EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Ms Elizabeth Hickman **v** Northampton General Hospital NHS Trust

Heard at: Cambridge
On: 9 to 12 September 2024

Before: Employment Judge Andrew Clarke KC
Members: Ms C Smith
Mr J Vaghela

Appearances
For the Claimant: In person
For the Respondent: Mrs G Holden, counsel

JUDGMENT

1. The claims for:

    1.1 Failure to make reasonable adjustments,
    1.2 Disability discriminaiton contrary to s.15 of the Equality Act 2010,
    1.3 Harassment, and
    1.4 Breach of contract (being a failure to pay wages in respect of a period of notice)

    are all dismissed.

REASONS

Introduction

1. The claimant commenced her claim for constructive unfair dismissal, a failure to make reasonable adjustments, disability related discrimination, harassment and notice pay. As she lacked two years continuous service the claim for unfair dismissal was not allowed to proceed.

2. The nature and extent of the remaining claims was ascertained and the issues arising clarified at a preliminary hearing before Employment Judge

Manley on 12 October 2023. It has not been suggested that the list of issues was deficient and it is those issues towards which the evidence has been directed. However, when we come to deal with our decision on certain of the issues, we will point out certain aspects of the case which could have been presented differently, albeit we make clear now that our decision will be that this would not have made any difference to the outcome.

3. We were provided with a bundle of relevant documents and one of witness statements. We read all of the witness statements at the start of the hearing and the documents referred to within them. A few further documents were referred to (and read) as the hearing progressed.

4. Mrs Holden, counsel for the respondent, provided a helpful written opening. It contained an application to amend the already revised ET3 in four minor ways. The claimant having no objection, we permitted those amendments.

Evidence

5. We heard oral evidence from the claimant and three witnesses for the respondent. We record below some relevant observations on each.

6. <u>The claimant</u>:

   6.1 To take account of her disability we gave breaks as and when required and shortened hearing days. The claimant became very emotional and upset during cross examination, in particular, despite it being undertaken in a calm and non-confrontational manner. Dealing with the events of which she complains clearly upset her.

   6.2 She is a lady with an adamantine sense of right and wrong. She expected formality and due process in all things and appeared unsettled by informality and imprecision. She was clearly trying to give an accurate account of material events, but it was equally clear to us that she had replayed the events over and over in her mind, especially during her unfortunately frequent periods of hospitalisation since her employment ended, and we were concerned that aspects of her recollection were inaccurate because they represented a reconstruction of events to align with what she had persuaded herself to be the attitudes and intentions of the other participants in written and oral exchanges.

   6.3 By way of example, we note how her account of the meeting of 30 January 2023 has changed over time. Her initial handwritten notes are very similar to the notes taken at the time by the respondent's notetaker, Ms Gardener. Later typed notes add in points adverse to the respondent which are disputed. Her witness statement contained a further significant matter not dealt with in either note, which is disputed and which we find was not said. In oral evidence she for the first time recalled that the others at the meeting laughed at her and said hurtful things. If this had happened it would have been of such significance as to feature in the typed notes, at the latest. We

consider that it did not happen. We have no doubt that the claimant believes that the respondent's attitude to her was such that they were treating her allegations with contempt and derision. We find to the contrary. However, for these purposes, that does not matter. She now sees them as laughing at her, but we are satisfied that they did not do so at the time.

6.4 For all of those reasons we have treated her evidence with care and paid particular respect to what is said in the contemporaneous documents as providing a guide to what actually happened.

7. Ms Claudette Shapcott:

7.1 She gave her evidence calmly and carefully. Her manner of giving evidence and in particular when dealing with the claimant's obvious distress when talking of certain events, appeared to us to show real concern for the claimant. We consider that this concern existed and was manifested at the time of these relevant events. When she could not recall she said so. She was open as to her belief that more should have been done in mid-2022 to investigate whether the claimant still wanted to reduce her hours and to inform her of the impending change. We found Ms Shapcott an honest and straightforward witness.

