EMPLOYMENT TRIBUNALS

Claimant: Ms C Fajri

Respondent: Vantage Capital Markets Ltd

Heard at: London Central (in person) **On:** 29, 30 April, 1, 2, 3 May 2024

Before: Employment Judge B Smith (sitting with members)
Ms Craik
Mr Adolphus

Representation
Claimant: In person
Respondent: Mr Humphries (Counsel)

JUDGMENT having been sent to the parties on 7 June 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant was employed as a broker by the respondent, a wholesale agency broker authorised and regulated by the Financial Conduct Authority ('FCA'), following a TUPE transfer on 17 March 2022. Her original employment started with Arian Financial LLP ('Arian') on 4 May 2020. The claimant's employment at the respondent ended with her written resignation with immediate effect on 15 March 2023.

2. The claimant was diagnosed with breast cancer in December 2021. She had chemotherapy treatment between January and May 2022 and surgery in June/July 2022. The claimant did not attend work because of sickness

from December 2021 until her resignation. The claimant was paid her full salary until the month of October 2022 and received half her salary for the month of November 2022. She was not paid for the months of December 2022 onwards.

3. The claimant claims unfair (constructive) dismissal on the basis of allegations, in summary, that the respondent reduced her pay; the respondent's communications with her; and the processes put in place by the claimant for her to return to work.

4. The respondent denies the claims. It says that the claimant resigned voluntarily and not in response to any breach of contract on its part. It also variously denies that the policies, criteria or practices alleged were in place, and or that the steps sought were reasonable.

5. The claimant brings claims of:

   (i) Unfair dismissal (constructive dismissal);

   (ii) Discrimination arising from disability contrary to section 15 of the Equality Act 2010 (EQA 2010); and

   (iii) Failure to make reasonable adjustments contrary to sections 20-21 of the EQA 2010.

6. The respondent agreed that the claimant was disabled for the purposes of s.6 EQA 2010 at the material times.

<u>Procedure, documents, and evidence heard</u>

7. The claimant was represented for the majority of the proceedings before the final hearing although there was a degree of ambiguity about this. The claimant indicated that she had received some assistance in relation to her witness statement and the agreed list of issues from her solicitors who remained on record throughout the proceedings (including to the extent of requesting written reasons on her behalf). However, the claimant appeared

in person for the final hearing and did not have an advocate representing her. A trainee solicitor from the claimant's solicitors did attend during her evidence on the second day of the hearing to take notes. Generally speaking, the tribunal explained the process, procedure and law to the claimant in clear language and sought to put the parties on an equal footing. The claimant did not raise any problems with not understanding the procedure save in respect of a discussion about whether or not she needed to apply to amend her case. Ultimately the tribunal and respondent agreed that the claimant did not need to make an application to amend her case in respect of adding a new reasonable adjustment to what the claimant said the respondent should have done. In those circumstances no prejudice arose from this.

8. No particular adjustments were required or asked for by any of the parties or witnesses. The Tribunal took regular breaks throughout proceedings. The claimant confirmed that she was happy to proceed after each break.

9. The claimant gave evidence under affirmation. The respondent's witnesses were Mr Charles Eddis, Mr Kanwaljit Rehal (also known as 'Kam'), and Mr John Meadows. All gave evidence under oath or affirmation and were cross-examined.

10. The list of issues was set by order of Employment Judge Smart. The list was amended and agreed by the parties following exchanges of information. No dispute as to the list of issues arose and it was adopted by the Tribunal at the final hearing. It is reproduced at **Appendix A**. The only addition to this was that the claimant said that the respondent should have included as a reasonable adjustment '*to lower the expectations of the claimant's revenue, at least in the short term'* at issue 6.3(c)(vi). The tribunal disregarded any difficulties purely arising from the slightly unclear grammar used in some of the issues.

11. The claimant indicated at the start of the hearing, after clarification from the tribunal, that the course of conduct by the respondent relied on for the constructive dismissal claim was that at 5.1 of the list of issues.

12. The documents were:

    a. A final hearing bundle. This originally had 599 pages and 10 additional pages were submitted by the respondent to 609.

       The claimant objected to the additional pages. We admitted those pages in evidence because the claimant had sufficient opportunity to consider them and the admission of the documents would cause no material prejudice to the claimant. The documents were disclosed to the claimant in good time before the hearing and the claimant's only objection was to the Arian handbook extracts on the basis that she says she did not receive them during the time of her employment. However, we felt that this objection was more relevant for submissions on liability than whether or not the documents should be considered. Also, they were directly relevant to a matter in issue, namely the claimant's right to pay whilst off sick.

    b. Witness statements from the claimant, Mr Eddis, Mr Rehal, and Mr Meadows.

    c. Hearing timetable.

    d. Proposed list of issues.

    e. Cast list and chronology of main events (an agreed document).

13. The tribunal only took into account those documents which the parties referred to during the course of the hearing in accordance with the normal practice of Employment Tribunals. The parties were made aware of this from the outset and both parties indicated specific pages for the tribunal to read.

14. The tribunal indicated that we would deal with liability and remedy separately with any issues relating to the change that the claimant would have been dismissed if a fair procedure had been followed reserved until any remedy hearing.

15. The respondent made oral submissions after the evidence had finished. The claimant provided written and oral submissions which we took into account before making our decisions. The claimant was initially too distressed to make oral submissions. However, after a significant break she confirmed she was able to do so, and she did.

Relevant Law

16. We have applied the relevant sections of the Employment Rights Act 1996 ('ERA 1996') and EQA 2010. In particular, we have applied sections 94, 95, and 98 of the ERA 1996 and sections 6, 15, 20 and 21 EQA. These informed the phrasing of the list of issues and our conclusions below. We also considered the Equality and Human Rights Commission's Statutory Code of Practice on Employment ('the Code') as applicable to the claims under the EQA 2010.

Constructive dismissal

17. A dismissal will be unfair unless it is for one of the admissible reasons specified in s.98 ERA 1996. If the dismissal is proved to be for one of those reasons then the determination of the question of whether the dismissal is fair or unfair, having regard to the reasons shown by the employer, depends on whether in the circumstances, including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably as in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with the substantial merits of the case. The tribunal must not substitute its own opinion about whether or not an employee should have been dismissed and must recognise that there will be a band of reasonable responses on the part of the employer. A dismissal should not be held to be unfair unless it falls outside of that range.

18. Constructive dismissal is set out in s.95(1)(c) ERA 1996. This says that:

(1) For the purposes of this Part an employee is dismissed by his employer if … (c) the employee terminates the contract under which he is

employed with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

19. This was explained by Lord Denning MR in *Western Excavating (ECC) v Sharp* [1978] ICR 221 CA as '*If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed.'*

20. There must be:

    (i) a repudiatory or fundamental breach of the contract of employment by the employer;

    (ii) a termination of the contract by the employee because of that breach; and

    (iii) the employee must not have lost the right to resign by affirming the contract after the breach (such as by delay).

21. The claimant in this case relies on an alleged breach of the implied term of trust and confidence. This is an obligation that the employer should 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': Malik and Mahmud v BCCI* [1997] ICR 606. Acting in an unreasonable manner is insufficient: *Frenkel Topping Limited v King* UKEAT/0106/15/LA. Section 95(1)(c) does not introduce a concept of reasonable behaviour by employers into contracts of employment: *Western Excavating (ECC) Ltd v Sharp* (above). It is relevant to consider whether there was reasonable and proper cause for any alleged conduct, and, if not, the tribunal must ask: when viewed objectively, was that conduct which was calculated or likely to destroy or seriously damage trust and confidence?

22. A course of conduct can cumulatively amount to a fundamental breach of contract even if the last incident itself does not amount to a breach of contract: *Lewis v Motorworld Garages* Ltd 1986 ICR 157 CA. Where a claimant relies on a series of events which they say collectively amount to a breach of trust and confidence, if the last event is entirely innocuous or trivial, and none of the preceding matters amount to a fundamental breach of contract, the claim of constructive dismissal will fail: *Omilaju v Waltham Forest London Borough Council* [2005] ICR 481 CA. However, any act constituting a 'last straw' need not be the same character as the earlier acts. It also does not need to constitute unreasonable or blameworthy conduct. The test is objective.

