



EMPLOYMENT TRIBUNALS

Claimant: Miss Katie Megan Baldock

Respondent: Driver and Vehicle Standards Agency

Record of a Hearing at the Employment Tribunal

Heard at: Nottingham

Heard on: 10, 11, 12, 13 June 2024

In Chambers: 14 June 2024

Before: Employment Judge M Butler

Members: Mr K P Chester
Mr P Pabla

Appearances:

Claimant: Mr M Rudd, Counsel

Respondent: Mr J Duffy, Counsel

Format of Hearing: This was a Hybrid Hearing with the Claimant and 2 of the Respondent's witnesses attending by Cloud Video Platform.

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. The claim that the Respondent failed to make reasonable adjustments by maintaining updated training in the use of the EVAC chair is well founded and

succeeds;

2. The remaining claims of failure to make reasonable adjustments are not well founded and are dismissed;
3. The claim of indirect discrimination on the grounds of disability is not well founded and is dismissed;
4. The claim of discrimination arising in consequence of disability is not well founded and is dismissed;
5. The claim of direct discrimination on the grounds of disability is not well founded and is dismissed.
6. The claim of constructive and/or discriminatory dismissal is not well founded and is dismissed.

REASONS

BACKGROUND

1. The Claimant submitted her claim form to the Tribunal on 4 January 2023 after periods of Early Conciliation from 24 October to 5 December 2022 and 18 December to 20 December 2022. She was employed by the Respondent as a Theory Test Contract and Operational Support Officer from 2 March 2021 until her resignation on 22 November 2022. The effective date of termination was 22 December 2022.
2. The Claimant suffers from Nemaline Myopathy, a form of muscular dystrophy. The symptoms of this impairment are weakened muscles which affect mobility. The Claimant can walk short distances on the flat but has more difficulty with stairs. She mostly uses a wheelchair and has a specially adapted car. She also has an assistance dog called Digby.
3. The Respondent concedes that the Claimant is disabled because of Nemaline Myopathy and that it had knowledge of this impairment throughout the Claimant's employment.
4. The Claimant brings claims of failure to make reasonable adjustments, direct and indirect disability discrimination and less favourable treatment arising from something in consequence of her disability. She originally also claimed constructive unfair dismissal for asserting a statutory right but that claim was dismissed on withdrawal when it was pointed out to the Claimant that discrimination is not a statutory right. She maintains a claim for constructive dismissal but the ground of that claim is unclear as set out below.
5. The Respondent defends the claims on the grounds that some of them are out of time and the Tribunal has no jurisdiction to hear them and that, in any event, there

was no discrimination of any kind against the Claimant.

THE ISSUES

6. There was an agreed list of issues which, as pointed out by Mr Duffy and agreed by Mr Rudd, were at times inconsistent with the pleaded case and the evidence given to the Tribunal. This led to a number of anomalies. For example, the claim regarding constructive dismissal is unclear, the arguments relating to jurisdiction and direct disability discrimination were not pursued and the claim of indirect disability discrimination was not pursued or responded to with any enthusiasm. This situation arose mainly, in our view, as a result of the Claimant bringing a number of claims broadly based on the same factual allegations and it cannot be right that they can all succeed. In essence, this is a claim about failure to make reasonable adjustments. For completeness, however, we set out below the agreed list of issues.

"LIST OF ISSUES

Jurisdictional Issues

1. Are the Claimant's claims for indirect discrimination, discrimination arising from a disability and

failure to make reasonable adjustments within time?

2. If not, do the allegations made by the Claimant amount to an act extending over a period of time so as to bring the Claimant's claims in time?

3. Would it be just and equitable to extend the time limited for submitting such claims?

Failure to make reasonable adjustments.

4. Did the Respondent apply a provision, criterion or practice of only ensuring that two individuals were trained in use of the EVAC chair? If so:

4.1 Did this put the Claimant at a substantial disadvantage in comparison with persons who were not disabled? The Claimant claims that amounted to a substantial disadvantage in her case because she was required to work from home whenever those trained in use of the EVAC Chair were not present at the Respondent's premises.

4.2 Did the Respondent fail to take such steps as were reasonable to avoid the disadvantage?

The Claimant suggests that reasonable steps would have included:

4.2.1 Training three or more people in use of the EVAC Chair; and/or

4.2.2 Agreeing a rota with the Claimant to ensure that a person trained in use of the EVAC chair was present at the Respondent's premise at the dates and times that she was attending the Respondent's premises.

5. Did the Respondent apply a provision, criterion or practice of not providing updated training in use of the EVAC chair? If so:

5.1 Did this put the Claimant at a substantial disadvantage in comparison with persons who were not disabled? The Claimant claims that amounted to a substantial disadvantage in her case, because:

5.1.1 During June 2022 the Claimant was forced to walk down three flights of stairs which caused her a significant amount of pain and distress; and

5.1.2 The Claimant remained anxious that a safe evacuation might not be facilitated in event of an emergency.

5.2 Did the Respondent fail to take such steps as were reasonable to avoid the disadvantage? The Claimant suggests that reasonable steps would have included ensuring that sufficient personal had received sufficient training to use the EVAC Chair.

6. Did the Respondent apply a provision, criterion or practice of restricting use of the goods elevator to particular individuals? If so:

6.1 Did this put the Claimant at a substantial disadvantage in comparison with persons who were not disabled? The Claimant claims that amounted to a substantial disadvantage in her case, because of the difficulties that she faced in accessing the Respondent's premises on 20th and 26th July 2022. Thereafter the Claimant suffered the substantial disadvantage of lacking confidence that she could access the Respondent's premises in the event that a further problem arose with the escalators and/or that she could safely exit the premises in the event that the main elevators broke down.

6.2 Did the Respondent fail to take such steps as were reasonable to avoid the disadvantage? The Claimant suggests that reasonable steps would have included:

6.2.1 Ensuring that sufficient personnel with access to the goods escalator were available when she arrived at the Respondent's premises; and/or

6.2.2 Providing the Claimant with access to use of the goods escalator alone without requiring support from authorised personnel.