8. Mr Jonathan Loasby:

8.1 We were unimpressed by Mr Loasby as a witness. We formed the view that he had little recall of the relevant events and was seeking to put the most favourable (to the respondent) interpretation on the documentary evidence. In reality, we felt that he was able to add little to the documents. He was, for example, unable satisfactorily to explain why his informal grievance investigation took so long and why, in particular, it took so long for him to speak to Ms Shapcott.

9. Ms Gardener:

9.1 She was very upset when giving her evidence. We were, in her case, again struck by her limited recall of events but reminded ourselves of the size of her job at the time. With a part-time deputy and two relatively junior assistants she had HR responsibility for some 3,500 employees of the respondent. We do not doubt the honesty or sincerity of her evidence. It was clear that she too had great sympathy for the claimant and had sought to help as best she could. Sadly, she appeared to have done little to spur on the grievance process. Further, the fact that her notes taken at the time were so sparse and never submitted to the claimant or Ms Shapcott for them to comment on what they were supposed to have said, made them of more limited use than notes from an HR professional ought, in our view, to be.

Findings of fact

10. The claimant was employed by the respondent from 22 November 2021 until her resignation with immediate effect on 30 January 2023. She was a Physician Associate ("PA"). A PA sees patients, may triage them and has limited prescribing and other powers. So far as the respondent is concerned, it employs a team of PAs who are expected to rotate between departments.

11. The claimant had not revealed any disability when completing her application form, despite specific questions directed to establish whether she was disabled and, if so, what adjustments might be needed. However, from at least April 2022 the respondent was aware that the claimant was disabled and it is conceded that she was at all material times disabled for the purposes of the 2010 Act.

12. In spring 2022, the claimant's then line manager learned of problems with the claimant's lower spine which were causing difficulties as regards aspects of her job which involved long periods of time on her feet. She commissioned an Occupational Health report on the instructions of Ms Shapcott. That assessment in April 2022 suggested that the claimant was likely to be disabled for the purposes of the 2010 Act and recommended a desk-based role. The claimant was then placed in the Covid Medicine Delivery Unit ("CMDU"), a desk-based PA role. She was also provided with auxiliary aids to assist with her sitting comfortably and working on a computer.

13. The claimant in effect worked a job share with another PA. The claimant did three days and the other PA the remaining two days in the working week. The claimant was at the same time undertaking further study and was in receipt of a bursary to support this.

14. In spring 2022, the other job sharing PA resigned and, at the same time, the respondent was already short of PAs. Recruitment efforts began at about this time.

15. In June 2022, the claimant told her then line manager that she would like to reduce her working hours from 22.5, ie three days a week, to 15, ie 2 days a week. The claimant was asked not to do this until after summer 2022 by Ms Shapcott due to the current shortage of PAs and the additional pressures likely to occur due to summer holidays. The claimant agreed. The respondent then sought a PA to work three days a week in the light of the claimant's request. The respondent's policies permit this process of agreeing a change in hours to be dealt with informally. We are satisfied that in June of that year when the claimant reported her intention to change from three days to two, in a meeting with other PAs which is minuted, the claimant intended that the change should take place at some time after the summer, but no date had been agreed upon.

16. Acting on that understanding reached in June, a new part-time PA was recruited to start in either November or December 2022. A new full-time PA was also recruited. This enabled the respondent to reduce the claimant's hours and completion of the necessary paperwork to effect the change from 1 September was started on 12 July 2022. The paperwork then passed through various people who needed to see it in order to effect the change.

17. We think that, before effecting the change, it would have been sensible for the respondent to check that the claimant still wished this change to take place and to agree a start date. We also note that the claimant never indicated any change of mind and we consider it likely that, had the claimant not subsequently been absent sick, that the change would have been effected in September without complaint. However, unexpectedly, the claimant received a notification on 24 August of the need to have further surgery on her spine. It was to take place on 31 August and the claimant was then off sick for a significant period of recovery.