23. A fundamental breach of contract may be actual or anticipatory. An anticipatory breach is when, before performance is due, the employer intimates by words or conduct to the employee that it does not intend to follow an essential term of the contract at the time of performance.

24. The tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it: *Woods v WM Car Services (Peterborough) Ltd* 1981 ICR 666 EAT.

25. A breach of the implied term of trust and confidence is inevitably fundamental: *Morrow v Safeway Stores plc* 2002 IRLR 9 EAT

26. A constructive dismissal is not necessarily unfair: *Savoia v Chiltern Herb Farms Ltd* (1982) IRLR 166 CA.

Equality Act 2010 claims

27. Summarising section 15 EQA 2010, a person discriminates against a disabled person if they treat them unfavourably because of something arising in consequence of their disability and they cannot show that the treatment is a proportionate means of achieving a legitimate aim. This does

not apply if the employer shows that they did not know, and could not reasonably have been expected to know, that the employee had a disability.

28. 'Unfavourably' is not defined in the EQA 2010. The Code at [5.7] says that this means that the disabled person must have been put at a disadvantage.

29. The proper approach to determining s.15 EQA 2010 claims was summarised by Mrs Justice Simler in *Pnaiser v NHS England and anor* [2016] IRLR 170 EAT at [31]:

'(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: … A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises…

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act … the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence

or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) … the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) …

(h) Moreover, the statutory language of section 15(2) makes clear … that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable

treatment is a consequence of the disability. Had this been required the statute would have said so. … … it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

30. It follows that the something that causes the unfavourable treatment does not need to be the main or sole reason but must have at least a significant (or more than trivial) influence on the unfavourable treatment and so amount to an effective reason for or cause of it: *Pnaiser v NHS England* (above) at [31(b)].

31. A claimant bringing a complaint under s.15 EQA 2010 bears an initial burden of proof. They must prove facts from which the tribunal could decide

that an unlawful act of discrimination has taken place. This means that the claimant has to show that they were disabled at the relevant times, they have been subjected to unfavourable treatment, a link between the disability and the 'something' that is said to be the ground for the unfavourable treatment, and evidence from which the tribunal could infer that the something was an effective reason or cause of the unfavourable treatment. If the claimant proves facts from which the tribunal could conclude that there was s.15 discrimination the burden shifts under s.136 EQA 2010 to the respondent to provide a non-discriminatory explanation or to justify the treatment under s.15(1)(b). In *Hewage v Grampion Health Board* [2012] UKSC 37 Lord Hope stated that the burden provisions '*will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence, one way or the other*'.

32. Equally, '*the claimant has the burden of proving, on the balance of probabilities, those matters which he or she wishes the tribunal to find as facts from which the inference could properly be drawn (in the absence of any other explanation) that an unlawful act was committed': Efobi v Royal Mail Group* [2021] UKSC 33 *per* Lord Leggatt at [30].

33. In the context of discrimination arising from disability claims we were also referred to *Pipe v Coventry University Higher Education Corp* [2024] EWCA Civ 191.

34. In the context of reasonable adjustments claims, the claimant must prove facts from which it could reasonably be inferred, absent an explanation, that the relevant duty has been breached: *Project Management Institute v Latif* [2007] IRLR 579 EAT at [54]. The burden then shifts to the respondent under s.136 EQA 2010. In *Rentokil Initial UK Ltd v Miller* [2024] EAT 37 it was then held at [43] that '*What Latif means is that the burden is on the employee, initially, to show (if disputed) that the PCP was applied and that it placed the employee at the substantial disadvantage asserted. They also need to put forward and identify some at least potentially or apparently reasonable adjustment which could be made. But, if they do, then the*

burden may pass to the employer to show that it would not have been reasonable to expect them to make that adjustment'.

35. Whether or not unfavourable treatment is a proportionate means of achieving a legitimate aim involves a balancing exercise between the reasonable needs of the respondent and the discriminatory effect on the claimant: *Hampson v Department of Education and Science* [1989] ICR 179 CA. Factors to be considered include whether a lesser measure could have achieved the employer's legitimate aim.

36. The duty to make reasonable adjustments is found in ss.20 EQA. That duty applies to employers: s.39(5) EQA 2010. A failure to comply with the duty is in s.21 EQA 2010. The relevant questions are:

    a. what is the provision, criterion or practice ('PCP') relied upon;

    b. how does the PCP put the claimant at a substantial disadvantage in comparison with persons who are not disabled;

    c. can the respondent show that it did not know and could not reasonably have been expected to have known that the claimant was a disabled person and likely to be at that disadvantage; and

    d. has the respondent failed in its duty to take such steps as it would have been reasonable to have taken to have avoided that disadvantage?

37. The Code says at [6.10] that it *'should be construed widely so as to include, for example, an formal or informal policies, rules, practices, arrangements or qualifications include one-off decisions and actions'.*

38. *Pendleton v Derbyshire County Council* [2016] IRLR 580 and *Nottingham City Transport Ltd v* Harvey [2013] ALL ER(D) 267 EAT demonstrate that, generally, a one-off incident will not qualify. However, a practice does not need to arise often to qualify as a PCP. However, in *Ishola v Transport for London* [2020] ICR 1204 the Court of Appeal said that the words provision, criterion or practice '*carry a connotation of a state of affairs (whether framed*

positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again'.

39. Substantial disadvantage means more than minor or trivial: s.212 EQA 2010. It must also be a disadvantage which is linked to the disability.

40. A PCP is unlikely to be considered proportionate if there is a way of achieving the aim which imposes less detriment: *Chief Constable of West Yorkshire Police v Homer* [2012] ICR 704.

41. The tribunal must also consider the extent to which the step will prevent the disadvantage to the claimant.

Findings of fact

42. There is no dispute about the authenticity of the documents. We adopt the names used in the cast list in **Appendix B**.

43. The claimant was employed as a broker by the respondent, a wholesale agency broker authorised and regulated by the Financial Conduct Authority ('FCA') since a TUPE transfer on 17 March 2022. Her original employment started with Arian Financial LLP ('Arian') on 4 May 2020. The claimant's employment at the respondent ended with a written resignation with immediate effect on 15 March 2023.

44. The claimant's role was as an equity derivatives broker. Her team was called 'Delta One' The manager and managing partner of the respondent was Mr Rehal. Her role included the facilitation of trade between different clients such as banks or hedge funds.

45. The claimant was diagnosed with breast cancer in December 2021 when she was aged around 29. She had chemotherapy treatment between January and May 2022 and surgery in June/July 2022. The claimant did not attend work because of sickness for the period from December 2021. The claimant did not return to work from then until her resignation on 15 March

2023 save for a meeting on 4 or 5 January 2022. The claimant was paid her full salary until the month of October 2022 and received half her salary for the month of November 2022. She was not paid for the months of December 2022 onwards. The claimant provided extended sick notes throughout her periods of absence.

46. The claimant's contractual rights to sick pay were limited to statutory sick pay. This is because of the terms of her contract.

47. The parties engaged in various correspondence. Generally speaking, we find that the correspondence was exchanged as set out in the hearing bundle and agreed chronology. However, whether or not some items were sent and or received is in dispute. We resolve any dispute as follows. We find that all correspondence alleged to have been sent was as a matter of fact sent. This is because the disputed correspondence was in the form of emails and the bundle included copies of emails with recipients and send times included. However, where any witness said in evidence they did not receive any particular email, we find that they did not receive that email. This is because there was no reason to doubt the credibility or reliability of any witness on this issue. Also, some of the later correspondence was corroborative of emails not having been received, both by the claimant and the respondent, for example, because it was consistent with or suggested non-receipt.

48. The correspondence included the following.

49. On 7 September 2022 Mr Meadows sent the claimant the following WhatsApp:

'Hi Camelia, hope this message finds you well [emoji].

What are your plans now ? Do you think you will be able / want to return to work ?

We have and are keen to support you as much we can but obviously there are limits to what we ca do .. are you free for chat ?'