7. Did the Respondent apply a provision, criterion or practice of failing to update the Personal Emergency Evacuation Plan ('PEEP') following introduction of the Home Working Policy during 2021? If so:

7.1 Did this put the Claimant at a substantial disadvantage in comparison with persons who were not disabled? The Claimant claims that amounted to a substantial disadvantage in her case, because:

7.1.1 This restricted the Claimant's ability to access the Respondent's premises;

7.1.2 The Claimant was occasionally required to work from home; and

7.1.3 the Claimant felt anxious that a safe evacuation might not be facilitated in event of an emergency.

7.2 Did the Respondent fail to take such steps as were reasonable to avoid the disadvantage? The Claimant suggests that reasonable steps would have included updating the PEEP and considering it's interaction with the home-working policy.

8. Did the Respondent apply a provision, criterion or practice of failing to update the PEEP following the relocation announced in 2022? If so:

8.1 Did this put the Claimant at a substantial disadvantage in comparison with persons who were not disabled? The Claimant claims that amounted to a substantial disadvantage in her case, because:

8.1.1 This restricted the Claimant's ability to access the Respondent's premises;

8.1.2 The Claimant was occasionally required to work from home; and

8.1.3 the Claimant felt anxious that a safe evacuation might not be facilitated in event of an emergency.

8.2 Did the Respondent fail to take such steps as were reasonable to avoid the disadvantage? The Claimant suggests that reasonable steps would have included updating the PEEP, considering the impact of the relocation and the grievance outcome.

9. Did the Respondent apply a provision, criterion or practice of failing to provide the Claimant with appropriate disabled parking? If so:

9.1 Did this put the Claimant at a substantial disadvantage in comparison with persons who were not disabled? The Claimant claims that amounted to a substantial disadvantage in her case, because she required a bigger parking space to remove her wheelchair and support dog, Digby.

9.2 Did the Respondent fail to take such steps as were reasonable to avoid the disadvantage? The Claimant suggests that reasonable steps would have included:

9.2.1 designating a parking space as disabled; or

9.2.2 Reserving two parking spaces together for the Claimant's use.

10. Did the Respondent apply a provision, criterion or practice of permitting staff to work from home instead of its premises? If so:

10.1 Did this put the Claimant at a substantial disadvantage in comparison with persons who were not disabled? The Claimant claims that amounted to a substantial disadvantage in her case, because the failure to guarantee that those staff trained in use of the EVAC chair would be in the office restricted the Claimant's attendance at the office.

10.2 Did the Respondent fail to take such steps as were reasonable to avoid the disadvantage? The Claimant suggests that reasonable steps would have included:

10.2.1 Training more staff in the use of the EVAC Chair; and

10.2.2 agreeing a rota to ensure that at least one individual trained in use of the EVAC chair would be present in the office at the same time as the Claimant.

11. Did the Respondent apply a provision, criterion or practice of organising work to be undertaken collectively at it's premises? If so:

11.1 Did this put the Claimant at a substantial disadvantage in comparison with persons who were not disabled? The Claimant claims that amounted to a substantial disadvantage in her case, because of the obstacles to her accessing or exiting the premises including in the event of an emergency, thus restricting her ability to interact with colleagues and/or attend events.

11.2 Did the Respondent fail to take such steps as were reasonable to avoid the disadvantage? The Claimant suggests that reasonable steps would have included:

11.2.1 Updating the Claimant's PEEP;

11.2.2 Ensuring that EVAC Chair training was kept up to date;

11.2.3 Ensuring that more than two individuals were trained to use the EVAC chair;

11.2.4 Agreeing a rota with the Claimant to ensure that a person trained in use of the EVAC chair was present at the Respondent's premise at the dates and times that she was attending the Respondent's premises.

11.2.5 Ensuring that sufficient personnel with access to the goods escalator were available when she arrived at the Respondent's premises; and/or

11.2.6 Providing the Claimant with access to use of the goods escalator alone without requiring support from authorised personnel;

11.2.7 designating a parking space as disabled; or

11.2.8 Reserving two parking spaces together for the Claimant's use.

12. Did the Respondent apply a provision, criterion or practice of planning to use a starburst approach to evacuation at Unity Square? If so:

12.1 Did this put the Claimant at a substantial disadvantage in comparison with persons who were not disabled? The Claimant claims that amounted to a substantial disadvantage in her case, because she felt anxious about the lack of clarity as to where she would wait for 45 minutes and whether this would be practicable or whether she would need to return home.

12.2 Did the Respondent fail to take such steps as were reasonable to avoid the disadvantage? The Claimant suggests that reasonable steps would have included:

12.1.1 Amending the Claimant's draft PEEP to clarify this issue;

12.1.2 Identifying a particular place for the Claimant to remain at for 45 minutes and

informing key evacuation personnel of this plan.

13. *Did any failure to make a reasonable adjustment damage trust and confidence in the employment relationship to the extent that the claimant was entitled to terminate her contract of employment, by reason of the employer's conduct pursuant to s.95(1)(c) Employment Rights Act ("ERA") 1996)?*

14. *Did the Claimant resign as a result of any failure to make a reasonable adjustment?*

Indirect discrimination on the grounds of disability - section 19 of the Equality Act 2010

15. *Were the PCPs set out at paras 04-11 applied to disabled and non-disabled employees?*

16. *Did the PCPs put those with the Claimant's disability at the respective particular disadvantage set out at paras 04-11, when compared to those who do not share that characteristic and if so, did they put the Claimant at that disadvantage?*

17. *If so, can the Respondent show that the PCP was a proportionate means of achieving a legitimate aim?*

16.1.1 *The Respondent avers that a minimum of two individuals were trained in the EVAC chair and would be available to support individuals who needed to use it. The Respondent further asserts that the facilities team would be responsible for the entire evacuation of the building, and as such the EVAC trained individuals were there to provide additional support in an evacuation.*

16.1.2 *The Respondent avers that whilst formal training may not have been provided, all EVAC trained individuals were advised to practice on regular occasions (once every 12 weeks) as the training was only effective with practice.*

