EMPLOYMENT TRIBUNALS

Claimant: **Ms B Buckle**

Respondent: **Secretary of State for Justice**

Heard on: **13, 14, 15 and 16 August 2024**

Before: **Employment Judge Pritchard**
Members: **Mr R Singh**
Dr S Chacko

Representation
Claimant: In person
Respondent: Ms E Walker, counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is:

1. The Respondent did not directly discriminate against the Claimant because of her disability. The Claimant's claim of direct disability discrimination is dismissed.

2. The Respondent did not fail to make reasonable adjustments. The Claimant's claim that the Respondent failed to make reasonable adjustments is dismissed.

3. The Claimant's claim of unfair dismissal is not well founded and her claim is dismissed.

REASONS

1. The Claimant claimed direct disability discrimination, failure to make reasonable adjustments, and constructive unfair dismissal. The Respondent resisted the claims.

2. The Tribunal heard evidence from the Claimant and her witnesses: Avicta Good (former colleague and friend); and Charmaine Buckle (the Claimant's daughter and a former employee of the Respondent). The Tribunal heard evidence from the Respondent's witnesses: Andrew Wisdom (Approved Premises Area Manager), Diane Orlebar (Head of Public Protection), Earlin Enoe (Finance Officer), and Asabi Beckles (Business Manager). The Tribunal was provided with a bundle of documents in excess of 850 pages to which the parties

variously referred. Further documents were provided by the Respondent during the course of the hearing. At the conclusion of the hearing, the Respondent made oral submissions; the Claimant did not wish to do so.

Issues

3. The claims and issues had been discussed at a preliminary hearing before Employment Judge D Wright on 9 October 2023. By way of an amended case management order sent to the parties on 14 May 2024 (erroneously dated 14 May 2023) Employment Judge D Wright set out the claims and issues in the case which are copied below. At the commencement of the hearing both parties confirmed that they remained the claims and issues in the case.

The Complaints

4. The Claimant is making the following complaints:

4.1. Unfair dismissal;

4.2. Direct disability discrimination;

4.3. Failure to make reasonable adjustments.

The Issues

5. The issues the Tribunal will decide are set out below.

Disability - general

6. Which alleged disabilities does the Claimant rely upon for the purposes of the claim? The Claimant says that she suffers from the following disabilities:

6.1. Borderline Personality Disorder

6.2. Complex Post Traumatic Stress Disorder

6.3. Anxiety and Depression Disorder

6.4. DVT

6.5. Osteoarthritis in her left (and possibly right) knee

6.6. Lumbar spine degeneration with disc bulge and sciatica

6.7. Vestibular migraines

7. What are the material times for the Disability Discrimination claims? The Claimant says the period is June 2021 until 2 October 2022.

8. At the material times, was the Claimant a disabled person within the meaning of Section 6(1) Equality Act 2010? In particular:

8.1. Did the Claimant have a mental or physical impairment?

8.2. Did any such impairment have a substantial adverse effect on the Claimant's ability to carry out normal day to day activities?

8.3. Was any substantial adverse effect long-term at the material time?

Failure to make reasonable adjustments

9. Did the Respondent know, or ought to have known, that the Claimant was disabled at the material time?

10. Did the Respondent apply the following PCPs, and if so, when?

    10.1. (PCP 1) A requirement to attend the workplace in-person; rather than working from home. The Claimant says that this was applied from 22 November 2021.

    10.2. (PCP 2) A requirement to attend work 5-days per week, rather than working compressed hours of 4 days per week. The claimant says that this was applied from 22 November 2021.

    10.3. (PCP 3) A requirement to complete a Flexible Working Request Application, and harassment to complete it, between November 2021 and March 2022, in order to be permitted to work compressed hours.

    10.4. (PCP 4) Not providing/arranging refresher training upon her return to work in November 2021.

    10.5. (PCP 5) a requirement for the claimant to use her TOIL within a certain time before it "expired" after her return to work in November 2021.

11. Did the application of the PCPs place the Claimant at a substantial disadvantage in comparison with persons who are not disabled? The Claimant says that the impact on her health and ability to work to the best of her abilities was a disadvantage.

12. Did the Respondent know, or ought to have known, of that substantial disadvantage.

13. Did the Respondent take such steps as it is reasonable to have to take to avoid that disadvantage? The Claimant relies upon the following alleged reasonable adjustments:

    13.1. (As to PCP 1) Allowing the Claimant to work 2 days at home, and 2 days in the office, as the claimant had previously been working before her absence began in December 2020.

    13.2. (As to PCP 2) Allowing the Claimant to work compressed hours of 4 days per week, as the claimant had previously been working before her absence began in December 2020.

    13.3. (As to PCP 3) Not requiring a formal form to be completed and not harassing the Claimant for it to be completed.

13.4. (As to PCP 4) Provide refresher training after the Claimant returned from a long absence.

13.5. Allow the Claimant a longer period of time to use her TOIL.

Direct discrimination

14. Did the Respondent do the following acts?

14.1. During the Claimant's sickness absence between December 2020 and November 2021, provide the Claimant with an insufficient and unreasonable lack of support from her manager Mr Andrew Wisdom. In particular:

14.2. In around June to July 2021, Mr Wisdom indicated and/or suggested to the Claimant that he did not believe or care about the Claimant's illness;

14.3. During Formal Absence Review Meetings on 31 August 2021 and 10 September 2021, Mr Wisdom acted in a harassing and/or threatening manner, in suggesting to the Claimant that there would be further meetings if her attendance did not improve.