50. On 4 October 2022 Mr Meadows sent the claimant a WhatsApp saying:

'Hi Camelia, dont want to bother you [emjoi] However, you should expect an email from VCM HR dept in the coming days which will say that the amount of money paid to you currently will be significantly reduced. I have done all I can to support you at a very difficult time, but there are limits to what is reasonably possible. I hope you understand, and I hope we are are to welcome you back to the office very soon [emoji]'

51. On 5 October 2022 the claimant sent a WhatsApp to Mr Meadows stating that she was not feeling well, she was still undergoing treatment, and in response to the above message included '*This is very bad news for me at a time that is already extremely difficult as I didn't expect it at all. In fact I'm quite surprised and I don't understand. I can't handle this extra stress at the moment as I'm very unwell*.'

52. On 14 October 2022 Simon Cook emailed the claimant stating:

'*As you know we (and Arian Financial LLP before your employment transferred) have been supporting you through your absence on sick leave on full salary. We had hoped that you would be fit to return to full-time duties by now but that appears, sadly, not to be possible at the moment. We have, unfortunately, got to the point where we need to take account of the commercial realities, and I have to advise that October is the last month that you will be paid in full while absent. You will receive half your November salary at the end of that month, and thereafter there will be no salary payments until you return to work.*

We of course hope that your return is sooner rather than later, and we look forward to receiving positive news in that regard in due course.'

53. The claimant emailed Mr Meadows and Mr Rehal on 7 November 2022 stating:

'I hope all is well. From my side I'm getting better, I have just finished radiotherapy, there's ups and downs but overall I'm recovering everyday.

I'm thinking about coming back to work and joining the dream team again! I believe that it's time for me to reconnect with society and get back on Bloomberg to feel part of the team again. I'm sure that my clients will be supportive and I believe I'm much more motivated.

Let me know your thoughts.'

54. The claimant sent a further email to them on 28 November 2022 stating:

'…I'm contacting you again as I have now completed all my treatment for breast cancer, I finished my chemotherapy and my radiotherapy. I'm getting better every day a little more, and trying to get back to a new 'normal' life.

I believe that I'm ready to come back to work and be part of the team again, I'm sure I will have the full support of my clients as well.

I think there might have been some sort of mistake on my last payslip as I only received half of my salary, can you please rectify that and let me know your thoughts about how we can proceed for the future.

I'm happy to start as soon as you would like.'

55. On 9 December 2022 the claimant sent Mr Meadows a WhatsApp stating:

'Hi John, I hope all is well on your side. I have sent you emails but I haven't heard back from you.

Can you please let me know what's going on..

As I said in my emails, I'm ready to come back to work as I have now completed my treatments and I'm feeling better every day. I hope expiry is going well!

I look forward to *hearing from you soon thanks [emoji]'*

56. Mr Meadow's replied:

'Hi Camelia – that's very good news indeed !!

I've not seen any emails so perhaps they've been trapped by the spam filter or something. Please send again to …

But in essence you can restart when you want – when did you have in mind ? [smile emoji]'

57. The claimant sent Mr Meadows a WhatsApp on 12 December 2022 stating:

'Hey John, I'm glad to hear back from you! I think in January would be good to start again [smile emoji] I'm looking forward to it!

I've also been in touch with some of my clients so hopefully will be ready to start again in 2023 :)

(ALso I think there's must have been a mistake on my latest salary as I only received half of the amount.. if you can please check and adjust the problem would be much appreciated) Many thanks

Good luck with expiry!'

58. Mr Meadows replied stating:

'Hi Camlia, January will be fine. There have been a few hires on D1, so we need to sit and figure out how this will all fit together – which clients have you been in touch with out of interest? (this may help us work thongs [sic] *out)*

Regarding your salary, Simon Cook wrote to you on 14th October explaining the position but essentially, November was half salary and payments have ceased now until you recommence work.

Looking forward to seeing you very shortly !! [smile emoji]'

59. The claimant replied stating:

'Hi John, yes ok I'm sure we will figure it out, I can at least start again and be part of the team..

…

I'm also looking forward to being back [smile emoji]'

60. The claimant sent an email to Simon Cook on 13 December 2022 which included a discussion about missing emails. Also, it said that the claimant was now starting to feel better and she was doing everything she can to come back as quickly as possible and she requested that her salary be restored and before '*hopefully starting in January*'.

61. Mr Eddis and the claimant exchanged various correspondence after 14 December 2022 about the claimant's return to work.

62. On 14 December 2022 Mr Eddis stated '*Clearly there will be a number of challenges after an extended time out, and we will, on both sides, need to be comfortable that you are properly fit to return to what is, as you know, a stressful and demanding job. …. We will, in due course, need to have a full report from your doctor/oncologist in order to assess your fitness to return*

to work, so I would be grateful I you could let me know how you would prefer to go about this. Our preference would be to send a form (the content of which we have agreed) to the relevant individual(s) for completion, for which we would need to have your written consent. Let me know, please, if that is OK.'

63. At a time around this period Mr Eddis had a conversation with Mr Rehal during which they discussed the claimant coming back to work, in principle, and Mr Rehal made it clear that there was no reason whatsoever why she could not return on a part-time basis.

64. On 16 January 2023 the claimant's reply included that she was keen to move forward, and she was happy to accept the respondent's preference in the respondent providing a form which would be agreed (for the report) and she requested a draft document. She also queried her sick pay arrangements.

65. On 18 January 2023 Mr Eddis emailed the claimant. This included that the respondent's priority was to ensure that she was fit enough to cope with her role and the additional difficulties in re-establishing client relationship. It also discussed different working areas and changes in the organisation to the effect that the claimant's preferred broking area was no longer being covered. The claimant was asked if there was a specific product she would like to broke, and *'it would be helpful if you could set out, in as much detail as possible, your expectations and plans'* including pre-existing client relationships, the levels of expected business, who she would be targeting as new clients and how she would go about developing the new relationships and the sort of level of revenues she expected over 3/6/12 months. The communication asked whether the claimant anticipated being fit to work full time, whether she expected to be able to cope with additional travel and entertainment, and what reasonable adjustments she had in contemplation, such as a phased return and any timeframe. It also asked what additional support or assistance she might want. It also included '*If you are looking for a phased/partial return to work, it would be helpful to know how you would address the inherent difficulty posed by the fact that the*

demands of clients and markets mean that it is very rare (in fact, unknown by us) for a part-time broker to be a successful broker'.

66. Solicitors acting on behalf of the claimant sent a letter to the respondent dated 1 February 2023 alleging disability discrimination. The respondent replied on 2 February 2023. This included that there would be little merit in submitting a request for a medical report without first understanding what sort of hours the claimant proposed. Also, they did not expect the claimant to commit to a particular role and was only asking for preliminary thoughts on product areas. The claimant had also been invited to have a constructive discussion with John Meadows. The respondent stated that '*We are, subject to meaningful progress being made in enabling Camelia's return to work (of which, more below), happy to consider payment of some remuneration in the interim …. We wish for some meaningful progress to be made so that the shared goal of a return to work can be achieved'. To that end, we await (i) the clarification requested and (ii) some times/dates when John Meadows can call Camelia for the supporting dialogue which we have offered'.*

67. The claimant emailed Mr Eddis on 28 February 2023. This included that she was ready to return to work, and that she continued to believe that the company had put up barriers to her return. She requested that her pay be reinstated. She requested working from home for 3 days a week on a phased return basis and asked that her system access be reinstated so that she could start the next day and catch up on emails. She also provided the details of her oncologist. The claimant also said that she did not consider networking and travel possible at that time.

68. Mr Eddis replied on 1 March 2023. This included that '*we do have to complete the proper processes in order to be satisfied that you are fit to return to work, on the basis proposed. To that end I attach the relevant documents for your review…. Once we have completed these processes and I am in position to certify you as an approved person, we can reinstate your pay'.*

69. The claimant replied on 2 March 2023 querying why a medical report was required before she could restart work, suggesting that it could take weeks.

70. On 7 March 2023 the claimant emailed Mr Eddis. This included that '*whilst my return is delayed by your insistence on making contact with my consultant, you have also added a further stipulation regarding certifying me as an approved person. I am not sure that this has to do with anything?...'* She also queried whether questions about improvement were necessary (from the draft medical report) and the relevance of including content about bonuses and performance.