16.1.3 *The Respondent maintains that the reason for restricting the use of the goods elevator was to ensure the safety and security of the Respondent and its employees.*

16.1.4 *The Respondent avers that as a result of the pandemic, they sought to bring people back to the office where it was necessary for them to be based in the office to carry out their role. A hybrid working policy came into effect in 2021 which was intended to retain flexibility and to allow the Respondent to vary the arrangements for the business and individuals.*

18. *Did any indirect discrimination damage trust and confidence in the employment relationship to the extent that the claimant was entitled to terminate her contract of employment, by reason of the employer's conduct pursuant to s.95(1)(c) Employment Rights Act ("ERA") 1996)?*

19. *Did the Claimant resign as a result of any indirect discrimination?*

Discrimination arising from disability - section 15 of the Equality Act 2010

20. *Did the PEEP that applied during 2021, after the implementation of the Respondent's Workingfrom Home Policy, fail to provide the Claimant with flexible access to her place of work? If so:*

18.1 *Did this constitute unfavourable treatment?*

18.2 Did this happen because of something arising in consequence of the Claimant's disability, namely her difficulties in entering and exiting the Respondent's premises?

21. Did the Respondent fail to adequately update the PEEP in 2022, to provide the Claimant with flexible access to her place of work following the relocation? If so:

19.1 Did this constitute unfavourable treatment?

19.2 Did this happen because of something arising in consequence of the Claimant's disability, namely her difficulties in entering and exiting the Respondent's premises?

22. Did the Respondent fail to provide expedient access to its premises for the Claimant by resolving obstacles to using the elevators, including the goods elevator? If so:

20.1 Did this constitute unfavourable treatment?

20.2 Did this happen because of something arising in consequence of the Claimant's disability, namely her difficulties in entering and exiting the Respondent's premises?

23. Did the Respondent fail to implement the grievance outcome? If so:

21.1 Did this constitute unfavourable treatment?

21.2 Did this happen because of something arising in consequence of the Claimant's disability, namely her difficulties in entering and exiting the Respondent's premises?

24. If so, can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim?

23.1 The Respondent avers that a minimum of two individuals were trained in the EVAC chair and would be available to support individuals who needed to use it. The Respondent further asserts that the facilities team would be responsible for the entire evacuation of the building, and as such the EVAC trained individuals were there to provide additional support in an evacuation.

23.2 The Respondent avers that whilst formal training may not have been provided, all EVAC trained individuals were advised to practice on regular occasions (once every 12 weeks) as the training was only effective with practice

23.3 The Respondent maintains that the reason for restricting the use of the goods elevator was to ensure the safety and security of the Respondent and its employees.

23.4 The Respondent avers that as a result of the pandemic, they sought to bring people back to the office where it was necessary for them to be based in the office to carry out their role. A hybrid working policy came into effect in 2021 which was intended to retain flexibility and to allow the Respondent to vary the arrangements for the business and individuals.

25. Did any unfavourable treatment damage trust and confidence in the employment relationship to the extent that the claimant was entitled to terminate her contract of employment, by reason of the employer's conduct pursuant to s.95(1)(c) Employment Rights Act ("ERA") 1996)?

26. Did the Claimant resign as a result of the unfavourable treatment?

Direct discrimination on the grounds of disability - section 13 Equality Act 2010

27. Did the Respondent treat the Claimant less favourably than it treats or would treat others by:

- a) Failing to implement the actions set out in its grievance outcome
- b) Failing to ensure there was an adequate PEEP for the claimant
- c) Failing to ensure there were sufficient members of staff adequately trained in the claimant's PEEP to ensure she could access the respondent's premises.
- d) Failing to provide adequate parking facilities for the claimant and her assistance dog.
- e) Failing to ensure PEEP had been put in place before the claimant returned to work following her sick leave.
- f) Failing to discuss the PEEP with the claimant before she returned to work.
- g) Failing to ensure that the 'Starburst' evacuation policy was suitable for the claimant.
 - h) In particular to ensure that the claimant has the means to be mobile upon evacuation and follow the policy
- i) As a result of the treatment described above, there was a fundamental breach of the implied term of trust and confidence which led the claimant to consider that her employment was terminated.

28. Was the less favourable treatment on the grounds of a protected characteristic, namely the Claimant's disability?

29. Did the Respondent by its conduct fundamentally breach the Claimant's contract of employment by acting in breach of the implied term of trust and confidence?

30. Did the Claimant resign as a result of the less favourable treatment?"

THE EVIDENCE

7. We heard evidence from the Claimant by CVP and for the Respondent from Mr E C Yorke, Theory Test Contract Manager, Ms L Massey, Theory Test Contract and Operational Delivery Manager, Mr P J Breen, Earned Recognition National Account Manager and Ms H R McKinnon, Programme Manager in Finance and Corporate Services. Ms Massey and Ms McKinnon gave evidence by CVP. All witnesses produced written witness statements and were cross-examined.
8. There was also an agreed bundle of documents extending to 654 pages. References to page numbers in this Judgment are to page numbers in that bundle.

THE FACTS

9. In relation to the issues to be determined by the Tribunal, we find the following facts on the balance of probabilities:

