrading or offensive. A lengthy absence in a busy NHS department would have had an impact on the service. Here the Claimant' s own perception is described as guilt or embarrassment and does not itself fit into these other terms.

131.4. The majority therefore did not need to go on to consider whether the comment 'related to disability'.

132. The minority does find the comment met the threshold of having the effect of creating a humiliating environment for the following reasons:

132.1. He finds that the guilt and embarrassment and feelings that her colleagues were unhappy with her that the Claimant felt on hearing this comment were sufficient to amount to humiliation. Her disability magnified feelings and those magnified feelings were sufficient to amount to humiliation from her perspective. The minority member considers that the repeat of the phrase verbally and in the letter sent after 12 July were sufficient to create a state of affairs and therefore an environment and because, in her perception, it affected her ability to go

back to work (not wishing to face her colleagues). He considered that it was reasonable for those remarks to have that effect, given that the Respondent knew the Claimant had EUPD and anxiety by this time. In all those circumstances he considered the threshold of harassment (by effect) was met.

133. Further the minority member considered that the comment related to disability:

133.1. First he acknowledges the Claimant was not *because of* disability because it was the Respondent's practice to say this to anyone with a significant absence whether or not caused by disability.

133.2. But 'related to' has a broader meaning than 'because of' and he refers to the EHRC Code on Employment para 7.9 .

133.3. The minority member judges the impact of the absence comment was sufficiently related to the Claimant's disability because it related to a lengthy absence, caused by the Claimant needing significant intervention medically because of her disability. This was a sufficient link in his view to the disability in this case.

133.4. The Minority judge therefore in all circumstances considers the comment did relate to disability and had the effect of creating proscribed env and therefore harassment.

134. The harassment claims fail by a majority decision.

Time Limits

135. As all the discrimination claims fail, we do not need to decide the time limits point.

Constructive Unfair Dismissal

Legal Principles

136. Section 95(1)(c) of the Employment Rights Act 1996 ('the ERA') provides that there is a dismissal where the employee terminates the contract in circumstances such that she is entitled to terminate it without notice by reason of the employer's conduct. This is known as a 'constructive dismissal'.

137. An employee is entitled to terminate without notice (treat herself as constructively dismissed) when the employer has committed a repudiatory breach of contract, Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, namely: *'a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract'.*

138. Here the Claimant relies on the implied term existing in all employment contracts '*the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of*

confidence and trust between employer and employee', see Malik v BCCC SA [1998] AC 20, 34H-35D.

139. A breach of this implied term is inevitably a repudiation of the contract, Woods v WM Car Services (Peterborough) Ltd [1982] ICR 666, 672A. The test of whether there is a breach of it is objective, and not dependent on the employee's subjective view.

140. We also have regard to the principle that a course of conduct can amount to a breach of the implied term: individual actions may not in themselves be sufficient but taken together may have the cumulative effect of such a breach. The last incident relied on does not need to be serious (a breach in and of itself), see Lewis v Motorworld [1986] ICR 157, but it must contribute, however slightly, to the breach of the implied term, Omilaju v Waltham Forest LBC [2005] ICR 481. This is an objective test: even if the employee finds it hurtful, if the last act is entirely innocuous it is insufficient.

141. If there is a repudiatory breach the employee must show that she resigned in response to the breach or, at least in part, in response to the breach: Nottinghamshire County Council v Meikle [2004] IRLR 703 CA.

142. After any repudiatory breach the employee has a choice, either to affirm the contract and continue to work or to accept the breach and resign and treat herself as dismissed. Delay in resigning after the breach is not, of itself, affirmation but, in an employment context, it may be evidence of an implied affirmation. This is because, by working and receiving a salary, the employee can be said to be doing acts consistent with further performance of the contract and therefore affirmation of it, see WE Cox Toner Ltd v Crook 1981 ICR 823 EAT.

143. However, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his rights to accept the repudiation or is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation: Farnworth Finance Facilities Ltd. v. Attryde [1970] 1 W.L.R. 1053.

144. Our understanding of the principles are that during the period of a grievance the employee will not be found to have affirmed the contract and waived the breach. But there is no principle of law that requires the employee who has experienced a fundamental breach of contract to wait for the employer's response to a grievance about it before she may accept it and resign.

145. If we find there to be a dismissal we must go on to consider the reason for any breach, whether it was potentially fair and whether the dismissal was fair under section 98 of the Employment Rights Act.

146. A claim for unfair dismissal cannot be made to the Tribunal before the effective date of termination. This means that this claim was made prematurely and unless the application to amend the claim is successful, the Tribunal has not power to hear it. We heard submissions about amendment at this hearing.