71. The draft report, produced by Mr Eddis, included by way of background to the assessing doctor that:

'*VCM is a wholesale interdealer broker …. It is a relationship business. The importance of successfully matching buyers and sellers cannot be underestimated…all brokers fully understand that they are paid on results. A broker that does well will receive significant quarterly bonuses in addition to their basic salary. Brokers who do not cover their costs (desk costs and salary) with room to spare will be subject to a performance review and, in the absence of improvement, termination of employment will result.*

In short, broking is a highly stressful occupation, both in terms of the stress of trying to arrange trades, the stress of a trade failing to match and the stress of a trade being 'traded away' (the broker losing out to a competitor'.

The report includes that the respondent is alert to the need to make reasonable adjustments and that the claimant has proposed returning to work on a part-time basis, three days a week for market hours, and that she had advised that she would want to work from home and would not be able to engage in client entertainment, at least in the short term.

72. Mr Eddis replied on the same day stating that FCA certification was required by the FCA for her role, and justified the inclusion of background material about bonuses and performance so that the medical assessment was informed by the relevant employment context.

73. We find that in order for the claimant's FCA certification to be completed the claimant would need to have undertaken some short training on areas such as AML. We make this finding because of the evidence of Mr Eddis.

74. We find that the respondent would adapt, and had in the past adapted, results (ie. performance) expectations (at least in the short term) to take into account personal circumstances. We make this finding because we accept Mr Eddis' evidence of this which was not meaningfully undermined by anything.

75. The claimant resigned by email to Mr Eddis dated 15 March 2023 alleging constructive dismissal and disability discrimination.

76. The claimant's condition affected her ability to network. This is because of physical changes which arose as a result of her treatment and also the effect of her condition on her confidence and self-consciousness.

77. We find that there was a perception on the part of Mr Eddis that that the Claimant may only be able to work part-time, and therefore, was unlikely to be successful as a broker. This is because Mr Eddis' witness evidence included that working part-time as a broker is so inherently at odds with the requirements of the job and the demands of the clients. Also, this finding is supported by the wording of his email dated 18 January 2023, above, about part-time brokers and how likely it was that they would be successful.

Conclusions

Equality Act Claims 2010 – disability and jurisdiction

78. We decided that at all material times the claimant was disabled for the purposes of s.6 Equality Act 2010 (**Issue 4**). This is because she had cancer and because disability was agreed by the respondent.

79. We decided that all of the alleged acts by the respondent which may have been out of time for the purposes of jurisdiction were in time. This is because the conduct of the respondent regarding the claimant on the issues in dispute can be properly regarded as a course of conduct ending within time. This is because by their nature they concerned the respondent's reaction to the claimant's illness and the arrangements for her to return to work. We noted that the respondent did not contest jurisdiction on the basis of time limits at the original preliminary hearing. It was necessary to make a clear determination on this point in any event.

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

5.1 Did the Respondent do the following things and treat the Claimant unfavourably thereby:

5.1.1 Deciding to reduce the Claimant's pay as indicated by a WhatsApp message sent by Mr. Meadows to the Claimant of 4 October 2022.

80. We find that this happened as a question of fact, as set out above. The changes in the claimant's pay were not in dispute. However, we find that the claimant had no contractual right to the additional payments that she received. This is because of the terms of her contract. We do not find that the changes in her pay were unfavourable treatment. This is because it concerned the removal by the respondent of a voluntary payment that the claimant had no legal entitlement to.

5.1.2 The Respondent then reducing the Claimant's pay to half pay in November 2022 and then to no pay in December 2022;

81. We find that this happened as a question of fact, as set out above. The changes to the claimant's pay were not in dispute. However, the claimant had no contractual right to the additional pay in November 2022 or pay in December 2022. This is because of the terms of her contract. We do not find that the changes in her pay were unfavourable treatment. This is because it concerned the removal by the respondent of a voluntary payment that the claimant had no legal entitlement to.

5.1.3 From November 2022 onwards conveying to the Claimant that the Respondent intended to remove the Claimant from the business

82. We find that some of the correspondence between the parties was definitely perceived by the claimant as unwelcoming. This is because we accept her evidence of this, to that extent. However, as a matter of fact we do not find that the respondent conveyed to the claimant that they intended to remove her from the business. This is because of the plain reading of the content of the communications. It is correct that the claimant received mixed messages about her return to work because Mr Meadows told her that a January start would be find and this was contradicted by Mr Eddis. However, this is not sufficient to find the specifically alleged treatment (above at 5.1.3) happened as a matter of fact.

5.1.4 The Claimant receiving no response to a communication she sent to the Respondent on 5 October 2022 about how she could not handle the extra stress of reduced salary;

83. We find that this did happen. The documents clearly showed that the claimant send a communication to the respondent on 5 October 2022. Our decision on this issue – whether the claimant received a response - in part is determined by the meaning given to 'receive'. We find that the respondent's email about the pay reduction – the response for the purposes of this issue - was sent by them, but was not (for whatever reason) read by the claimant. This is because we accept her evidence that she was not aware of it. We consider that the word 'receive' for this issue is ambiguous but we should resolve this ambiguity in favour of the claimant by taking it to mean 'effectively received' ie. 'read'. However, we do not consider that this

was unfavourable treatment. This is because there were clear attempts at correspondent by both sides with correspondence from both parties having been sent but not effectively received. We consider that the fact that the respondent had attempted to respond to her communication by its letter was such that she was not treated unfavourably. We did not consider that it was the respondent's fault that she did not necessarily receive that response, or that the respondent's attempts at communication overall on this issue were unfavourable given that Mr Meadow's warned the claimant about the pay issue by WhatsApp message already.

5.1.5 With reference to the Claimant's communications with Mr. Meadows at paragraph 14 of the grounds of claim that the Respondent went back on its agreement that the Claimant could return to work in January 2023.

84. We find that this did happen and was unfavourable treatment. This is because Mr Meadows was in a senior role and was effectively the claimant's line manager (she was not necessarily working with Mr Rehal anymore because of a change in products traded, and it was with Mr Meadows that she was expected by the respondent to communicate about what products she would broker in the future). The claimant clearly communicated that she wanted to return to work on 12 December 2022 and this was agreed to by Mr Meadows on that day. The exchange of correspondence clearly indicated that both expected that she would restart in the very short term and without caveats. However, Mr Eddis then changed this by his communication on 14 December 2022 that the agreement to restart was subject to a full report from her doctor or oncologist to assess her fitness to return to work. We find that, overall, the addition of this caveat amounted to going back on the agreement formed with Mr Meadows. In those circumstances, this is unfavourable treatment because it was a change from an unconditional return to a conditional return. The claimant was in a worse position as a result.

5.1.6 Mr. Eddis insisting that the claimant undergo a medical assessment before she could return to work as referred to in emails of 14 December 2022 and 1 March 2023;

85. We find that this did happen. We make this finding because of the language in the correspondence referred to which suggests that it was a requirement of the respondent. The 1 March 2023 email clearly states that reinstatement of pay was only once the processes (including medical assessment) were completed. An element of assessment was inherent in the report proposed given our factual findings. We find that this was unfavourable because whilst the claimant was not working she wasn't being paid (at least for the months of December, January and February 2023). The consequences of not letting the claimant return to work (when she had clearly stated at various times that she wanted to return to work, including starting as early as January 2023) were that she would not be paid for that time, but this was (at least in part) because of respondent's requirement for a medical assessment despite the claimant's position that she was fit to return. We also did not find that a medical assessment was required as a matter of law before the claimant could return to work. This is because we did not consider it strictly necessary. Whilst it may well have been a matter of good practice, particularly to identify reasonable adjustments, the lack of assessment did not preclude the claimant's employment in some way. Given the respondent's position on pay, this amounted to unfavourable treatment in all of the circumstances.

5.1.7 Mr. Eddis requiring the claimant to provide a plan as to what work and duties she would be doing upon her return to work by email of 18 January 2023;

86. We do not find that this happened. This is because the correspondence stated that '*it would be helpful if*'. Accordingly, it was not a requirement of Mr Eddis.