14.4. From around November 2021 until around mid-2022, Mr Wisdom delayed sending medical and OH evidence concerning the Claimant to the Panel who would determine whether the Claimant should have been paid half-pay or full-pay whilst absent. This evidence was ultimately sent, and the Claimant received any difference in pay by September 2022. The Claimant relies on the injury to feelings caused by this delay.

14.5. In around June 2022, the Respondent failed to refer the Claimant for a DSE Work Assessment, despite this being recommended by OH.

14.6. At a meeting in August 2022, Mr Wisdom rejected the Claimant's request to change to working only part-time hours.

15. Who is the appropriate hypothetical comparator?

16. If the Respondent did the acts as set out in paragraph 14 above, in doing those acts did the Respondent treat the Claimant less favourably than that comparator because of the Claimant's disabilities?

Constructive unfair dismissal

17. Did the following acts or omissions, relied upon as alleged breaches of the implied term of mutual trust and confidence, occur?

17.1. During the Claimant's sickness absence between December 2020 and November 2021, the Claimant received an insufficient and unreasonable lack of support from her manager Mr Andrew Wisdom. In particular:

17.1.1. In around June to July 2021, Mr Wisdom indicated and/or suggested to the Claimant that he did not believe or care about the Claimant's illness;

17.1.2. During Formal Absence Review Meetings on 31 August 2021 and 10 September 2021, Mr Wisdom acted in a harassing and/or threatening manner, in suggesting to the Claimant that there would be further meetings if her attendance did not improve.

17.2. A Failure to Make Reasonable Adjustments (as per the Disability Discrimination claim outlined above).

17.3. From around November 2021 until its submission by the Claimant in around March 2022, Mr Wisdom harassed the Claimant in requiring her to complete a Flexible Working Request Application for her to be permitted to work compressed hours.

17.4. Upon returning to work on around 7 February 2022, the Claimant received no refresher training.

17.5. From around November 2021 until around mid-2022, Mr Wisdom delayed sending medical and OH evidence concerning the Claimant to the Panel who would determine whether the Claimant should have been paid half-pay or full-pay whilst absent. This evidence was ultimately sent, and the Claimant received any difference in pay by September 2022.

17.6. In around June 2022, the Respondent failed to refer the Claimant for a DSE Work Assessment, despite this being recommended by OH.

17.7. At a meeting in August 2022, Mr Wisdom rejected the Claimant's request to change to working only part-time hours.

17.8. Following the Claimant's periods of absence, the Respondent stated that the Claimant had lost around 19.25 hours of 'TOIL' which she had previously accrued.

18. For any proven acts or omissions (if any), do they amount to a fundamental and repudiatory breach of the Claimant's contract of employment? The Tribunal will need to consider the test in Malik v BCCI, and whether without reasonable and proper cause, the Respondent acted in a manner which was likely to destroy or seriously damage the relation of mutual trust and confidence between the parties.

19. If so, did the Claimant affirm the contract of employment prior to resigning?

20. Did the Claimant resign in response to any breach of the implied term of mutual trust and confidence?

21. If so, and the Claimant was dismissed, was there a potentially fair reason for the dismissal?

22. Was any dismissal fair, pursuant to Section 98(4) ERA 1996?

Jurisdiction

23. As to the Disability Discrimination claims:

23.1. Did the acts or omissions relied upon occur prior to 28 July 2022, so as to fall prima facie out of time?

23.2. If so, are they part of a continuing act, so as to bring the claims in time?

23.3. If not, and the claims are prima facie out of time, were the claims brought within such further period as is 'just and equitable'?

Admissions / withdrawals

24. By way of amended Grounds of Resistance dated 27 November 2023 the Respondent conceded that, apart from disability by reason of DVT, the Claimant was a disabled person at relevant times by reason of the impairments relied upon.

25. The Respondent conceded that if the Tribunal were to conclude that the Claimant had been constructively dismissed then the dismissal would be unfair.

26. The Respondent would not seek to rely on the principle in Polkey. The Respondent's case was that if she had not resigned the Claimant would have remained employed by the Respondent.

27. During the course of cross examination the Claimant withdrew her allegation concerning Mr Wisdom's conduct said to have taken place on 10 September 2021.

The hearing

28. At the commencement of the hearing, the Tribunal expressed its concern with the sufficiency of the four-day listing allocation. The bundle was voluminous, the Tribunal was to hear evidence from seven witnesses, whose statements ran to 72 pages, and the Claimant was an unrepresented disabled person who might need frequent breaks. To avoid the undesirability of going part-heard, it was agreed with the parties that:

28.1. The Tribunal would consider liability only at this hearing (a further hearing to be held to consider remedy should the Claimant succeed in respect of all or any of her claims). However, the parties were told that they should adduce at this hearing any evidence relevant to the question of contributory conduct and/or Polkey that they might wish to rely on at a future remedy hearing.