18. On 4 September she was notified of the change in her hours. She was under some financial pressure at the time. She was in receipt of sick pay and could not work additional bank shifts at weekends, as she had habitually been doing. She did not want to reduce her working hors at that time. The only impact would have been to reduce her sick pay. On the day she received the notification she requested that the reduction in hours be reversed. This was done the following day.

19. Shortly thereafter she discussed the proposed reduction with Ms Shapcott and indicated that she still wanted to reduce her hours, but that her intention was to do this in about November 2022 when the job sharing PA started work. Ms Shapcott was quite happy to leave matters to be considered in November. In fact, the claimant did not want a reduction in November and Ms Shapcott was content to have both the claimant and the new PA working three days a week. There was apparently ample work and the budget could accommodate this.

20. Against the above background, we are satisfied that the reduction in hours announced to the claimant on 4 September, had nothing to do with her disability or her absence form 31 August which was associated with it. The process had been begun by the claimant's request in June and as we have said, we consider it likely that, had she not been off sick in early September, the reduction would have proceeded without complaint. We are also satisfied that the three day a week PA, who was recruited to start in November or December, was not recruited to replace the claimant but to work with her. The advert for the job showing that the PA was to work on three particular days confirms this. These were the three week days other than the two that the claimant had told her manager (and later her colleagues) in June that she wished to continue to work.

21. On 6 September 2022, Ms Shapcott emailed the claimant inviting her to a sickness absence review meeting. To do this she used the claimant's personal email address as she did not expect the claimant to be looking at work emails whilst sick. The claimant objected on the basis that she

frequently deleted personal emails. She asked the respondent not to use this account in the future. Ms Shapcott agreed, but in fact did so for work emails on three further occasions. Each time the claimant complained and Ms Shapcott apologised. We accept that this happened because Ms Shapcott had the claimant's personal email on her system and when she began to type the claimant's name that address was generated by the autofill function as the most recently used. She should, of course, have deleted it or taken greater care not to use it, however, we accept that the use of was inadvertent. We accept that the continuing use of her personal account annoyed the claimant a little as she felt it was inappropriate to send work related emails to a personal email address. The claimant is, as we have already noted, someone very concerned with due process and propriety, but we consider her annoyance to be mild having heard her evidence and seen the contemporaneous exchanges of emails with Ms Shapcott.

22. The meeting notified on 6 September took place on 6 October and was attended by the claimant, Ms Shapcott and Ms Gardener (as the HR representative). The claimant was still off sick and was suffering financially. Her sick pay entitlement had run out and her bursary had been suspended due to her sickness. She suggested working some bank shifts before, eventually, returning to work. Ms Shapcott and Ms Gardener were unhappy with that, taking the view that if she was unfit to work she was unfit to work bank shifts. Instead, they offered to extend her sick pay by another four weeks and then to undertake a phased return to work.

23. The claimant was offered, by letter, either that arrangement or a variation of it. She chose that arrangement. She was then to recommence work on Thursday 27 October from home. There was then to be a phased return over a four week period before returning to work at the respondent's premises. The phased return was to build from two hour shifts on the Thursday and Friday of that first week to, eventually, working her normal hours albeit from home. At the end of that four week period it was intended that she would return to work at the hospital.

24. Ms Shapcott discussed with the claimant what equipment she would need in order to work from home. It was agreed, at the claimant's request, that she would be provided with a laptop and a card reader to enable her to access the respondent's patient records and to send and receive documents within the respondent's system.

25. On 13 October, Ms Shapcott told another manager of the arrangements and asked the other manager to arrange for the equipment to be sent to the claimant. Ms Shapcott did this as she was about to go on holiday. Unfortunately, the other manager was taken ill before she could arrange the supply of the equipment.

26. On 25 October, the claimant emailed to query where the equipment was. She was told that Ms Shapcott was on holiday and the other manager who was supposed to deal with the matter was absent sick. Ms Gardener, who dealt with her email, suggested that the claimant start on 28 October as Ms

Shapcott was returning on 27th. It was intended that the claimant should send an email to Ms Shapcott asking her to deal with the matter of the missing equipment on her return. In fact, the equipment was not available as the claimant and Ms Shapcott had thought. The claimant had noted in an email that the department had a spare laptop and a spare reader. In fact, by this stage, it did not.