- 9.1. The Claimant commenced employment with the Respondent on 3 March 2021 as a Theory Test Contract and Operational Support Officer. Prior to the commencement of her employment she was supplied to the Respondent as an agency worker carrying out similar roles. She suffers from Nemaline Myopathy, a type of muscular dystrophy which causes her muscles to be extremely weak and her joints to dislocate. She can walk short distances on flat, even surfaces but has significant difficulty in negotiating stairs. For the most part, she uses a wheelchair and she has an assistance dog called Digby. She was a part time employee working 30 hours over 4 weekdays.
- 9.2. The Claimant was employed in the Axis Building in Nottingham in which the Respondent leased the 3rd and 4th floors. The ground floor is occupied by a Casino and the higher floors of the building are residential flats. Access to the building for the Respondent's employees was through reception where they had to use their passes to pass through security and access the stairs and lifts. The Claimant worked on the 3rd floor. The Respondent was planning to move its undertaking to a building in Unity Square Nottingham in late 2022 of which the staff had been informed.
- 9.3. Whilst the Claimant was an agency worker for the Respondent, a Personal Emergency Evacuation Plan (PEEP) was drafted in consultation with her as she suffered from a mobility impairment. She was assessed by Mr Simon Hobbs and the assessment is at page 405-408. At page 406, the Claimant expressed a preference to evacuate using an EVAC chair in an emergency although it is stated *"given the steepness of the stairwells it is preferable at this time to use an EVAC chair but it is possible for Katie to get out under her own steam but this could exacerbate her condition"*.
- 9.4. The Respondent's fire emergency procedure states at page 417, *"There are EVAC chairs available on the emergency exit stairwells and people trained in their use. It would be advisable that, as part of the plan, a person trained in the use of EVAC chairs is nominated to help identify team members from the building using the chairs. It is DVSA's legal duty as an employer to ensure that all staff can be evacuated from the building safely. PEEP's are an essential requirement of that process"*.

HM Government Fire Safety Risk Assessment (supplementary guide) provides that all staff but, in particular, disabled staff should be consulted when arrangements are made for their evacuation from a building in an emergency. The first PEEP was signed off on 2 September 2019 and it is clear the Claimant was consulted by Mr Hobbs for the purposes of her assessment. This guide also provides (page 78) that, *"Practice for PEEPS will depend on the type of escape required. Generally, escape plans should*

be practised on a regular basis and at least every six months”.

- 9.5. On 17 June 2021, the Claimant’s PEEP was updated by Mr Adrian Jennings (pages 399-404). In her witness statement at paragraph 5, the Claimant says that PEEP “*was never signed and I thus doubt that had been properly considered and completed*”. Nevertheless, it is clear that Mr Jennings spoke to the Claimant to answer the questions in the assessment form and Mr Will Hopkin and Mr Yorke were named as EVAC chair trained colleagues who would assist her. They received training in the use of the EVAC chair.
- 9.6. Sometime in June 2022, the fire alarm sounded when the Claimant was working in the office. It is not clear whether this was a drill or false alarm but there was no fire. Upon meeting Mr Yorke at the site of the EVAC chair, it became apparent that he was unable to set up the chair for use by the Claimant. Both he and Mr Hopkin subsequently confirmed to the Claimant that they would require more regular training in its use (pages 305 and 598). Neither had received such training in breach of the Respondent’s Fire Safety Policy and Fire Safety Risk Assessment which we discuss further in our conclusions below.
- 9.7. Following the Covid-19 pandemic, the Respondent implemented a hybrid working policy whereby employees were able to work from home. The Respondent’s Hybrid Working Guidance (page 196) provides that: “**The ability to work from home will always be subject to business needs**”. For safety reasons in the event of a need to evacuate the building, the Claimant could not attend the office unless EVAC trained colleagues were also in attendance. She was, however, able to attend the office for meetings as EVAC trained colleagues would be there. The Respondent was to agree a plan with all of the staff as to when they would attend the office. For those who primarily worked from home, they could not be ordered to attend the office on other days in the absence of a business need. The Claimant has not evidenced any business need for her to attend the office when she just wished to do so and ultimately says she gave up on trying to coordinate her attendance with the attendance of her EVAC trained colleagues. There was no evidence before us of the Claimant’s attempts to coordinate her visits with Mr Yorke or Mr Hopkin or with other trained EVAC trained staff in the Facilities Team or other teams.
- 9.8. On 7 July 2022, the Respondent emailed its staff to advise that the lifts were out of order and that staff would need to use the goods lift instead. This involved the Claimant in telephoning the facilities team in advance when she was due to attend the office so they could meet her and take her to the third floor in the goods lift. The goods lift was operated by using a key and a code. Accessing this lift did not require staff to first pass through the Respondent’s security gate on the ground floor and it also gave access to the floor the casino was on and the upper floors where the flats were located. Only senior management of the Respondent were allowed to use the lift without a

member of the facilities staff. This was said in evidence as being for security reasons due to confidential information being stored by the Respondent and access to other occupants' floors having to be prohibited. We also heard that the goods lift was not actually part of the demised premises and was retained in the landlord's control.

- 9.9. On the first occasion the Claimant came to the office when the lifts were still out of action on 20 July 2022, she telephoned ahead but on arrival still had to wait 15 minutes for a member of facilities to arrive to take her and Digby to the third floor in the goods lift. The Claimant had arrived at the office at 7.45am and the facilities team started work at 8am hence the slight delay. She brought Digby with her on this day which was the day after a Red Weather Warning due to heat. Digby was not coping well with the heat and the Claimant arranged for him to be collected and taken home. She justified taking Digby in to work on such a very hot day by saying she presumed the office had air conditioning (page 374). She also said she presumed the lifts would be working by then and did not contact anyone to check this before going in (page 375).
- 9.10. The Claimant again contacted the facilities team on 22 July 2022 to say she would be attending the office as the Respondent's CEO, Ms Loveday Ryder, was delivering a talk. This event was badly organised in that those attending were only told at the last minute where Ms Ryder's talk was taking place and where other workshops on the day were taking place. The talk was to be on the fourth floor and the Claimant was on the third floor and became upset that she could not freely access the goods lift when she wished to. Ms Elizabeth Smith, a senior manager, stepped in and a key was given to her and she was instructed in how to use the goods lift so she could assist the Claimant to move between floors.
- 9.11. This did not assist the Claimant, however, at lunchtime when she had to wait for Ms Smith to become available before being able to leave the third floor. The Claimant did not give evidence as to whether, on this occasion, she contacted facilities to help her. The Claimant did miss one of the workshops on the day, as did other staff members.
- 9.12. On 30 July 2022, the Claimant submitted a formal grievance to Ms Massey (page 308). The Claimant went on sickness absence with work related stress on 4 August 2022 (page 310).
- 9.13. Mr Breen was appointed to investigate the grievance and then to report to Ms McKinnon who was to be the decision maker. Mr Breen interviewed the Claimant on 6 September 2022 when she was accompanied by her union representative. The notes of the meeting are at pages 373-379. He also interviewed Mr S Hobbs, TFM Contract Service Delivery Manager, and Ms Massey. The interview with the Claimant was wide ranging and covered all of the issues raised by the Claimant.