28.2. The proposed timetable was be amended such that:

28.2.1. The first day would be a reading day for the Tribunal;

28.2.2. the Claimant's witnesses would give evidence on the second day;

28.2.3. the Respondent's witnesses give evidence on the third day and into morning of the fourth day, with submissions in the afternoon;

28.2.4. if necessary, the Tribunal would meet in chambers on a future date to deliberate and judgment would be reserved. (In the event,

the Tribunal was able to deliberate and reach its decision within the allocated time).

Findings of fact

29. The Respondent is responsible for the courts, attendance centres, prisons and the probation service. The Claimant commenced employment with the Respondent within the London Probation Service on 7 January 2015 as an Administrator.

30. In July 2018, the Claimant was appointed to the role of Finance Officer.

31. The summary of the principal terms and conditions of the Claimant's employment included:

31.1. A normal working week of 35 hours;

31.2. After five years continuous service, full rate sick pay for six months followed by six months at half pay.

32. The Respondent has a number of policies in place, accessible to employees through the Respondent's intranet, including:

32.1. A Work Life Balance / Flexible Working Policy which provides that flexibility in working arrangements can be considered subject to business needs.

32.2. A Remote Working Policy which provides that it may be possible to work remotely some of the time.

32.3. An Attendance Management Policy which provides that, during long term absences, managers must have informal "keep in touch" meetings and carry out Formal Attendance Review Meetings (FARM) with absent employees. The Policy provides for warnings and attendance improvement notices to be issued where absences exceed certain trigger points.

33. The Respondent has Sick Leave Excusal (SLE) arrangements in place whereby certain sickness absences, including absence for work-related stress, will not count towards recorded sickness for sick pay purposes up to a maximum of six months. The Respondent's guidance shows that sick leave excusals are driven by the employee who will normally initiate an application.

34. Employees may claim time off in lieu (TOIL) with agreement from their managers in advance. Up to three days TOIL may be taken. Employees are required to submit a time sheet on a four-weekly basis. TOIL must be claimed within three months.

35. From the commencement of her role as Finance Officer, with the agreement of an interim line manager, the Claimant was permitted to work compressed hours: 35 hours a week over four days, Monday to Thursday, instead of five days. Also, instead of being 100% office based, she was permitted to work two days at home and two days in the offices of Approved Premises.

36. In March 2020, all Finance Officers, including the Claimant, were required to work at home during lockdown caused by the Covid-19 pandemic and were not permitted to attend Approved Premises.

37. It was at this time that Ms Orlebar was appointed to the position of Head of Public Protection.

38. In about April 2020, Mr Wisdom took over line management of the Claimant. Mr Wisdom was line managed by Ms Orlebar.

39. In October 2020, during the pandemic restrictions, the Respondent issued guidance for probation staff and managers stating that it may be possible to work remotely up to 50% of the time. Temporary guidance was issued in September 2021 for staff working in Approved Premises requiring them to work from home where possible with attendance at Approved Premises only for the minimum period to facilitate required tasks.

40. In December 2020 the Claimant went on sick leave, the fit notes issued by her GP showing that she was suffering from stress related problems.

41. In February 2021, Mr Wisdom held a FARM with the Claimant. The Claimant told Mr Wisdom that she had felt overworked and that her stress levels were high. It was noted that the Claimant's span of control covered four to five Approved Premises instead of two and that the pandemic had had a stressful effect on her. Mr Wisdom also discussed the Claimant's back and leg conditions. In the Claimant's view, the main reason for her inability to attend work was a combination of problems with her back, leg, stress and anxiety.

42. An Occupational Health Report dated 11 February 2021 confirmed that due to culmination of issues, the pandemic, leg and back pain, excessive workload (and a personal matter which need not be specified in this judgment), the Claimant was unfit for work. A fit note issued by her GP showed that the Claimant was unfit for work because of stress related issues and painful lower limbs.

43. The Claimant commenced a phased return to work towards the end of April 2021 but soon commenced sick leave again, undergoing knee surgery on 16 June 2021. In the event, this became the start of a protracted sickness absence.

44. In July 2021 the Respondent informed the Claimant that from 4 August 2021 she would be paid half pay because contractual entitlement to full pay during sick leave would have expired.

45. In an email of 8 July 2021, Mr Wisdom suggested to the Claimant that she should apply for Sick Leave Excusal (SLE) which would first be considered by Ms Orlebar, then by a panel, the process taking between 3 and 6 months.

46. On 19 July 2021 the Claimant made an application for SLE. Her application was on the basis that she was suffering from work-related stress caused by excessive workloads. In support of her application, the Claimant's GP re-issued previous fit notes, amended to state that the stress which the Claimant was experiencing was work-related. The Claimant emailed Mr Wisdom explaining,

in terms, that her GP was aware of the work-related element of her stress and had amended the fit notes accordingly.

47. Mr Wisdom reviewed the Claimant's SLE application and sent it to Diane Orlebar in accordance with the Respondent's SLE guidance.

48. Occupational Health reported on 27 July 2021 that the Claimant was experiencing a swollen leg and knee and had been diagnosed with blood clots for which she was receiving medication. She could walk for 10 minutes at a time. Mr Wisdom was advised to make a further referral because the Claimant had reported work-related stress. The Claimant was thought to be fit for home working, initially with reduced hours and regular postural breaks. The Claimant was unhappy with the report.