27. The claimant emailed Ms Shapcott on 27 October, but she did not see that email until the day following her return to work. She arranged for an interim solution to enable the claimant to work on the following Monday, 31 October, from home and for a more permanent arrangement to be put in place by the respondent's IT Department the following day. The claimant did not make any further requests for this or other equipment until she returned to work on site on 24 November. We consider that the respondent should perhaps have acted sooner to locate and supply the equipment sought and should have monitored the supply of the equipment to ensure that it was in place on time or that the inability to provide it had been discovered much earlier and dealt with. However, we do not believe that the failure to supply it or the failure to act more promptly had anything to do with the claimant's disability.

28. On 24 November, a return to work meeting took place between the claimant and Ms Shapcott. The outcome of the meeting is succinctly recorded in a form of that date signed by both ladies. Answering the question as to what adjustments would be needed in the future, Ms Shapcott recorded the following, "Desk based work for foreseeable future with further review to ascertain any health improvement or changes that will need to be accommodated."

29. The meeting can be divided into two parts. In the second part the claimant and Ms Shapcott had a discussion for which Ms Shapcott, to use her own phrase, "removed her manager's hat". The meeting began with a review of the claimant's health post-operation and the phased return. It was agreed that she would continue to need a desk-bound job for the foreseeable future. Ms Shapcott reminded the claimant that the CMDU job might not have a long-term future, as it was dependent on the provision of external funding, and that the work might be located into the community in time. The claimant accepts that this was well known. Ms Shapcott said that if this happened, they would need to look for another desk-based job for the claimant.

30. The claimant was deeply upset at the commencement of the meeting because there had been what she saw as errors in her pay and she disagreed with Ms Shapcott treating one absence as unpaid leave. The details of those matters are not material as it is agreed that Ms Shapcott contacted appropriate people there and then and resolved the matter straightaway. The claimant acknowledged at the time that Ms Shapcott was trying to be helpful and supportive during this first part of the meeting. We find that what happened in the second part of the meeting caused the claimant to see the first part in a different light.

31. The claimant's upset regarding pay issues was acute because money was tight and, as she told Ms Shapcott, she was struggling to pay her mortgage. So, as they were readying themselves to leave the meeting, after signing the paperwork already referred to, the claimant's problems were briefly discussed. Ms Shapcott asked whether the claimant had considered asking for a mortgage holiday, taking a lodger or even selling her house. Ms Shapcott meant well, but the claimant regarded this as inappropriate for a manager to raise with her even despite the fact that her financial problems had been raised by her in the meeting.

32. As she reviewed the whole of that meeting in the light of those, to her, inappropriate comments, she reconsidered what had gone before. She now saw the reference to the prospect of the CMDU job ending as threatening and amounting to telling her that she needed to find a new job. She began to suspect that Ms Shapcott really did not want her as an employee and that her inability to rotate between jobs was resented by her and her colleagues. Ms Shapcott had said no such thing, but in the claimant's heightened emotional state she misinterpreted Ms Shapcott's comments in the light of the matters which occurred at the end of the meeting.

33. She told us that she felt that her whole career as a PA, which she had worked so hard to establish over five years of study, was disappearing. Given her state of health at the time we are sure she must have had such thoughts but she was wrong when she persuaded herself that Ms Shapcott's comments and conduct was aimed at removing her as a PA. On the contrary, having examined the contemporaneous documents, seen how Ms Shapcott dealt with matters in early October and having heard Ms Shapcott's evidence, we are satisfied that she was determined to do all that she reasonably could to help the claimant and to accommodate her continuing to work as a PA, albeit in a desk-bound way.