5.1.8 Mr. Eddis stating that the Claimant could not be a successful broker if she returned to work part time as mentioned in an email of 18 January 2023 and by him focussing on the stresses and difficulties of the role.

87. The majority of the tribunal did not find that this happened as a matter of fact. This is because the wording of the email is not the same as the allegation above. The dissenting member of the tribunal (Member Craik) found that this did happen, reasoning that on a natural reading of the email the correspondence was effectively saying the same thing as this allegation,

and that this was unfavourable treatment because it had the effect of discouraging the claimant.

5.1.9 A request by Mr. Eddis by email 18 January 2023 for further information to be provided by the Claimant for the purposes of a medical report as per paragraph 18 of the grounds of claim;

88. We find that this did happen. This is because the information was requested in that correspondence. However, we do not find that this was unfavourable treatment. This is because these were reasonable requests for the purposes of informing a medical report that the claimant, at least at that stage, had agreed to.

5.1.10 Mr. Eddis insist by email dated 1 March 2023 that the Claimant is certified as a fit and proper person to do her job in accordance with FCA regulatory requirements as a condition of her pay being reinstated.

89. We find that this did happen. This is because of the content of that email. We find that this was unfavourable treatment because it prevented the claimant from working which meant that she was not paid. We find that there were alternative tasks that the claimant could have done pending FCA certification, not least the completion of training required before she could be certified. If she had completed that training whilst not being paid then this would have certainly been unfavourable treatment, particularly in the context when she was keen to return to work.

5.1.11 Mr. Eddis failing to provide information about how the Respondent would certify the Claimant as being fit and proper to perform her role.

90. We find that this information was not, as a matter of fact, provided to the claimant. However, we did not consider that there was any reason why Mr Eddis was under a duty to do so (generally) and it was not specifically requested by the claimant. In those circumstances, there was no failure. Also, absent a duty to do so (or respond to a request) we did not consider that there was anything about this that was unfavourable.

5.1.12 By reference to the draft request for a medical report sent to the Claimant on 2 March 2023 by email from Mr. Eddis, seeking to obtain endorsement from

a medical practitioner that the Claimant would not be able to do her job.

91. We find that this did not happen. This is because it is not supported by the evidence on a clear reading of any of the relevant documentation.

5.2 Did the following things arise in consequence of the Claimant's disability:

(a) the Claimant's absence from work in the period from December 2021 onwards, and/or

92. This did arise from the claimant's disability. This is admitted by the respondent and is clear from the factual findings above.

(b) the fact or perception that she would be likely to have further periods of sickness absence, and/or time off, and/or

93. We do not find that there was a fact or perception that the claimant would have further periods of sickness absence and or time off. Although this was a theoretical possibility, we do not consider that there is clear evidence from which to make either of these findings. This is because of an absence of cogent medical evidence about the factual position. Equally, there is an absence of cogent evidence (either direct or indirect) that there was a perception that either of these things would arise. Neither was inevitable from the claimant's condition.

(c) the fact or perception that she would be likely to have disrupted working hours as a result of the need for treatment, and/or

94. We do not find that there was a fact or perception that the claimant would be likely to have disrupted working hours as a result of the need for treatment. As above, although this was a theoretical possibility, we do not consider that there is clear evidence from to make either of these findings. This is because of an absence of cogent medical evidence about the factual position. Equally, there is an absence of cogent evidence (either direct or indirect) that there was a perception that this would arise. It was not inevitable from the claimant's condition.

(d) the fact or perception that the Claimant's ability to travel

would be impacted by her condition, and/or

95. We did not find that this was the case (factually) because there was insufficient cogent evidence that this was the position. However, the tribunal was not unanimous on this finding with Member Craik finding it proven on the basis that the claimant's email dated 28 February 2023 was sufficient to establish this. The majority did not consider that the claimant's own view was enough to find that her ability to travel would be impacted by her condition.

96. On the question of perception, having considered the totality of the evidence carefully, we did not find (on a unanimous basis) that this was made out. This is because there was insufficient cogent evidence from which make this finding. We considered that, to the extent this was covered by the correspondence, there is not enough to find that the respondent, or Mr Eddis, had this perception.

(e) the fact or perception that the Claimant's ability to conduct networking would be impacted by her condition, and/or

97. We did not find that this was the case as a matter of perception. This is because there is insufficient cogent evidence to support such a finding, whether on the part of the respondent generally or Mr Eddis specifically.

98. However, this was an area which was covered in more detail by the claimant in her witness evidence (particularly compared to her condition's impact on travel) as a question of fact. We accept the claimant's evidence on this issue. In those circumstances, we find that the claimant's ability to conduct networking was impacted by her condition as set out in our factual findings above.

(f) the fact or perception that the Claimant may only be able to work part-time, and therefore, unlikely to be successful as a broker, and/or

99. We do not find that this is made out as a question of fact. This is because there was insufficient evidence in the case that this was the case. There was no clear evidence as a matter of fact that a part-time broker was unlikely to be successful.

100. However, we do find as a matter of fact that this was the respondent's perception, through Mr Eddis. This is explained in our findings of fact, above.

(g) the fact or perception that the Claimant would not be able to cope with the stress of her role, and/or

101. We do not find that there was the fact or perception that the claimant would not be able to cope with the stress of her role. This is because there is insufficient evidence to make this finding. Although there was a concern on the part of Mr Eddis about the effect that stress may have on the claimant this is not the same as a concern that she would not be able to cope. The evidence also did not suggest that she would be unable to cope, as a matter of fact.

(h) the fact or perception that the Claimant may, as a result of her condition, suffer or be prone to suffer being "traded away", and/or

102. We do not find that there was the fact or perception that the claimant, as a result of her condition, may suffer or be prone to suffering being traded away. This is because there is insufficient evidence to make this finding. We did not consider that the evidence from the claimant or Mr Eddis on this issue established that the claimant was at a greater or lesser risk of this as a result of her condition, or that the respondent had this perception of the claimant.

(i) the requirement that on her return from work the Claimant would, at least initially, require reasonable adjustments to be put in place.

103. This did arise from the claimant's disability. This is admitted by the respondent and is plain given the claimant's condition.

5.3 The Respondent's position with respect to each of the 'something(s) arising' is set out at paragraphs 77-82 of

the Amended Grounds of Resistance.

5.4 Was the unfavourable treatment, to the extent found as fact by the Tribunal, because of any of the 'something arising(s)' identified above?

104. We did find that the issue at 5.1.5 (about a return to work in January 2023, as above) was because of a something arising, namely that the claimant would (at least initially) require reasonable adjustments to be put in place. This is because the change in position was through Mr Eddis' correspondence dated 14 December 2022 which identified the need for a medical report. Although that email only identifies fitness to return to work as the justification, later correspondence also included as a justification for the medical report the need to identify reasonable adjustments. Also, we accepted Mr Eddis' evidence that his approach from the outset was that he was mindful of the obligation to put reasonable adjustments in place.

105. We did not find that this was because of the other somethings arising because there was no causal link between them and the unfavourable treatment. Although the claimant's absence was a precondition as a matter of logic, it was not a causal factor. There was also no evidence that her ability to network was a causal factor in the respondent going back on the agreement, or because of the respondent's perception as to the likely success from part-time working.

106. We find that the issue at 5.1.6 (about a medical assessment, as above) was because of somethings arising, namely 5.2(a) and 5.2(i). We find that the respondent wanted a medical report because the claimant had been absent from work for a long period of time and on Mr Eddis' own evidence there was a requirement that they put reasonable adjustments in place, which would be informed by the medical report.

107. We did not find that the issue at 5.1.10 (about being a fit and proper person) was because of any of the somethings arising. This is because the respondent required that the claimant be certified was as a result of FCA requirements that applied to the respondent and the claimant's role. The evidence did not

suggest that this unfavourable treatment was because of the other somethings arising, namely the claimant's absence, the requirement for reasonable adjustments, the fact that her condition would impact her ability to network or the respondent's perception as to her likely success if working part-time.