49. On 3 August 2021, HR held a meeting with Ms Orlebar and Mr Wisdom to understand the bigger picture and share concerns about retrospective amendments made to the Claimant's fit notes. In particular, the position was unclear as to whether the reason for the absence was wholly or only partly due to work-related stress. HR took the view that an independent occupational health report would be required.

50. On 16 August 2021, Mr Wisdom having completed the appropriate form, the Claimant gave her consent for the Respondent to seek an occupational health report with a wider remit in order to give further consideration to her application for SLE.

51. Mr Wisdom held a further FARM with the Claimant on 31 August 2021. Discussions focussed on the Claimant's anticipated return to work on a phased basis.

52. On 10 September 2021 Mr Wisdom wrote to the Claimant summarising the outcome of the meeting. Among other things, Mr Wisdom informed the Claimant that in the circumstances he was not pursuing formal attendance management action.

53. Mr Wisdom made a referral for the Claimant to be supported by PAM Assist, the employee assistance program.

54. The Claimant continued to be certificated as unfit for work following knee surgery, DVT, and work-related stress.

55. During a telephone call on 21 September 2021, the Claimant said she wanted to work from home full time. Mr Wisdom told the Claimant that the Respondent wanted staff to return to normality. This was in accordance with the Respondent's covid / post covid position statement.

56. Following a further referral by Mr Wisdom, Occupational Health provided an interim report on 29 September 2021 stating that the Claimant was showing severe symptoms of depression and anxiety. It was reported that the Claimant remained unfit for work due to the severity of her mental health symptoms and physical mobility restrictions.

57. On 16 November 2021, Occupational Health reported that although she continued to have problems with her right knee and hands affected by

underlying osteoarthritis, together with back problems, the Clamant was showing some improvement: she was mobilising more and had resumed driving short distances. Her improved physical health had led to an improvement in her mental health with reduced anxiety and increased motivation. A well-managed return to work was likely to offer therapeutic benefit and lead to further improvement. It was thought that the Claimant would be able to return to work following expiry of her current fit note on a phased basis, working exclusively from home, her hours of work increasing to 100% working hours within five weeks. It was reported that a return to the office may possible after the phased return to full hours, the ongoing provision of work from home, if possible, likely to be helpful. The current outlook was stated to be:

> *A good prognosis is anticipated given her current improving physical and mental health but would appear to be subject to ongoing medical treatment, as planned, and satisfactory resolution of her work-related concerns.*

58. Mr Wisdom held a further FARM on 19 November 2021 and the Claimant's health conditions were discussed. Mr Wisdom explained that by the fifth week of the Claimant's phased return to work, it would be necessary for her to return to the office (Seafield Lodge) four days each week and that working from home two days a week would not be possible.

59. The Claimant returned to work on the recommended phased basis on 22 November 2021.

60. In November 2021, Ms Orlebar questioned why the Claimant had been working compressed hours without an application for flexible working having been made and approved. She informed Mr Wisdom that the Claimant should return to a normal working pattern, in days not hours, because compressed hours in the role did not support business needs. Nevertheless, the Claimant would be permitted to make a formal application for flexible working.

61. Mr Wisdom told Ms Orlebar that having been informed of the Claimant's working arrangements when he first became her line manager, he had accepted the informal working pattern going forward and felt no need to question it.

62. He nevertheless agreed to start the process whereby the Claimant would formally apply for flexible working.

63. By email dated 1 December 2021, the Claimant informed Mr Wisdom that, by week five of her phased return work, she hoped to be able to attend Seafield Lodge working full hours.

64. On 14 December 2021, the Claimant asked Ms Earlin for any help she could give regarding changes to work practices during her sickness absence. The Claimant undertook Excel training the following week.

65. On 17 December 2021, Mr Wisdom conducted a Covid-19 risk assessment with the Claimant.

66. In December 2021, the Claimant asked Ms Orlebar for an update on her SLE application. Ms Orlebar referred the matter to Mr Wisdom who followed it up.

He noticed that there was no occupational health report to view on the system. He agreed to pursue the matter when he was able to speak to the person responsible at the occupational health provider.

67. In the event, the Claimant again took sick leave from 14 February 2022 to 6 March 2022, her fit note stating that she was experiencing anxiety and depression. Thereafter she was off work having tested positive for Covid.

68. The Claimant was advised by her union representative that she should not make a formal application for flexible working: she had been working compressed hours with two days at home since the commencement of her current role which, according to the union representative, had become a contractual arrangement.

69. In March 2022, the Claimant chased Mr Wisdom because her application for SLE had still not been processed.

70. At an Attendance Management and Workforce Planning Meeting held on 18 March 2022, it was noted that the Claimant remained off sick with Covid and that she had now made a formal application to compress her hours which was being supported. However, her wish to work from home was not being supported pending receipt of an occupational health report. It was noted that the Claimant was due to return to work in May.

71. Having discussed sickness data within the London region, Ms Orlebar discovered that attendance management needed a more robust approach. By email on 18 March 2022, she informed Mr Wisdom that the Claimant should have already been issued with a warning under the Respondent's attendance management policy.