34. The following day, 25 November, the claimant raised a grievance about the conduct of the return to work meeting and alleged that Ms Shapcott had acted inappropriately. She complained about comments to the effect that she should look for another job as she was holding herself and others back by occupying a PA post the duties of which she could not perform. She also complained about the comments made about selling her house and so forth. As we have set out above, we do not consider that some of those comments were made at all and we have set out above what we consider was actually said.

35. Mr Loasby, assisted by Ms Gardener, was appointed to consider the grievance. They met with the claimant on 5 December in order to discuss it. Mr Loasby was Mr Shapcott's line manager.

36. As a result of hearing from the claimant Mr Loasby sought to remove some of Ms Shapcott's line management responsibilities for the claimant so that, as far as practicable, in the interim while the grievance was being resolved, she would deal with him. He gave to the claimant his telephone number so that she could contact him if she needed to. He wanted, in accordance with his understanding of the respondent's grievance policy, to deal with matters

informally if he could. That, we are satisfied, had been his intention from the moment he knew of the grievance. The claimant told him that two colleagues would support her claims, but it was clear that neither had been present at the return to work meeting. Mr Loasby contacted both, one was absent on holiday and he did not seek to contact her again and the other declined to become involved.

37. We do not think that Mr Loasby either properly explained to the claimant the difference between the process that he intended to adopt, namely to deal with the grievance informally and how the matter might progress as a formal grievance if this did not resolve matters, or explain to her the possibility of her asking him to deal with the matter formally from the start.

38. Mr Loasby was due to meet with Ms Shapcott to discuss the grievance on 7 December, that is a couple of days after he had seen the claimant. Unfortunately, that meeting had to be postponed and it was re-scheduled for 19 December, hence, that meant a further delay of some 12 days. The consequence of dealing with the matter informally in the way that Mr Loasby did, was that no rigorous fact finding process was undertaken; no detailed notes of meetings were prepared and shared and no clear outcome was ever set down in writing. We do not consider that this was because of the claimant's disability but because of Mr Loasby's view that this approach was best. In fact, we consider that the approach adopted was helpful neither to the claimant nor to Ms Shapcott, nor to the respondent.

39. It seems to us that, the essence of an informal process adopted in these circumstances is, as Mr Loasby himself asserted, that it might offer the prospect of resolving matters. In order for it to do that, such an informal process has to proceed speedily and, as will become apparent, this one did not do so.

40. By 16 December at the latest, Ms Shapcott became aware that the claimant had raised a grievance and was alleging that she had upset the claimant. She did not know the details of the allegations, but as their only substantial dealings since the claimant's return to work had been the return to work meeting itself, she assumed that it must relate to that.

41. As a result, Ms Shapcott went to see the claimant in her office in order to clear the air. Given that the grievance process was unfinished, and that she did not know the details of what was alleged, this was probably ill advised. However, we do not doubt Ms Shapcott's sincerity in wishing to try to resolve matters with the claimant and to apologise for inadvertently causing her distress.

42. What surprised and disturbed us was that, given his wish to act informally, by this stage three weeks had passed without Mr Loasby even speaking to Ms Shapcott in order to hear her side of events, or trying to do anything to bring the parties together.

43. When the claimant and Ms Shapcott met the claimant did mention her concerns regarding what was said at the return to work meeting about future

work, but we find that the focus of the claimant's complaint, as explained to Ms Shapcott, was Ms Shapcott's suggestions about her mortgage problems. The claimant was upset that her manager should raise such matters in conversation with her. Ms Shapcott apologised and explained that she had not intended to offend or to upset the claimant. They then proceeded to discuss various departmental issues and Ms Shapcott felt that the claimant had accepted her apology and that they could move on. We understand the basis upon which Ms Shapcott formed that view. However, that was not the claimant's attitude, certainly by shortly after the meeting.