9.14. Prior to the interview with Mr Breen, the Claimant emailed Ms Massey with a list of her desired outcomes from the grievance (page 334) which were:

- Access to the building office during opening hours.
- A contact number for Facilities in case of an emergency (or for when the lifts breakdown midday).
- The keys and code for the goods lift on days the passenger lifts have broken.
- A workable PEEP that I am confident with, and if it relies on others, they must be fully trained and competent to provide the assistance needed.
- An early visit to Unity Square (so its quieter) so Digby and I can familiarise ourselves with the building and its facilities and can ask questions.

9.15. Mr Breen reported to Ms McKinnon who met with the Claimant on 17 October 2022 (pages 473-475). Part of the delay was due to the Claimant's union representative being unavailable for the first meeting arranged. Ms McKinnon's outcome letter dated 3 November 2022 (page 479) set out the main reasons for the Claimant's complaint and confirmed that her decision was to uphold that complaint because:

“

- *You had restricted access to the building.*
- *You didn't have an up-to-date list of the people trained to use the EVAC chair if needed.*
- *Your current PEEP is not signed so not fit for purpose.*
- *You and your Line Manager have different understandings of whether you have a PEEP and Disability Passport.”*

The outcome letter confirmed what actions would be taken to address the concerns raised by the Claimant which were:

“

- *Facilities will work with you and your Line Manager to ensure you have a PEEP that is signed and is a fit for purpose PEEP. This will be scheduled on your first day back at the Axis. Adrian and Linda to co-ordinate.*
- *Facilities will work with you and your Line Manager to ensure you have a PEEP that is signed and fit for purpose for Unity Square. This will be scheduled on your first day at Unity Square. Adrian and Linda to co-ordinate.*

- *Nick Lee (Theory Test Inductor) will arrange a visit to Unity Square for you and Digby so you can familiarise yourselves and ask any questions.*
 - *Facilities will work with you to ensure access to the Axis so you can sort any belongings personal to you and Digby.*
 - *You and your Line Manager will meet with the Inclusion Manager to ensure you all understand the purpose of a Workplace Adjustment Passport and have an appropriate Workplace Adjustment Passport in place which addresses and records the adjustments you require. To be completed within 2 weeks of your return to work. Linda to co-ordinate.*
 - *As DVSA didn't have reasonable adjustments in place for you to attend the Axis and feel safe, I will be recommending to your line management chain that your recent sick absence be converted to disability leave. The disability leave will cease when you feel able to return to work and/or once the necessary adjustments have been put in place for you, whichever is sooner.*
 - *Mediation will be suggested with your Line Manager to ensure you have appropriate meetings/processes in place to highlight any issues and have them resolved in a suitable time scale."*
- 9.16. Ms McKinnon accepted in her oral evidence that her outcome letter did not cover every aspect of the Claimant's grievance but she made the point that she upheld all of the complaints, specifically, that there was a failure to make reasonable adjustments, the Claimant felt there was an underlying tone of disrespect towards her because of her disability, that she was discriminated because of her disability and that she felt terrified regarding the lack of EVAC training. Ms McKinnon confirmed that the reference at the end of her outcome letter to mediation between the Claimant and Miss Massey was not really relevant as there had been no issues between them.
- 9.17. The Claimant attended an induction at the Unity Square premises on 15 November 2022. The new PEEP for that building had been reviewed by the Claimant and drafted by Mr Jennings (pages 535 – 541). The Claimant had requested a disabled parking bay but when she drove to Unity Square on 17 November 2022 she had been allocated a normal parking bay which was not a problem as there were no cars parked in either bay to the side of hers. She was subsequently allocated a disabled parking bay as she had requested but by this time had resigned. Volunteers had also been requested to be trained in the use of an EVAC chair. The first arranged training session did not go ahead due to low numbers but subsequent sessions did take place.
- 9.18. There were some short delays in the Respondent making the arrangements referred to by Ms McKinnon in her outcome letter to the Claimant. This was because Unity Square was effectively controlled by HMRC and its Facilities Team had to be consulted by the Respondent's Facilities Team in relation to all arrangements made for the building.

9.19. The Claimant resigned on 22 November 2022 (page 522). The reason for her resignation was expressed as *“I do not feel like my discrimination grievance has been fully understood despite being upheld as I do not wish to remain be employed at an organisation that does not acknowledge and respect me. I must add that your (Linda Massey) support since my return has been excellent and I can’t fault you for everything that you sorted out and the support you have provided me”*.

SUBMISSIONS

10. Mr Rudd gave oral submissions and Mr Duffy provided written submissions and responded to Mr Rudd’s submissions.

11. We do not rehearse those submissions here but refer to them as appropriate in our discussion and conclusions below. We confirm we took full account of all submissions.

THE LAW

12. Section 13 sub section (1) EqA provides:

“Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”

13. Section 15(1) EqA provides:

“Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B’s disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.”

14. Section 19 EqA provides:

“Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B’s.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B’s if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

- (b) *it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
- (c) *it puts, or would put, B at that disadvantage, and*
- (d) *A cannot show it to be a proportionate means of achieving a legitimate aim.*

(3) *The relevant protected characteristics are—*

- age;*
- disability;*
- gender reassignment;*
- marriage and civil partnership;*
- race;*
- religion or belief;*
- sex;*
- sexual orientation.”*

15. Section 20 EqA provides:

“Duty to make adjustments

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

(2) The duty comprises the following three requirements.