72. On 24 March 2022, Occupational Health reported that because of the severity of ongoing psychological distress, as well as the physical symptoms of Coronavirus, the Claimant remained unfit for work and that Further Medical Evidence would be requested upon receipt of the Claimant's formal consent.

73. On 16 May 2022, Occupational Health reported that the Claimant was fit to return to work after she had used up accrued annual leave and that she was hoping to return on compressed hours working two days from home. It was reported that the Claimant felt pressurised and bullied into attending the workplace five days a week and would struggle to do so. A referral to an Occupational Health assessment via the CAT referral pathway was recommended to provide a detailed appraisal of the particular issues impacting on the Claimant's work and to suggest practical adjustments. It was stated that the Claimant's medical conditions were long-standing and not curable in the true sense of the word but that:

> *… it is hoped that these may remain sufficiently well-managed for her to resume her expected work activities with appropriate support in place.*

74. The Claimant returned to work on 19 May 2022. It was agreed that she would be permitted to continue to work compressed hours while her flexible working request was being processed. She emailed two colleagues asking for support.

75. Mr Wisdom held a FARM with the Claimant on 23 June 2022. He recorded in his outcome letter that: the Respondent would make a CAT referral via the occupational health provider together with a Cardinus workstation assessment; support from peers would be organised; formal supervision would take place every six weeks; upon the Claimant removing the request for working from home two days a week, Mr Wisdom would endorse the application for compressed hours.

76. Mr Wisdom noted that both he and Ms Orlebar had completed their parts of the Claimant's SLE application and he advised the Claimant to liaise with occupational health about their current position in the process.

77. In light of the Claimant's significant periods of absence, Mr Wisdom issued an Unsatisfactory Attendance Warning Stage 1 Notification under the Respondent's Attendance Management Policy. Although Mr Wisdom extended the Trigger Point from 8 to 12 days, the Claimant was subject to an Improvement Period. The Claimant did not appeal against the warning.

78. It was noted at an Attendance Management and Workforce Planning Meeting on 11 July 2022 that for the purposed of her SLE application, occupational health had requested a wet signature from the Claimant, which she had not supplied. Mr Wisdom agreed to meet with the Claimant to ensure she sent a wet signature. The Claimant's application for SLE was re-submitted and its subsequent approval led to a back payment of wages being paid on 31 August 2022.

79. The Claimant attended a Finance Officer Meeting on 19 July 2022 when she said that she was struggling to get support from her colleagues. This caused friction between the Claimant and her colleague Ms Enoe who said she had offered support but that the proposed meeting venue had not been acceptable to the Claimant. A number of emails show that Ms Enoe subsequently emailed instructions to the Claimant about how to complete a number of work tasks.

80. On 1 August 2022, the Claimant emailed Mr Wisdom asking him to process her request to go part time which she felt would be the best way forward to juggle her health and wellbeing. Mr Wisdom agreed to process the application upon receipt of the completed form.

81. By email dated 5 September 2022, the Claimant tendered her resignation to Mr Wisdom stating:

> *After much thought and for my mental wellbeing and life balance I have decided to resign from my position of Finance Officer.*

82. Mr Wisdom held a video meeting with the Claimant on 8 September 2022 to discuss her annual leave and TOIL.

83. By email dated 12 September 2022, the Claimant emailed Mr Wisdom to say that she had felt ambushed, victimised and bullied during the video meeting of 8 September 2022 and that, since her return to work following sick leave, she had felt unsupported.

84. The Claimant sought to be paid for 22 hours TOIL which were not approved by the Respondent because they dated back to 2020.

85. Having given notice, which she took as sick leave, the Claimant's last day of employment was 2 October 2022. The Claimant commenced new employment the following day.

86. The Claimant contacted ACAS on 27 October 2022 to commence early conciliation. ACAS issued a certificate on 8 December 2022. The Claimant presented her claim to the Tribunal on 6 January 2023.

Applicable law

Duty to make reasonable adjustments

87. Section 20 of the Equality Act 2010 provides that where the Act imposes a duty to make reasonable adjustments, that duty comprises the following three requirements:

    …

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

    (4) …

    (5) …

88. Section 21 EA 2010 provides that:

    (1) A failure to comply with the first … requirement is a failure to comply with a duty to make reasonable adjustments

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

89. In Environment Agency v Rowan [2008] ICR 218, the EAT set out how an employment tribunal should consider a reasonable adjustments claim. The tribunal must identify:

    a) the provision, criterion or practice applied by or on behalf of an employer or the physical feature of premises occupied by the employer;

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

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

90. Section 212(1) EA 2010 defines 'substantial disadvantage' as one which is more than minor or trivial and whether such a disadvantage exists in a particular case is a question of fact and it is to be assessed on an objective basis.

91. It is necessary for a Tribunal to identify the nature and extent of any alleged disadvantage suffered and to determine whether that disadvantage is because

of disability. In order to do so, the Tribunal should consider whether the employee was substantially disadvantaged in comparison with a non- disabled comparator. If a non-disabled person would be affected by the PCP in the same way as a disabled person then there is no comparative substantial disadvantage Newcastle Upon Tyne Hospitals NHS Trust v Bagley (2012) UKEAT/0417/11/RN, para 72).

92. The words 'provision, criterion or practice' all carry the connotation of a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. Although a one-off decision or act can be a practice, it is not necessarily one: Ishola v Transport for London 2020 ICR 1204, CA.