5.5 If so, was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:

5.5.1 Ensuring that, before an employee returns to work after a prolonged period of sickness absence, as in the circumstances of the Claimant, the Respondent is satisfied they are able to do so and are properly supported with appropriate adjustments, by securing a report from an appropriately qualified, and briefed, professional.

5.5.2 Ensuring that any medical report regarding an employee returning from a prolonged period of sickness absence, is properly prepared by:

5.5.2.1 providing the medical professional with details of the employee's role and surrounding circumstances; and

5.5.2.2 involving the employee by requesting them to set out, to the extent they can, their expectations on return, what they believe they are capable of and what adjustments they consider would be required.

8.3.3 Where sick pay payments are made to employees on a discretionary basis, and so exceed an employee's contractual and statutory entitlements, reviewing that discretion on an ongoing basis, and limiting (including reducing to zero) those discretionary payments depending on the circumstances of the case and balancing the needs of the employee and the employer.

5.6 The Tribunal will decide in particular:

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

5.6.2 could something less discriminatory have been done instead;

5.6.3 how should the needs of the Claimant and the Respondent be balanced?

108. We find that the treatment at 5.1.5 (about a change of position with respect to a return to work in January 2023) was a proportionate means of achieving a legitimate aim, namely because the change of position was because of the need to identify the reasonable adjustments and assess the claimant's fitness to return to work. We consider that this treatment was appropriate and reasonably necessary to achieve those aims. This is because in principle it is entirely proper that the respondent seeks to understand and put in place the reasonable adjustments that the claimant required and that she was fit to return to work. We do not consider that anything less discriminatory could have been done instead in respect of this particular treatment. This is because there was no lesser obvious alternative way of achieving that aim in respect of. Overall, we felt that the obligations on the respondent to identify and put in place reasonable adjustments was not outweighed by the claimant's need to return to work without undue delay.

109. However, we do not find that the particular treatment at 5.1.6 (requiring a medical assessment before the claimant returned to work as referred to in emails of 14 December 2022 and 1 march 2023) was a proportionate means of achieving a legitimate aim. This is a slightly different treatment to that at 5.1.5. This particular treatment was in the circumstances of the respondent not going to reinstate pay before the medical report and these circumstances are important to understanding our decision on this issue. In particular, the circumstances were that on 2 February 2023 the respondent's position on interim pay was expressly '*We are*, *subject to meaningful progress … happy to consider payment of some remuneration in the interim…'* However, by 1 March 2023 the respondent's position was expressly '*Once we have completed process and in a position to certify as approved we can reinstate you pay'.* Whilst we consider that the respondent's aims in preparing a suitable report were legitimate, as set out above, we did not consider it to be a proportionate means of achieving those aims in circumstances were

completion of the report was one of two conditions that had to be satisfied before pay was reinstated. We accepted that the additional relevant legitimate aim (8.3.3, above) was legitimate in principle as reflective of appropriate employment practice. However, in these circumstances the claimant had effectively entered a limbo period between her being off sick (on her account) and being prevented from returning to work (on the respondent's account). We balance the competing needs of the respondent to give effect to the contractual position, the need for the claimant to not be prevented from returning to work without a good reason, and the need to identify reasonable adjustments, in favour of the claimant in the specific circumstances of this case. This is because something less discriminatory could have been done instead. A reasonable period for the claimant to completed the medical report (and also be in a position to be recertified for FCA purposes) was likely to be around four weeks, and certainly no more than three months. We consider that payment of up to three months' salary as part of the overall requirement that the claimant not return to work whilst the medical report and FCA certification took place could have been done instead. On this basis, something lesser than the respondent's treatment could have been done instead which would have reduced the effect on the claimant.

110. For those reasons the claim for discrimination because of something arising from disability is extent to the above extent only, namely the unfavourable treatment at 5.1.6. The other elements of that claim are dismissed.

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

1.1 Under the first requirement, did the Respondent apply a "PCP" namely a provision, criterion or practice, which put the Claimant at a particular disadvantage because she is a disabled person?

The Claimant says there were the following PCPs:

(a) following a working pattern which did not involve interruptions caused by sickness absence, and/or

111. We do not find that this PCP was applied by the respondent. We make this finding because this alleged PCP was not supported by clear and cogent

evidence. There was no clear evidence of working patterns which did not involve or permit interruptions caused by sickness absence. Also, the respondent's overall approach to the claimant did allow for an interruption caused by sickness absence.

(b) following a working pattern which did not involve having disrupted working hours as a result of the need for treatment, and/or

112. We did not find that this PCP was applied by the respondent. We make this finding because this alleged PCP was not supported by clear and cogent evidence. There was no clear evidence of the working pattern alleged. There was nothing to suggest that the working pattern did not permit disrupted working hours arising from the need for treatment.

(c) Being able to work sufficient hours/days so as to "justify" (from the Respondent's perspective) being paid a salary;

113. We did not find that this PCP was applied by the respondent. We make this finding because this alleged PCP was not supported by clear and cogent evidence. There was no clear evidence of this alleged requirement. The respondent's approach to remuneration (ie. salary plus a significant performance based-bonus) did not amount to this alleged PCP.

(d) being able to travel, and/or

(e) being able to conduct networking, and/or

(f) being able to work full time, and/or

114. We did not find that these PCPs were applied by the respondent. We make this finding because these alleged PCPs were not supported by clear and cogent evidence. The evidence did not show an express or implied requirement or practice that employees be able to travel, conduct networking, or work full time. Whilst these were things that sometimes happened (as in, employees doing some travel and networking) this is not the same as amounting to a PCP.

(g) being able to work to the level where she would (from the Respondent's perspective) be *"paid on results",* in

other words achieving the *"results"* required of her by the Respondent, and/or

115. We do not find that this PCP was applied by the respondent.. We make this finding because this alleged PCP was not supported by clear and cogent evidence. Also, we accepted the evidence of Mr Eddis that the respondent would adapt, and had in the past adapted, results (ie. performance) expectations (at least in the short term) to take into account personal circumstances. His evidence on this point was not meaningfully undermined by anything.

(h) Being able to cope with the stress of her role.

116. We find that this PCP was in place at the respondent. Although the respondent's amended Grounds of Resistance state that this is denied, it did accept that '*there is an expectation by the Respondent that its brokers are able to cope with the stress of the role and where someone is not coping they would do what they could to support them*.' Plainly, there was a practice of the respondent expecting people to being able to cope with the stress of their roles and this is reflected in, for example, the draft medical report. This is also consistent with Mr Eddis' rationale for requesting a medical report prior to the claimant's return.

6.2 Did any of the PCP's found by the Tribunal and set out above place the Claimant at a substantial disadvantage within the meaning of s.20(3) of the Equality Act 2010?

The Claimant relies on the alleged substantial disadvantage that she was unable to meet each of the PCP's relied on.

117. We do not find that the PCP found proven put the claimant at a significant disadvantage. This is because, given the claimant's circumstances, there was nothing inherent in her disability that meant that she was necessarily less able to cope with a given level of stress. There was a clear lack of evidence suggesting that this was the case. This is especially true in circumstances where, on the claimant's own account, she was fit to return to work.

118. However, we also continue to make conclusions remaining issues in the alternative if we are wrong about this.

6.3 If so, what steps would it have been reasonable for the Respondent to take to avoid the disadvantage? The Claimant has put forward the following by way of suggested reasonable adjustments:

(a) failing to reinstate the Claimant's pay (para. 38 of the GOC; see also paras. 7, 11, 14, 17, 20 to 23, 25, 31 and 33 of the GOC), and/or

119. We do not find that this would have been a reasonable step. This is because pay is irrelevant to any disadvantage that the PCP would have caused.

(b) failing to remove the requirement for the Claimant to be approved as a certified person before her pay could be reinstated (para. 33 of the GOC), and/or

120. We do not find that this would have been a reasonable step. This is because FCA certification is irrelevant to any disadvantage that the PCP would have caused.