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

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

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

16. Section 21 EqA provides:

“Failure to comply with duty

- (1) *A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.*
- (2) *A discriminates against a disabled person if A fails to comply with that duty in relation to that person.*
- (3) *A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.”*

17. Section 39(2) EqA provides:

“Employees and applicants

- (2) *An employer (A) must not discriminate against an employee of A's (B)—*
 - (a) *as to B's terms of employment;*
 - (b) *in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;*
 - (c) *by dismissing B;*
 - (d) *by subjecting B to any other detriment.”*

18. Section 95 Employment Rights Act 1996 provides at sub section (1)(c):

“Circumstances in which an employee is dismissed.

- (1) *For the purposes of this Part an employee is dismissed by his employer if —*
 - (a)
 - (b)
 - (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. We were also referred to a very small number of authorities which are referred to below insofar as we can consider them relevant to the issues.

DISCUSSION AND CONCLUSIONS

20. We consider it appropriate to comment on the oral evidence we heard in this hearing. The Claimant has a serious physical impairment which greatly affects her mobility. Despite this, she clearly exercises a high degree of independence. This is illustrated by the fact that she was comfortable in driving to work or taking the tram.

She moved for short distances around the office without her wheelchair and it is understandable that she had difficulty negotiating stairs. Having said that, we did find her evidence to be somewhat questionable in relation to certain matters. For example, she spoke often about no one “*taking ownership*” of putting her PEEP into force. At no time did she suggest that she should be responsible for this and sharing relevant details with a wider group of people. Further, as a second example, when she met “Thomas” from Facilities who took her to the 3rd floor in the goods lift, she subsequently complained about not being able to contact him when she had failed to ask his name or telephone extension number, nor did she think to email facilities when she needed to leave the building.

21. We also considered that at times her expectations were rather unrealistic. For example, after the Covid Lockdown when Hybrid working came into force at the Respondent’s premises, she seems to have expected the Respondent to insist that Mr Yorke and Mr Hopkin be present as EVAC trained colleagues when Mr Yorke’s role required him to travel within the UK at short notice and no other colleague, including Mr Hopkin, could be required to attend the office for non-operational reasons.
22. Again, the Claimant’s evidence was that after Ms McKinnon had upheld her grievance, she saw no reason why the Respondent could not have put in place all those changes Ms McKinon said would be addressed within 7 days.
23. Having said that, the Tribunal panel did appreciate the difficulties experienced by the Claimant in terms of her lack of mobility.
24. The evidence of Mr Yorke we found to be honestly given and without concern that some of that evidence might reflect badly upon the Respondent. The evidence of Ms Massey was, in its early stages, given in a somewhat brusque manner but we considered it to be honestly given. Mr Breen showed no hesitation in giving his evidence in justifying aspects of his investigation. Ms McKinnon was unable to fully explain why the grievance process took longer than the 40 days normally expected “*if possible*” other than the reference to some delay in accommodating the Claimant’s union representative’s availability. However, she was honest in her evidence explaining that, although not every aspect of the Claimant’s grievance had been covered in the outcome letter, nonetheless every aspect had been upheld.
25. We now address each of the Claimant’s specific claims of discrimination in turn.

Failure to Make Reasonable Adjustments

26. Dealing firstly with the arrangements for the emergency evacuation of the building, we find that the Respondent provided the Claimant with an EVAC chair and, at least initially, trained 3 of her colleagues in how to use that chair if the building had to be evacuated. There was also a PEEP in place for the Claimant in the completion of which she had been consulted. Mr Duffy submits that the Respondent had, therefore, made the necessary reasonable adjustments to protect

the Claimant and others suffering from mobility issues.

27. But in June 2022, the PEEP for the Claimant was found to be lacking because Mr Yorke, who attended the Claimant when the alarm sounded to evacuate the building, could not unfold the EVAC chair. He attributes this failure to lack of refresher training. The Respondent's Fire Risk Assessment Supplementary Guide (page 78) states: "*Practice for PEEP's will depend on the type of escape required. Generally, escape plans should be practiced on a regular basis and at least every 6 months*". No such practice or refresher training had been offered to the Claimant's designated helpers.
28. In determining the PCP in these circumstances, we note it should be construed widely to include formal or informal policies, rules, practices, arrangements and even one-off decisions and actions (**Lamb v The Business Academy Bexley UKEAT/0226/15**). In this case, as noted above, there was a policy in place regarding training and practice for emergency evacuations and a PEEP for the Claimant which were ignored by the Respondent. The PCP, therefore, we find was the Respondent's practice of failing to follow the training and practice requirements of its written policies.
29. After identifying the PCP, we must determine whether it put the Claimant at a substantial disadvantage compared to her colleagues who were not disabled. "Substantial" is defined in s.212(1) EqA as "more than minor or trivial". We must, therefore, test "whether the PCP has the effect of disadvantaging the disabled person more than trivially in comparison with others who do not have the disability" (**Sheikholeslami v Edinburgh University [2018] IRLR 1090**) and must identify clearly the nature and extent of the disadvantage suffered. In this case, the substantial disadvantage is not difficult to identify. In the event of an emergency evacuation, the Claimant would not have been able to evacuate quickly and safely which is clearly a substantial disadvantage compared to colleagues who did not have a mobility impairment. Given the potential consequences for the Claimant, we find that this amounted to a failure to make reasonable adjustments by the Respondent.
30. We note Mr Duffy's submission that more training would not necessarily have prevented Mr Yorke from being unable to set up the EVAC chair but we disagree. It is more a matter of common sense which dictates that practice breeds familiarity and may well have avoided the particular issue in this case. In any event, in **Noor v Foreign & Commonwealth Office UKEAT/0470/10**, the EAT held that an adjustment might be reasonable even if it does not remove all of the disabled disadvantage stating, "...it is certainly not the law that an adjustment will only be reasonable if it is completely effective".
31. Consequently, the reasonable adjustment in this case would have been to hold regular evacuation practises and refresher training for those who had volunteered to help those with mobility issues by operating an EVAC chair. We are satisfied that this would have been entirely reasonable.