93. Section 21 provides that a failure to comply with the first, … requirement is a failure to comply with a duty to make reasonable adjustments. (2)

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

95. Schedule 8 of the Equality Act 2010 states that the duty to make reasonable adjustments does not arise if the employer can show that it did not know or "could not reasonably be expected to know" that the employee is disabled or that there was a substantial disadvantage.

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

97. The test of reasonableness in section 20 of the Equality Act 2010 is an objective one and it is the employment tribunal's view of what is reasonable that matters: Smith v Churchills Stairlifts plc 2006 ICR 524, CA.

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

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

Direct discrimination

99. Section 39 of the Equality Act 2010 provides that an employer must not discriminate against an employee of his by, amongst other things, subjecting him to a detriment.

100. Section 13 of the Equality Act 2010 sets out the legal test for direct discrimination. A person (A) discriminates against another (B) if, because of a protected characteristic (disability in this case), A treats B less favourably than A treats or would treat others.

101. The House of Lords has considered the test to be applied when determining whether a person discriminated "because of" a protected characteristic. In some cases the reason for the treatment is inherent in the Act itself: see James v Eastleigh Borough Council [1990] IRLR 572.

102. If the act is not inherently discriminatory, the Tribunal must look for the operative or effective cause. This requires consideration of why the alleged discriminator acted as he did. Although his motive will be irrelevant, the Tribunal must consider hat consciously or unconsciously was his reason? This is a subjective test and is a question of fact. See Nagarajan v London Regional Transport 1999 1 AC 502.

103. For the purposes of direct discrimination, section 23 of the Equality Act 2010 provides that on a comparison of cases there must be no material difference between the circumstances relating to each case. In other words, the relevant circumstances of the complainant and the comparator must be either the same or not materially different. Comparison may be made with an actual individual or a hypothetical individual. The circumstances relating to a case include a person's abilities if on a comparison for the purposes of section 13, the protected characteristic is disability.

104. Whether there is a factual difference between the position of a claimant and a comparator is in truth a material difference is an issue which cannot be resolved without determining why the claimant was treated as he or she was; see: Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337.

105. Section 136 of the Equality Act 2010 sets out the burden of proof that applies in discrimination cases. Subsection (2) provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that person (A) has contravened the provisions concerned, the Tribunal must hold that the contravention occurred. However, subsection (2) does not apply if A shows that A did not contravene the provision.

106. Thus, it has been said that the Tribunal must consider a two stage process. However, Tribunals should not divide hearings into two parts to correspond to those stages. Tribunals will wish to hear all the evidence before deciding whether the requirements at the first stage are satisfied and, if so, whether the Respondent has discharged the onus that has shifted; see Igen Ltd v Wong and Others CA [2005] IRLR 258.

107. However, the burden of proof does not shift to the employer simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination. "Could conclude" must mean that a reasonable Tribunal could properly conclude from all the evidence before it; see Madarassy v Nomura International [2007] IRLR 246. As stated in Madarassy, "the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

108. In Laing v Manchester City Council [2006] ICR 1519, the EAT stated, a case concerned with race discrimination but equally applicable in the present case:

> *No doubt in most cases it will be sensible for a Tribunal formally to analyse a case by reference to two stages. But it is not obligatory on them formally to go through each step in each case… An example where it might be sensible for a Tribunal to go straight to the second stage is where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is such a comparator – whether there is a prima facie case – is in practice often inextricably linked to the issue of what is the explanation for the treatment, as Lord Nicholls pointed out in Shamoon …. it must surely not be inappropriate for a Tribunal in such cases to go straight to the second stage. … The focus of the Tribunal's analysis must at all times be the question of whether or not they can properly infer race discrimination. If they are satisfied that the reason given by the employer is genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that, even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race.*

Time limits

109. Section 123(1) of the Equality Act 2010 provides that a complaint may not be brought after the end of (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the Tribunal thinks just and equitable. Under section 123(3) conduct extending over a period is to be treated as done at the end of the period; and failure to do something is to be treated as occurring when the person in question decided on it. Under section 123(4) in the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something (a) when P does an act inconsistent with doing it; or (b) If P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

110. In Robertson v Bexley Community Centre [2003] IRLR 434 the Court of Appeal stated that when Employment Tribunals consider exercising the discretion under section 123(1)(b) there is no presumption that they should do so unless they can justify failure to exercise the discretion. A Tribunal cannot hear a complaint unless the Claimant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule. In accordance with British Coal Corporation v Keeble [1997] IRLR 336 a Tribunal may have regard to the following factors: the overall circumstances of the case; the prejudice that each party would suffer as a result of the decision reached; the particular length of and the reasons for the delay, the extent to which the cogency of evidence is likely to be affected by the delay; the extent to which the Respondent has cooperated with any requests for information; the promptness with which the Claimant acted once he knew of facts giving rise to the cause of action; the steps taken by the Claimant to obtain appropriate advice once he knew of the possibility of taking action. The relevance of each factor depends on the facts of the individual case and Tribunals do not need to

consider all the factors in each and every case; see Department of Constitutional Affairs v Jones [2008] IRLR 128.