Analysis

147. We amended the claim to include a claim for unfair dismissal because:

147.1. The claim was made early.

147.2. Time limits are not determinative – in any event there was good reason why the Claimant did not apply to amend her claim any earlier: she had not understood, as a litigant in person, the need to do so and thought she had made the claim in her claim form.

147.3. When we balance the prejudice to either part of a decision one way or another we find there was more prejudice to the Claimant in not allowing the claim. The Respondent had the evidence to meet the claims and was prepare. There was a fair amount of overlap with the discrimination claims, which means we would have had to deal with many of those arguments anyway. In these circumstances, the hardship in losing a potential claim made technically too early was greater than the hardship of avoiding having to defend the claim.

Issue 2.1.1.1 At a meeting on **12 July** 2022 did Manisha Joosamaria and Benazir Palmer of the respondent suggest to the claimant that she take ill health retirement?

148. This issue fails on the facts as we have set out above. The managers merely made the suggestion that it be explored by OH.

Issue 2.1.1.2 At meetings with Manisha Joosamaria and Benazir Palmer of the respondent, which took place every four weeks between January 2022 and October 2022, was the claimant made to feel guilty that her work colleagues were unhappy with her?

149. This issue fails on the facts we have found. The managers did not say anything about her work colleagues. But to ensure we have covered the way the Claimant put her case, the managers did refer to the impact of her absence on the service and we will look at the likelihood as to whether that destroyed trust and confidence later.

Issue 2.1.1.3 Did the respondent fail to obtain occupational health advice about the claimant from the very onset, namely from 14 January 2022?

150. This issue fails on the facts.

Issue 2.1.1.4 Did the respondent fail to provide the claimant with psychotherapy sessions?

151. The Respondent did fail to provide psychotherapy sessions.

Issue 2.1.1.5 Did the respondent fail to hold a return-to-work meeting with the claimant when she returned to work in late December 2021 or January 2022?

152. The Respondent did fail to hold a return to work meeting from 31 December 2021 until 17 January 2022.

Para 59.1 In a meeting of 12 July 2022 the Claimant was informed by the Respondent that they were going through the process of dismissing her, but that she should hand in her notice as she was not well enough to go through the dismissal process.

153. This issue fails on the facts we have found. The Claimant was not told to hand in her notice.

Issue 2.1.2.2 For any of those that we find did the Respondent have reasonable and proper cause?

154. For the failure to provide psychotherapy sessions in our judgment the Respondent did have reasonable and proper cause for the reasons we have already set out.

155. For the delay in the return to work meeting: the majority consider the contractual term to do the meeting as soon as possible was not broken. The minority disagrees.

    155.1. First for sake of argument we all agree that by p196 the sickness policy was incorporated into the contract by the word 'employment is governed'.

    155.2. The majority decide that the return to work was offered probably as soon as possible on 7th working day given whole circumstance of the busy department; two of those days the manager not being there; and all of those days the employee not being there a full day; and because of the other staff absences Mrs Joosamaria was contending with.

    155.3. The minority does not judge the return to work to have been done as soon as possible breach. He takes the view that if there was some interaction on day 1 as we have decided, it could have been done then. The return to work would not have been a long meeting, given the phased return already agreed and the GP not indicated any other issue.

Issue 2.1.2.1 did the Respondent behave in a way that was calculated or likely to damage or seriously destroy trust and confidence?

156. On the RTW the difference in approach between us does not alter the legal decision on this question because we are unanimous that the delay to do RTW was not a fundamental breach because it was not sufficiently serious and not likely to seriously damage trust and confidence. The employee would recognise the pressure on the manager; the employee could have helped by reminding the manager sooner; and the manager did do it as soon as possible after reminder. This was a one off. Trust and confidence is about the whole relationship and trust had been well-established by the graded return. We all consider it was not sufficiently serious to be likely to seriously damage trust and confidence.

157. Minority member considers comment he has found to be harassment was likely to damage the relationship of trust and confidence but not sufficiently seriously to amount to a fundamental breach of contract given the countervailing needs of the contractual procedure. In his view this is one of those cases where unlawful harassment is not also fundamental breach (Amnesty). He has taken into account both the delay in the return to work and this further issue in reaching this conclusion.

158. The majority consider the impact on absence comment was not likely to seriously damage trust and confidence given that it was a statement of fact that the employer needed to state in order to explain the move to stage 3.

159. For all of those reasons there was no fundamental breach of contract and therefore no dismissal and we do not need to go on to consider other points.

Employment Judge Moor
Date: 26 June 2024