44. The claimant shortly thereafter complained to Mr Loasby about Ms Shapcott coming to see her. Both Ms Shapcott and the claimant made a note of their conversation. It is clear from her note and from her evidence that the claimant considered this a breach of procedure and inappropriate on the part of Ms Shapcott. She also said that she felt that Ms Shapcott was admitting that her version, that is the claimant's version, of the return to work meeting was accurate. Rather than help, as Ms Shapcott had intended, her approach to the claimant seems further to have reinforced in the claimant's mind the mistaken notion that Ms Shapcott wanted to remove her. We consider Ms Shapcott's note to be an accurate reflection of the conversation and the claimant's notes to reflect how she saw the conversation when she reviewed it, rather than what actually happened.

45. When Mr Loasby, Ms Gardener and Ms Shapcott eventually met on 19 December Ms Shapcott gave an accurate account of the return to work meeting. Ms Loasby was of the view that mediation might well be the way forward. Whether at this stage, or at some moment earlier, he formed the view that external mediation would be a good idea. Unfortunately, due no doubt to pressure of work and seasonal holidays, he did not arrange an outcome meeting before the claimant was again admitted to hospital having collapsed on 9 January 2023. Again, we were struck by the lack of urgency on Mr Loasby's part. It should have been obvious to him by now that if an informal resolution via external mediation was to succeed, matters needed to be dealt with swiftly. And thus, the possible advantage of this approach was completely lost.

46. The grievance outcome meeting was eventually arranged for 30 January after the claimant had returned to work. Mr Loasby explained that he could not decide the grievance in the claimant's favour as there were disputes about what was said in the return to work meeting. Whether that amounted to an adequate analysis of the situation is perhaps not material. However, we would suggest that an adequate analysis (even one intended to lead to external mediation) would have required a far more detailed and nuanced consideration of what Ms Shapcott and the claimant each said had happened. He told the claimant that he suggested neutral mediation. We consider that in order to persuade her of this as a sensible way forward at this stage, now several weeks removed from the events in question, a much more detailed analysis of the respective positions was needed in order to show why he had reached this conclusion and why he considered that mediation could help. He also needed to explain how the parties were to

work together in the interim. We note that the language chosen to give such minimal account as was given of the position adopted by Ms Shapcott was itself inappropriate. The claimant was told that Ms Shapcott did not recall saying what the claimant alleged when in fact she denied what were, to the claimant, the key aspects of it.

47. Ms Gardener told us that she considered that there was no difference between the two ways of stating the matter. We disagree. In order to take this matter forward it needed to be clear to the claimant that she and Ms Shapcott disagreed as to key aspects of the meeting and we consider that, in the circumstances (of delay and the claimant's character) it would have been preferrable to explain what Ms Shapcott was saying and where they disagreed.

48. The claimant refused the prospect of neutral mediation. She made clear that the only outcome that she would accept would be the disciplining of Ms Shapcott. Mr Loasby was clear that on the material before him he could not so proceed. The claimant then announced that she was resigning with immediate effect but would complete her shift on that day. Mr Loasby and Ms Gardener did not try to dissuade her, but they did ask her to take some time to think whether this was really what she wanted to do.

49. At this meeting the claimant, for the first time, had alleged that Ms Shapcott had given her "bad looks" as a result of the grievance. In her witness statement the claimant identified two occasions on which this was said to have happened. The first was the day after the grievance was submitted. Ms Shapcott did not then know of its existence. The second was on 15 December, the day before Ms Shapcott came to see her. We consider it more likely than not that Ms Shapcott did then know of the grievance, but not of its detail. Having heard the evidence of both the claimant and Ms Shapcott we think that Ms Shapcott did not give her some kind of dirty look on that occasion. We were struck by the claimant's willingness to accept that she might be mistaken, albeit that her view that she was not was reinforced by the fact that someone who had been with her had also thought that there might have been a dirty look. We were also struck by Ms Shapcott's general support for the claimant, her visit on the following day to the claimant and Ms Shapcott's reaction as a witness to the suggestion that she would do such a thing.

The law

50. The respondent's closing submissions set out in detail certain basic and uncontroversial legal principles before turning to the application of the law to the facts for which the respondent contended.

51. The claimant dealt substantially with the facts in her written closing submissions and did not quarrel with what the respondent said as to the law. The parties' submissions on fact are dealt with, where appropriate, in our findings of fact and when applying the law to the facts.