111. In South Western Ambulance Service NHS Foundation Trust v King 2020 IRLR 168 EAT it was observed that when a claimant wishes to show that there has been 'conduct extending over a period' — i.e. a continuing act — for the purposes of section 123(3) he or she will usually allege a series of acts, each of which is connected with the other, either because they are instances of the application of a discriminatory policy, rule or practice, or because they are evidence of a continuing discriminatory state of affairs. However, the EAT held that if any of those acts are not established on the facts or are found not to be discriminatory, they cannot form part of the continuing act.

Constructive dismissal

112. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is dismissed by his employer if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

113. In Western Excavating (ECC) Ltd v Sharp 1978 ICR 221 it was held that in order to claim constructive dismissal an employee must establish:

113.1. that there was a fundamental breach of contract on the part of the employer or a course of conduct on the employer's part that cumulatively amounted to a fundamental breach entitling the employee to resign, (whether or not one of the events in the course of conduct was serious enough in itself to amount to a repudiatory breach); (note that the final act must add something to the breach even if relatively insignificant: Omilaju v Waltham Forest LBC [2005] IRLR 35 CA). Whether there is breach of contract, having regard to the impact of the employer's behaviour on the employee (rather than what the employer intended) must be viewed objectively: Nottinghamshire CC v Meikle [2005] ICR 1.

113.2. that the breach caused the employee to resign – or the last in a series of events which was the last straw; (an employee may have multiple reasons which play a part in the decision to resign from their position. The fact they do so will not prevent them from being able to plead constructive unfair dismissal, as long as it can be shown that they at least partially resigned in response to conduct which was a material breach of contract; see Logan v Celyyn House UKEAT/2012/0069. Indeed, once a repudiatory breach is established if the employee leaves and even if he may have done so for a whole host of reasons, he can claim that he has been constructively dismissed if the repudiatory breach is one of the factors relied upon; see: Wright v North Ayrshire Council EATS/0017/13/BI); and

113.3. that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

114. All contracts of employment contain an implied term that an 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: Malik v BCCI [1997]

IRLR 462. A breach of this term will inevitably be a fundamental breach of contract; see Morrow v Safeway Stores plc [2002] IRLR 9.

115. In Croft v Consignia plc [2002] IRLR 851, the Employment Appeal Tribunal held that the implied term of trust and confidence is only breached by acts and omissions which seriously damage or destroy the necessary trust and confidence. Both sides are expected to absorb lesser blows. The gravity of a suggested breach of the implied term is very much left to the assessment of the Tribunal as the industrial jury.

Conclusion and further findings of fact

Failure to make reasonable adjustments

PCP 1

116. It is clear from the reasonable adjustment contended for (allowing her to work two days at home and two days in the office) that the Claimant complains she was being required by the Respondent to work in the office full time and was not permitted to work from home at all. Working from the office full time would have put the Claimant at a substantial disadvantage compared to a non-disabled comparator, in particular because of her mobility issues and the ability to drive only short distances. Mr Wisdom's explanation to the Tribunal for stating at the FARM of 19 November 2021 that the Claimant would not be permitted to work from home, namely his agreement with the human resources representative, was unsatisfactory. Nevertheless, the fact is that at no time was Claimant required to work in the office full time. She continued to work from home throughout the remainder of her employment, either fully at home during lockdown, the phased return to work periods, or two days a week in accordance with the informal agreement reached with an interim manager in 2018. The PCP was never applied. Alternatively, the reasonable adjustment contended for was made.

PCP 2

117. Similarly, notwithstanding what Mr Wisdom said at the meeting of 19 November 2021, the Respondent did not require the Claimant to attend the office five days a week. The PCP was never applied. Alternatively, as paragraph 32 of the meeting notes and the phased return plan appended to the notes of the meeting make clear, the reasonable adjustment was made.

PCP 3

118. The PCP alleged is that the Claimant was harassed to complete a Flexible Working Request Application in order to be permitted to work compressed hours. There was indeed a requirement applied by the Respondent for the Claimant to make the application but there was insufficient credible evidence before the Tribunal to show that she was harassed to do so. The Claimant's belief, whether credible or not, that this flexible working arrangement might have been taken away from her, was a substantial disadvantage and might well impact on her health and ability to work to the best of her abilities compared to a non-disabled

comparator. It was a substantial disadvantage of which the Respondent ought reasonably have been aware.

119. However, in the Tribunal's judgment, not requiring the Claimant to make such an application would not have been a reasonable adjustment. The requirement for employees wishing to work flexibly to make such an application was to ensure that business needs were met upon proper consideration. Further, such an adjustment would have introduced inconsistencies and possible inequity of treatment with other employees: the Claimant would have worked on a flexible basis granted on a discretionary basis with no express contractual change whereas other employees, whether disabled or not, were required to comply with the flexible working policy if they wanted to work flexibly. (The Tribunal notes that it was in any event highly likely that the Claimant's application would have been successful).

PCP 4

120. There was no credible evidence to suggest that the Respondent did not provide training or arrange refresher training to employees returning from sick leave or, if a one-off decision in the Claimant's case, that it was a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. The Tribunal concludes that no such PCP was applied.