(c) failing to make arrangements to facilitate the Claimant's return to work within a reasonable period - without prejudice to the generality of this contention:

i. failing to adapt or modify its sickness absence arrangements so as to facilitate the Claimant's return to work (paras. 31 to 37 of the GOC), and/or

ii. failing to provide the Claimant with a consistent basis upon which she could return to work (paras. 31 to 37 of the GOC), and/or

iii. moving from the position whereby she was free to return when she felt able, to the position whereby she could only return after a full medical report had been obtained to confirm her fitness (para. 31 of the GOC), and/or

iv. adding the requirement that she provide all manner of information and plans regarding the work she would do on her return to work before a medical report could be progressed (para. 32 of the GOC), and/or

v. failing to take any or sufficient steps to reintegrate the Claimant back into the working environment by

offering and facilitating a phased return and/or working part-time and/or working from home in the first instance (para. 35 of the GOC).

vi. to lower the expectations of the claimant's revenue, at least in the short term

121. We do find that taking steps to make arrangements to facilitate a return to work within a reasonable period would have been reasonable for the respondent to take to reduce any disadvantage to the claimant arising from her condition. However, of those proposed by the claimant (above), we only consider that a phased return alongside part-time working and or working from home would have been likely to reduce that disadvantage and would have been reasonable in the circumstances to put in place, in addition to at least short term lowering of expectations about the revenue. It is a matter of common sense that these things would reduce the disadvantage from a demanding role.

6.4 Did the Respondent fail to take those steps?

6.5 Was it reasonable for the Respondent to have to take those steps and, if so, when?

122. We do not find that the respondent failed to take those steps. We make this finding because the claimant resigned before they could be implemented. Also, we accept Mr Eddis' evidence that the respondent would have done a phased return and or allowed some working from home and or adjusted revenue expectations. This is also because there is no clear evidence to suggest that this would not have happened. Plainly these were reasonable adjustments that were being explored with the claimant, from the correspondence. Also, Mr Rehal's evidence suggested that this was considered entirely practicable from the respondent's perspective and was not expressly opposed by Mr Eddis.

123. For those reasons, the claim of failure to make reasonable adjustments is dismissed.

Unfair dismissal

2. **Did the Claimant's resignation amount to a dismissal within the meaning of s.95(1)(c) of the Employment Rights Act 1996? In considering this issue the Tribunal will determine:**

Did the Respondent breach the implied term of trust and confidence?

2.1 The Tribunal will need to decide:

2.1.1 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

2.1.2 whether it had reasonable and proper cause for doing so.

2.2 If so, was that breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the Claimant was entitled to treat the contract as being at an end.

2.3 If so, 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.

2.4 Is so, had the Claimant affirmed the contract in the intervening period, or waived any breach, so as to prevent her from resigning and claiming constructive dismissal?

If the Claimant was (constructively) dismissed,

3. **The Respondent does not rely on any potentially fair reason for the dismissal.**

124. The conduct relied on by the claimant was that set out at 5.1 of the list of issues, above.

125. The only applicable acts relied by the claimant which she said amounted to the breach of implied trust and confidence, which we found proven as a matter of fact, were issues 5.1.5 (relating to going back on the January return date agreement) and 5.1.6 (relating to a medical assessment before returning to work) and 5.1.10 (relating to requiring FCA certification before

pay was reinstated). Whilst some of the acts relied on were found proven as a matter of fact, where we have already found that they were not unfavourable treatment, we similarly find that these acts were not sufficient to breach the implied term of trust and confidence. We repeat our reasons from above as necessary.

126. We have considered carefully whether the acts at 5.1.5, 5.16, and 5.1.10 reach the required threshold individually or collectively. We find that, collectively, the treatment at 5.1.6 and 5.1.10 against the background of a change of position, as at 5.1.5, did amount to something beyond merely unreasonable behaviour and it amounted to a breach of the implied term of trust and confidence. This is because of the seriousness of the effect of the acts on the claimant's circumstances overall and the context of her returning to work. We consider that the conduct viewed objectively was conduct which was likely to destroy or seriously damage trust and confidence.

127. We find that the respondent did not have a reasonable and proper cause for its actions overall because a lesser alternative was available. Specifically, the respondent could have reinstated the claimant's pay during any period where she asserted that she was fit to return to work and the medical assessment and FCA certification was pending. We note that this was something considered but not followed through by the respondent given their change of position on interim payment as outlined above. We also took into account our reasoning above about the claimant having effectively entered a limbo period between being off sick on her own account and on the respondent's account.

128. However, we do not find that the claimant did in fact resign in response to that particular breach. We make this finding because, taking into account the content of the resignation letter, the claimant's oral evidence, and the case as it was put and argued, we do not consider that the breach we identified was a reason for her resignation. Ultimately, we find that the reason for the resignation was the claimant's belief that the respondent would never let her back. This finding is consistent with her oral evidence to us during the hearing. In the circumstances we do not find that the breach

of contract as identified by the tribunal was a reason for the claimant's resignation.

129. The claimant's written submissions included (at paragraph [17]) that '*They have made it impossible for me to come back simply because they didn't want me back because I had cancer and therefore needed adjustments which they were not willing to do and that is discrimination*' and (at paragraph [26]) '*An employer who was committed to supporting an employee's return to work would have worked collaboratively with the employee to discuss what their needs were in relation [sic] their return to work; they did not want me back and therefore were unwilling to even discuss with me directly what I thought would help me'*. The claimant also stated in cross-examination, for example, that in her view the respondent would make it impossible for her to get (FCA) certified. The claimant also, in her oral closing submissions, argued that the 'last straw' was (in her view) the respondent was seeking to get her doctor (through the medical report including a question about medication) to say that she was depressed and the respondent would use this as an excuse not to certify her to the FCA, and that on her account she knew Mr Eddis would never approve her. This submission is not something we have found to be the case as a matter of fact. See, for example, our findings in relation to issue 5.1.3 (paragraph [82], and 5.1.12 (paragraph [91]), above.

130. For the those reasons we did not decide that the breach of contract was a reason for the Claimant's resignation.

131. For those reasons the claim of unfair dismissal is dismissed.

Employment Judge Barry Smith
30 July 2024

SENT TO THE PARTIES ON

1 August 2024

.....
.....
FOR THE TRIBUNAL OFFICE

Appendix A – List of Issues

The Claimant was employed by the Respondent as a broker.

The Complaints

1) The Claimant is making the following complaints:

   a) Constructive unfair dismissal;

   b) Disability discrimination of various types namely:

      i) Discrimination arising from disability in contravention of section 15 of the Equality Act 2010; and
      ii) Failure to make reasonable adjustments in contravention of section 20 and/or section 21 of the Equality Act 2010.

   c) The Claimant claims that all acts of discrimination alleged form a continuing course of conduct.

The Issues

The issues the Tribunal will decide are set out below.

Unfair dismissal

4. Did the Claimant's resignation amount to a dismissal within the meaning of s.95(1)(c) of the Employment Rights Act 1996? In considering this issue the Tribunal will determine:

   Did the Respondent breach the implied term of trust and confidence?

   4.1 The Tribunal will need to decide:

      4.1.1 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

      4.1.2 whether it had reasonable and proper cause for doing so.

   4.2 If so, was that breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the Claimant was entitled to treat the contract as being at an end.

   4.3 If so, 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.

   4.4 Is so, had the Claimant affirmed the contract in the intervening period, or waived any breach, so as to prevent her from resigning and claiming constructive dismissal?

   If the Claimant was (constructively) dismissed,

   5. The Respondent does not rely on any potentially fair reason for the dismissal.

   6. **Remedy for unfair dismissal**

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

6.1.1 What financial losses has the dismissal caused the Claimant?

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

6.1.3 If not, for what period of loss should the Claimant be compensated?

6.1.4 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?

6.1.5 If so, should the Claimant's compensation be reduced? By how much?

6.1.6 Did the Respondent or the Claimant unreasonably fail to comply with the ACAS code of practice?

6.1.7 If so, is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?(also potentially relevant to the Basic award).

6.2 What basic award is payable to the Claimant, if any?

6.3 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?

6.4 Did the Respondent or the Claimant unreasonably fail to comply with the ACAS Code of Practice?

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

7. **Disability**

7.1 It is admitted that the Claimant is a disabled person at the relevant time with breast cancer, which is automatically deemed to be a disability.