32. We do not, however, support the Claimant's view that a reasonable adjustment to allow her to come to the office during the period of hybrid working would have been to impose a rota on those designated as trained helpers or that more than two employees should be trained in the use of the EVAC chair. There is no evidence before us that any of the Claimant's colleagues could be mandated to be trained in the use of the EVAC chair. The Respondent's Hybrid Working Policy states (page 197): "*We may bring people back into the office where it's necessary for the business*". There is no evidence before us that either the Claimant or those trained to assist her needed to go into the office because it was necessary for the business. The Claimant accepts that she did come into the office when there were meetings and the Hybrid Working Policy provides for this (page 200) identifying one reason for being in the workplace as being "*holding face to face meetings with managers, colleagues and stakeholders*". The Claimant's suggested adjustments cannot be reasonable during the aftermath of the Covid Pandemic. We do not find that there was a PCP of ensuring only two individuals were trained in the use of the EVAC chair; firstly, because the Respondent had no authority to force any more individuals to undertake the training and, secondly, because initially three of the Claimant's colleagues were trained in any event.
33. In relation to the issue with the lifts, the Respondent's PCP was that staff could only access the goods lift if accompanied by a member of the Facilities Team or authorised senior manager. This was because the goods lift could be accessed without passing through the security turnstiles in the Respondent's reception area on the ground floor and it could be used to access floors on which there was a casino and private flats. Further, it was not the Respondent's goods lift but the landlord's. Not all of these matters had been pleaded by the Respondent over and above the security issue it raised in relation to there being confidential documents in the building. The Claimant does not make much of having to wait for a member of the Facilities Team to take her up to the 3rd floor on a normal working day. She describes the wait as an inconvenience rather than any disadvantage. The subsequent issues she had with Digby on an extremely hot day for dogs can rightly be put down to her own decision to take him into the office on that day. Further, her presumption that there would be air conditioning in the office does not assist her when she had worked in that office for around 3 years and should have known full well that there was no air conditioning.
34. Based on the Claimant's own evidence, we are satisfied that she was not placed at a substantial disadvantage in not being able to use the goods lift alone. Any other employee wishing to use the goods lift was faced with the same issue. The Claimant suffered minor inconvenience in having to wait for a member of the facilities team to use the lift on the few occasions she had to use it.
35. The issue she had on the day of the Loveday Ryder Presentation was more of an inconvenience to her but Ms Smith had been given a key and instructions in how to use the goods lift, she being a Senior Manager who could be entrusted with that responsibility. But it has to be said that the Claimant chose to wait for Ms Smith to become available when she was extremely busy rather than endeavouring to

contact facilities herself to be taken to the next floor in the goods lift. Further, due to rather unfortunate organisation, she was not the only one to miss one of the workshops that day. We do not consider it would have been a reasonable adjustment to simply give a key and the code to the Claimant to allow her to use the goods lift unaccompanied. Whilst it is fair to say that other members of staff would have been able to walk to the 3rd and 4th floors, the Claimant did mention that there was at least one other member of staff with mobility difficulties and others may have been carrying boxes or other goods which made walking up the stairs impractical. Accordingly, we do not consider that the Claimant was placed at a substantial disadvantage in not having a key and a code to the goods lift on the few occasions she had to use it.

36. The reference to car parking at the Unity Square building arose following the Claimant's induction meeting at that building. It is abundantly clear from the evidence before us that discussions had taken place with a view to arranging a disabled parking bay for the Claimant to use when attending the office. On the one occasion she drove to the office she was directed to a normal parking bay with no cars on either side of it so she had no difficulty in parking at that office at a time when the office move had not been fully completed and there were few staff members in the building. Further, as we have already noted, the Claimant seemed to anticipate that all arrangements for her move to Unity Square could be accomplished within 7 days. A disabled parking bay was, as a result of the efforts of Ms Massey and others, designated for the Claimant's use and we do not consider this to be an issue to be relied upon by the Claimant. We are satisfied that there was no PCP involving the Respondent in a failure to provide a disabled parking space for the Claimant at Unity Square.
37. Mr Rudd in support of the parking issue amounting to a failure to make reasonable adjustments, relies on the Judgment of the EAT in **Mrs M Linsley v Commissioners for Her Majesty's Revenue and Customs UKEAT/0150/18/JOJ**. However, we do not consider that decision assists the Claimant for the simple reason that it was clear the Respondent had put in motion a procedure to provide a disabled parking bay and had requested and received details of the Claimant's Blue Badge. It is also clear that, in a comparatively short period of time, a disabled parking bay was provided for the Claimant shortly after she had resigned.
38. We are satisfied on the evidence that the Respondent did update the Claimant's PEEP pending the relocation to Unity Square in 2002 and there was no PCP of failing to update it on any basis. There is clear evidence this was done in conjunction with the Claimant and to suggest otherwise is unsustainable. The Claimant also alleges that the Respondent adopted a "*starburst*" approach of evacuation of the Unity Square building in the event of an emergency. This involved staff exiting the building and getting a safe distance away from it but without having a dedicated meeting point. We do not consider that it was necessary for the Claimant to have "*more clarity*" as to what she should do because she was in the same position as everyone else and her PEEP drafted by Mr Jennings makes it clear that it is incumbent upon all staff members to make their own arrangements

as to where to go and whether, for example, they should arrange to be collected or make their way home. We do not see that the Claimant was placed at any substantial disadvantage due to the implementation of a starburst approach.

Indirect Disability Discrimination

39. This head of claim was neither pursued nor defended with any vigour. It is unclear what group is identified as having the PCP imposed upon it. The Claimant has merely repeated the reasonable adjustments arguments already relied upon in that claim discussed above. It is not for the Tribunal to identify the group to support the Claimant's case. This is a basic failure and means the claim cannot get off the ground. Indeed, we are of the view that this was a head of claim thrown into the mix of claims to be pursued on the basis that the more claims are submitted, the better the chance that at least one will succeed.

Discrimination Arising from Disability

40. In **Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14**, the EAT held there are two distinct steps to the test to be applied in determining whether discrimination arising from disability has occurred. These are, firstly, did the employee's disability cause, have the consequence of or result in "something" and, secondly, did the employer treat the employee unfavourably because of that "something"?