52. We turn first to the burden of proof. In cases of discrimination the claimant bears an initial burden of proof to establish facts from which a tribunal could decide, in the absence of any acceptable explanation, that the respondent has contravened a provision of the Equality Act (see s.136(2) of the 2010 Act). It is not necessary for us to consider the application of s.136(2) in any detail. We have been able to reach findings of fact as to the events and as to causation and motivation without resort to the question of who bears the burden of proof on what.

53. We turn next to the issue of whether the claims were brought in time. Although the preliminary hearing note and the list of issues suggest that the relevant cut off day for a claim bring brought in time is a little earlier, we are satisfied that claims relating to matters before 1 December 2022 are prima facie out of time unless:

    53.1 The acts can be shown to be part of what are colloquially referred to as continuing acts, or

    53.2 The secondary limitation period can be invoked, here by the claimant showing it to be just and equitable to extend time.

54. We need not spend time dealing with those matters in any detail in the light of the findings we shall set out below on the matters potentially out of time.

55. We turn next to the failure to make reasonable adjustments. The duty is set out in s.20 of the 2010 Act as follows:

> "20 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.
>
> …
>
> (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."

56. We also remind ourselves of the provisions of s.21(1) and (2) as follows:

> "21 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."

57. S.22 provides that regulations may be made, for example to exemplify or explain the provision in s.20(5) relating to the nature of an auxiliary aid. We have considered the 2010 Regulations, but the definition of an auxiliary aid is not of particular assistance save that it says that "aids" includes equipment.

58. Hence, s.20 provides (for present purposes) two routes to a successful claim. The first route being based on the establishment of a provision, criterion or practice. The second relating to the failure to provide an auxiliary aid.

59. Both the PCP route and the auxiliary aid route to establishing a duty to make reasonable adjustments require a comparative exercise. A substantial disadvantage in comparison to a non-disabled person must be established and s.212(1) provides that substantial here means more than minor or trivial. Cases such as Ishola v Transport for London [2020] EWCA Civ 112 show that whilst a one-off act can evidence a PCP, the idea behind the comparison exercise is that something which would be done or applied to non-disabled employees generally, or within a particular group of employees of which the claimant formed part, places the claimant at a substantial disadvantage because of her disability. Even where an employer knows that an employee has a disability it will not be liable for a failure to make adjustments if it does not know and could not reasonably be expected to know that a PCP, or the failure to provide equipment, would be likely to place that employee at a substantial disadvantage (see paragraph 20(1)(b) of Schedule 8 of the 2010 Act).

60. We next turn to the law relating to discrimination arising from disability which is found in s.15 of the 2010 Act, which provides as follows:

> "15 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.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

61. There are two distinct steps which a tribunal needs to take when considering such a claim.

    61.1 Did the claimant's disability cause, have the consequence of or result in the "something"?

    61.2 Did the employer treat the claimant unfavourably because of that "something"?

62. In this case it is important to separate out the elements of the second point. Was there unfavourable treatment, and, if so, was it causatively linked to the "something"? The causative link is expressed in the words "arising in consequence of" in s.15. Whether that is the same as "because of" or whether it has a slightly wider definition, has been the subject of some judicial debate. In, for example, Charlesworth v Dransfields Engineering Services Ltd EAT 0197/16, Simler J (as she then was) contemplated the possibility that the test might be slightly wider. What is clear, however, is that a significant influence on the decision making is required, whether operating consciously or unconsciously on the relevant mind or minds. We were addressed on this in submissions but, ultimately, we do not think that this case turns on any such distinction as may exist between "arising in consequence" and "because".

63. We next turn to the law on harassment. That is found in s.26 of the 2010 Act.

> "26 Harassment
>
> (1) A person (A) harasses another (B) if—
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of—
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> (2) A also harasses B if—
>
> (a) A engages in unwanted conduct of a sexual nature, and
>
> (b) the conduct has the purpose or effect referred to in subsection (1)(b).
>
> …
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
>
> (a) the perception of B;
>
> (b) the other circumstances of the case;

> (c) whether it is reasonable for the conduct to have that effect."