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

8.1 Did the Respondent do the following things and treat the Claimant unfavourably thereby:

8.1.1 Deciding to reduce the Claimant's pay as indicated by a WhatsApp message sent by Mr. meadows to the Claimant of 4 October 2022.

8.1.2 The Respondent then reducing the Claimant's pay to half pay in November 2022 and then to no pay in December 2022;

8.1.3 From November 2022 onwards conveying to the Claimant that the Respondent intended to remove the Claimant from the business;

8.1.4 The Claimant receiving no response to a communication she sent to the Respondent on 5 October 2022 about how she could not handle the extra stress of reduced salary;

8.1.5 With reference to the Claimant's communications with Mr. Meadows at paragraph 14 of the grounds of claim that the Respondent went back on its agreement that the Claimant could return to work in January 2023.

8.1.6 Mr. Eddis insisting that the claimant undergo a medical assessment

before she could return to work as referred to in emails of 14 December 2022 and 1 March 2023;

8.1.7 Mr. Eddis requiring the claimant to provide a plan as to what work and duties she would be doing upon her return to work by email of 18 January 2023;

8.1.8 Mr. Eddis stating that the Claimant could not be a successful broker if she returned to work part time as mentioned in an email of 18 January 2023 and by him focussing on the stresses and difficulties of the role.

8.1.9 A request by Mr. Eddis by email 18 January 2023 for further information to be provided by the Claimant for the purposes of a medical report as per paragraph 18 of the grounds of claim;

8.1.10 Mr. Eddis insist by email dated 1 March 2023 that the Claimant is certified as a fit and proper person to do her job in accordance with FCA regulatory requirements as a condition of her pay being reinstated.

8.1.11 Mr. Eddis failing to provide information about how the Respondent would certify the Claimant as being fit and proper to perform her role.

8.1.12 By reference to the draft request for a medical report sent to the Claimant on 2 March 2023 by email from Mr. Eddis, seeking to obtain endorsement from a medical practitioner that the Claimant would not be able to do her job.

8.2 Did the following things arise in consequence of the Claimant's disability:

(j) the Claimant's absence from work in the period from December 2021 onwards, and/or

(k) the fact or perception that she would be likely to have further periods of sickness absence, and/or time off, and/or

(l) the fact or perception that she would be likely to have disrupted working hours as a result of the need for treatment, and/or

(m) the fact or perception that the Claimant's ability to travel would be impacted by her condition, and/or

(n) the fact or perception that the Claimant's ability to conduct networking would be impacted by her condition, and/or

(o) the fact or perception that the Claimant may only be able to work part-time, and therefore, unlikely to be successful as a broker, and/or

(p) the fact or perception that the Claimant would not be able to cope with the stress of her role, and/or

(q) the fact or perception that the Claimant may, as a result of her condition, suffer or be prone to suffer being "traded away", and/or

(r) the requirement that on her return from work the Claimant would, at least initially, require reasonable adjustments to be put in place.

8.3 The Respondent's position with respect to each of the 'something(s) arising' is set out at paragraphs 77-82 of the Amended Grounds of Resistance.

8.4 Was the unfavourable treatment, to the extent found as fact by the Tribunal, because of any of the 'something arising(s)' identified above?

8.5 If so, was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:

8.5.1 Ensuring that, before an employee returns to work after a prolonged period of sickness absence, as in the circumstances of the Claimant, the Respondent is satisfied they are able to do so and are properly supported with appropriate adjustments, by securing a report from an appropriately qualified, and briefed, professional.

8.5.2 Ensuring that any medical report regarding an employee returning from a prolonged period of sickness absence, is properly prepared by:

8.5.2.1 providing the medical professional with details of the employee's role and surrounding circumstances; and

8.5.2.2 involving the employee by requesting them to set out, to the extent they can, their expectations on return, what they believe they are capable of and what adjustments they consider would be required.

8.3.3 Where sick pay payments are made to employees on a discretionary basis, and so exceed an employee's contractual and statutory entitlements, reviewing that discretion on an ongoing basis, and limiting (including reducing to zero) those discretionary payments depending on the circumstances of the case and balancing the needs of the employee and the employer.

8.6 The Tribunal will decide in particular:

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

8.6.2 could something less discriminatory have been done instead;

8.6.3 how should the needs of the Claimant and the Respondent be balanced?

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

9.1 Under the first requirement, did the Respondent apply a "PCP" namely a provision, criterion or practice, which put the Claimant at a particular disadvantage because she is a disabled person? The Claimant says there were the following PCPs:

(i) following a working pattern which did not involve interruptions caused by sickness absence, and/or

(j) following a working pattern which did not involve having disrupted working hours as a result of the need for treatment, and/or

(k) Being able to work sufficient hours/days so as to "justify" (from the Respondent's perspective) being paid a salary;

(l) being able to travel, and/or

(m) being able to conduct networking, and/or

(n) being able to work full time, and/or

(o) being able to work to the level where she would (from the Respondent's perspective) be *"paid on results",* in other words achieving the *"results"* required of her by the Respondent, and/or

(p) Being able to cope with the stress of her role.

6.4 Did any of the PCP's found by the Tribunal and set out above place the Claimant at a substantial disadvantage within the meaning of s.20(3) of the Equality Act 2010? The Claimant relies on the alleged substantial disadvantage that she was unable to meet each of the PCP's relied on.

6.5 If so, what steps would it have been reasonable for the Respondent to take to avoid the disadvantage? The Claimant has put forward the following by way of suggested reasonable adjustments:

(d) failing to reinstate the Claimant's pay (para. 38 of the GOC; see also paras. 7, 11, 14, 17, 20 to 23, 25, 31 and 33 of the GOC), and/or

(e) failing to remove the requirement for the Claimant to be approved as a certified person before her pay could be reinstated (para. 33 of the GOC), and/or

(f) failing to make arrangements to facilitate the Claimant's return to work within a reasonable period - without prejudice to the generality of this contention:

vii. failing to adapt or modify its sickness absence arrangements so as to facilitate the Claimant's return to work (paras. 31 to 37 of the GOC), and/or

viii. failing to provide the Claimant with a consistent basis upon which she could return to work (paras. 31 to 37 of the GOC), and/or

ix. moving from the position whereby she was free to return when she felt able, to the position whereby she could only return after a full medical report had been obtained to confirm her fitness (para. 31 of the GOC), and/or

x. adding the requirement that she provide all manner of information and plans regarding the work she would do on her return to work before a medical report could be progressed (para. 32 of the GOC), and/or

xi. failing to take any or sufficient steps to reintegrate the Claimant back into the working environment by offering and facilitating a phased return and/or working part-time and/or working from home in the first instance (para. 35 of the GOC).

xii. to lower the expectations of the claimant's revenue, at least in the short term

6.6 Did the Respondent fail to take those steps?

6.7 Was it reasonable for the Respondent to have to take those steps and, if so, when?

1o. **Remedy for discrimination**

10.1 What financial losses has the discrimination caused the Claimant?
10.2 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?
10.3 If not, for what period of loss should the Claimant be compensated?

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

10.5 Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?
10.6 Did the Respondent or the Claimant unreasonably fail to comply with a provision of the ACAS Code of Practice?
10.7 If so, is it just and equitable to increase or decrease any award payable to the Claimant?

10.8 By what proportion, up to 25%?
10.9 Should interest be awarded? If so, how much?

Appendix B – Cast List

Camelia Fajri	Claimant and ex-employee of the Respondent, her employment having transferred from Arian Financial LLP (AFL) in March 2022
Charles Eddis	The Respondent's Group General Counsel and Group Head of Compliance.
John Meadows	Founder and CEO of AFL, Head of Broking at the Respondent since March 2022.
Kanwaljit (Kam) Rehal	The Head of the Respondent's Delta One Desk (previously Head of AFL's Delta One desk)
Kirk White	IT Officer at AFL and member of the Respondent's IT team
Rebecca Farsy	Co-broker with Kam Rehal on the Respondent's Delta One desk, previously on the AFL Delta One desk
Rodrick Wurfbain	CEO and Member of the Board of the Respondent
Simon Cook	The Respondent's Head of HR and Recruitment