This test was elaborated upon in **Pnaiser v NHS England and another [2016] IRLR 170** which held the proper approach to be to:

- identify whether the employee was treated unfavourably and by whom
- determine what caused that treatment focusing on the reason in the mind of the alleged discriminator
- then determine whether the reason was something arising in consequence of the employee's disability.

41. Once again the Claimant relies on allegations made under other heads of claim which are the 2021 PEEP failing to provide her with flexible access to work under the Hybrid Working Policy, failing to update her PEEP in 2002 to provide flexible access to work following the relocation to Unity Square and failing to provide access to her place of work before the relocation by allowing her to use the goods lift more freely. Added to this list is that the Claimant was treated unfavourably as a result of the Respondent's failure to implement the grievance outcome.

42. We focus first on the issue regarding the 2021 PEEP. It is arguable that the Claimant was treated unfavourably in not being able to attend the office every time she wished to do so. In determining what caused that treatment, we focus on the mind of the discriminator. Mr Rudd says the something arising was the Claimant's mobility issues but that jumps ahead of the second part of the test we must apply.

We find that the reason for the unfavourable treatment was the implementation of the Hybrid Working Policy and that was not something arising from the Claimant's disability. That claim must, therefore, fail.

43. The same reasoning applies, in part, to the issue regarding the goods lift as the policy of restricting access to that lift was the reason for any unfavourable treatment. However, that claim must also fail as we have already determined that the Claimant was not treated unfavourably in the circumstances.
44. As a claim under s.15, we are satisfied the assertion that the Claimant was treated unfavourably as a result of the Respondent failing to adequately update her 2022 PEEP to provide flexible access to work following the relocation must fail. The reason for this failure is that the evidence does not support the allegation that the Respondent did not adequately update that PEEP. The Claimant was clearly consulted at some length and all of the grievance outcomes were quickly being addressed for her benefit.
45. The claim under s.15 that the Respondent failed to implement the grievance outcome clearly fails in consequence of the Tribunal's determination that, on the evidence, the Respondent very quickly took action to implement those outcomes; any other conclusion cannot be supported by the facts.

Direct Disability Discrimination

46. Mr Rudd, on behalf of the Claimant, confirms that this head of claim was not being pursued and it is, therefore, dismissed.

Constructive Dismissal

47. We did not find that this head of claim was clearly pleaded or argued before us. There has been no explanation, for example, as to how a claim of automatic unfair dismissal arises on the facts given that the Claimant did not have 2 years' continuous employment at the time of her resignation. This is left completely open ended in the amended grounds of complaint.
48. We have considered very carefully the Claimant's letter of resignation. After a very short period of time following receipt of the grievance outcome, the Claimant resigned saying that in the light of the Respondent's failure to address matters previously, she had no confidence they would be addressed following that outcome. In her evidence, she said she did not resign in response to the matters she has raised before the Tribunal because they were not resigning events. In effect, they were inconveniences rather than matters which were so serious that the Claimant was entitled to resign. In such circumstances, it is not possible to conclude that the Claimant's alleged constructive dismissal was discriminatory (**Lauren De Lacey v Wechsels Limited t/a The Andrew Hill Salon [2021] IRLR 547**).
- 49.□ We have found that the only aspect of her claim for discrimination which

succeeds relates to the lack of refresher training and practices for the Claimant's EVAC trained colleagues. She did not resign because of this but because of a lack of confidence in the Respondent at a time when further adjustments in relation to a new PEEP, a parking space and an induction to the new building had all been completed or were in hand. Consequently, her lack of confidence in the Respondent was not predicated upon, for example, an inability to access her office during a period of hybrid working, lack of further training for EVAC trained colleagues and not being able to use a goods lift unaccompanied, but on her perception that, after a very short period of time following her grievance outcome, the Respondent would not take appropriate action to implement the suggested solutions. The evidence shows, however, that her lack of confidence was misplaced.

50. Nor can we find that the failure in respect of the EVAC training necessarily amounted to a fundamental breach of contract entitling the Claimant to resign. Her evidence was that it was not a resignation matter. A failure to make reasonable adjustments does not automatically amount to a fundamental breach of an express or implied term of a contract of employment. Indeed, the Claimant's resignation letter states quite clearly, "...I do not feel like my discrimination grievance has been fully understood despite being upheld and I do not wish to remain employed at an organisation that does not acknowledge and respect me". We consider this reasoning of the Claimant to be sufficient to distinguish the decision of the EAT in **Greenhof v Barnsley Metropolitan Borough Council [2006] IRLR 98** insofar as the EAT suggests a failure to make reasonable adjustments will amount to a breach of the implied term of trust and confidence entitling the employee to claim constructive dismissal. In that case, the EAT acknowledged that there may be circumstances in which there can be a breach of the obligation to make reasonable adjustments which might not be regarded as a repudiatory breach of contract enabling the employee to resign and claim constructive dismissal. In light of the reason for the Claimant's resignation and her evidence that the lack of training was not considered by her to be a resignation issue, this case falls into that category.

51. We do not consider that the Claimant can rely on what she thought might happen in the future, especially when the facts as found show the opposite, namely, that the Respondent was taking action to address the matters upheld in her grievance. In fact, in support of this conclusion, the Claimant's resignation letter to Ms Massey says: "I must add that your support since my return has been excellent and I can't fault you for everything that you have sorted out and the support you have provided me. Thank you". The Claimant seeks to rely on an anticipatory fundamental breach in circumstances which clearly show she considered there had been no such breach. Applying the principles of the judgment in **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221**, we find there is no fundamental breach of the implied term of trust and confidence as pleaded by the Claimant and this claim is not well-founded.

REMEDY

The Claimant having succeeded in one head of her claim, the case will now be listed for a preliminary hearing for case management followed by a Remedy Hearing with a time estimate of 1 day (subject to the comments of the parties).

Employment Judge M Butler

Date: 2 September 2024

JUDGMENT SENT TO THE PARTIES ON

.....09/09/2024.....

.....
FOR THE TRIBUNAL OFFICE

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing, or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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