PCP 5

121. The Respondent applied the PCP alleged: that employees were required to use TOIL before it expired.

122. It was for the Claimant to have made an application for TOIL in 2020 supported by timesheets, not in 2022. Her claim for TOIL came very late in day. As Mr Wisdom said, had the Claimant made a claim supported by timesheets at an earlier stage he might well have waived the time limit but the Claimant did not do so.

123. It would not have been reasonable for the Respondent to have known that the Claimant was put at a substantial disadvantage by the application of the PCP, nor was there credible evidence to show that the Claimant was put at a substantial disadvantage compared to non-disabled persons.

124. For these reasons the Claimant's claim of reasonable adjustments does not succeed.

<u>Direct discrimination</u>

125. The evidence did not support the Claimant's allegation that Mr Wisdom provided her with an insufficient and unreasonable lack of support during her sickness absence between December 2020 and November 2021

126. Mr Wisdom regularly kept in touch with the Claimant in accordance with the Respondent's policy, less frequently following the Claimant's request. He referred the Claimant to occupational health and had regard

to the reports. He held FARMs with the Claimant. He suggested the Claimant should apply for SLE and supported her application for flexible working, in part, in accordance with advice from occupational health. He made a referral for the Claimant to be supported by PAM Assist.

127. The Tribunal does not accept the Claimant's contention that in around June to July 2021, Mr Wisdom indicated and/or suggested Claimant that he did not believe or care about her illness. As to the Claimant's complaint that Mr Wisdom mimicked the Claimant's illnesses, the Tribunal prefers Mr Wisdom's evidence that he referred to his own illnesses because he had a similar condition for which was taking the same medication. On balance, the Tribunal finds that Mr Wisdom was being empathetic.

128. The Claimant has not shown on the balance of probabilities that Mr Wisdom provided the Claimant with insufficient support as alleged.

129. Having had regard to the oral evidence and the notes of the FARM of 31 August 2021, the Tribunal finds that the Claimant has failed to show that Mr Wisdom harassed her or threatened her as alleged.

130. The notes of the various meetings and interactions suggest that Mr Wisdom accepted that the Claimant was ill and cared about it sufficiently to make made accommodations for her, including a phased return during which time there was no requirement for her to travel to Seafield Lodge which the Claimant would find difficult. Mr Wisdom made adjustments in the Claimant's hours so she did not have to travel to the office at peak times. The notes show that Mr Wisdom told the Claimant that she would not be pushed back to work. He agreed to make a further referral to an occupational health counsellor and that a transfer on medical grounds could be considered. The Tribunal finds it understandable in the circumstances that Mr Wisdom did not recognise the interactions during the meeting as described by the Claimant.

131. If Mr Wisdom told the Claimant that there would be further FARMs if the Claimant's attendance did not improve, he was referring to the Respondent Attendance Management Policy. That was not something he said because the Claimant was a disabled person.

132. As to the allegation that Mr Wisdom delayed sending medical and occupational health evidence concerning the Claimant to the Panel who would determine her SLE application, the Tribunal prefers Mr Wisdom's clear evidence that once he had authorised the application and forwarded it to Ms Orlebar he had no further involvement in the process, in particular as far as obtaining Occupational Health advice was concerned. The Tribunal notes that such applications are driven by the employee and that it was Mr Wisdom who suggested that the Claimant should make an SLE application in the first place.

133. As to the allegation that in around June 2022 the Respondent failed to refer the Claimant for a DSE Work Assessment, the Tribunal finds that it is the responsibility of an employee to apply online for a DSE assessment, as Wisdom advised the Claimant. The allegation has not been proven.

134. The Claimant appeared to change this allegation during the hearing to an alleged failure to refer her for CAT (Cognitive Analytic Therapy). However, that was not an allegation set out in the list of issues and, in the absence of an application having been made to amend the claim, the Tribunal has no need to consider it. Regardless, there was no evidence to suggest that any failure to refer the Claimant for CAT was because she was a disabled person.

135. Turning to the allegation that Mr Wisdom rejected the Claimant's request to change to working only part-time hours at a meeting in August 2022, the evidence does not support it. The Tribunal accepts Mr Wisdom's evidence that he would have supported the Claimant's application but that she resigned before an outcome could be delivered. This is supported by the notes of the Workforce Planning Meeting of 8 August 2022 which show that part time vacancies were discussed and that Mr Wisdom would discuss vacancies with Claimant.

136. In any event, going straight to the second stage as permitted in Laing, even if any of the allegations had been proved, there was no credible evidence to show that the alleged acts or omissions were because the Claimant was a disabled person.

137. For these reasons the Claimant's claim of direct disability discrimination does not succeed.

138. Given the Tribunal's conclusion, the question of time limits does not fall for consideration.

Constructive unfair dismissal

139. The Tribunal reaches the same conclusions with regard to the same allegations which support the Claimant's claim of constructive unfair dismissal.

140. In addition, the Claimant complains of the loss of 19.25 hours of TOIL. The Tribunal finds that the loss is due to the Claimant's failure to claim TOIL and provide timesheets within a reasonable time frame.

141. There was no discernible act on the Respondent's part amounting to a breach of the Malik implied term of the Claimant's contract of employment. The Claimant was not constructively dismissed.

142. For these reasons the Claimant's claim for constructive unfair dismissal does not succeed.

Note

Employment Judge Pritchard

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Date: 30 August 2024