64. Disability is a protected characteristic for the purposes of this section (see sub section (5)).

65. "Unwanted" in s.26 means "unwelcome" or "uninvited" (see EHRC Code at para 7.8). The test is substantially subjective. We need not, on the facts of this case, consider the possible limitations on subjectivity in this context. We do need to consider both the purpose and the effect of any unwanted conduct. The concepts of violating dignity and of creating the kind of environment referred to in the section are factual and the words have their ordinary meanings. The words describe something intended or caused without intention which is more than trivial. In considering whether conduct has the required effect we must look beyond what the claimant perceived, albeit that is relevant, and consider all the circumstances of the case and whether it was reasonable for the conduct to have that effect upon the claimant. The unwanted conduct must relate to, in this case, disability. Violating her dignity or producing such an environment for a reason unrelated to disability is not enough. It follows that showing that the claimant was disabled at the material time will not of itself supply the relevant connection between the unwanted conduct and the forbidden effect.

66. Finally, we turn to the law relating to notice pay. A former employee can claim a sum in respect of what would have been the pay earned in their notice period if they were dismissed without notice and such dismissal was in breach of contract. Where the employee has resigned, they need to show that the employer had breached the contract of employment in a fundamental way (ie a repudiatory breach) indicating an intention on the employer's part no longer to be bound by one or more of the essential terms of the contract, including the implied term found in all contracts of employment as to trust and confidence. The claimant must then have resigned in response to that breach of contract.

Applying the law to the facts

67. We turn first to the reasonable adjustment claim and to the PCP route. The PCP relied upon in this case is set out in the list of issues and is as follows:

> "Not providing the necessary equipment to enable the claimant to work from home between the end of August 2022 and mid November 2022."

68. At the time, and in her witness statement, the equipment was identified as being the laptop and card reader referred to above. During the course of evidence this position was changed a little and we deal with that below.

69. The alleged PCP is not, in our view, a PCP at all. It is a description of how the claimant is said to have been treated. It might be said that the PCP was

that other non-disabled staff were given equipment to work from home and she was not but:

69.1 We have no evidence directed to homeworking by others;

69.2 That does not give rise to a PCP either, rather it might give rise to a direct discrimination claim if the claimant was not provided with that with which others were provided in order to work from home, and

69.3 It would seem to us that such a direct discrimination claim would be answered by showing that the claimant intended to provide equipment but was frustrated by a combination of illness and the lack of equipment. Hence there would seem to us, on the facts of this case, to be no prospect of showing less favourable treatment never mind that the disproportionate treatment was because of disability. Hence, we have not contemplated exploring any late amendment to the claim.

70. Furthermore, the factual basis of the alleged PCP is not made out. There was no need to, or request to, supply equipment until the claimant's return to home working on 27 October and the failure relates only to 27 and 28 October, for which the claimant was paid. Thereafter, the equipment was not provided, but an alternative way of working from home was and the claimant did not complain at the lack of equipment.

71. When cross examining the respondent's last witness, Ms Gardener, the claimant suggested that she had not been provided at home with the chair and other aids that she had whilst at work. In fact, she had never asked for these to be provided even when specifically asked by email what equipment she might need. So, the respondent could not reasonably be expected to know that she might need these.

72. Hence, this claim, using the PCP route, cannot succeed.

73. We turn next to the reasonable adjustment claim using the auxiliary aid route. We remind ourselves that this is again a comparative exercise. We do not consider that the lack of a computer or card reader placed her at a substantial disadvantage compared to a non-disabled person. Neither a disabled nor a non-disabled person could work without access to the internet via a computer and access to the respondent's systems. We question whether these items are properly described as auxiliary aids in any case. But, even if they are, the point we have made above is fatal to this way of putting the claim. Again, this appears to us more like a direct discrimination claim, but such a claim would fail for the very reasons set out above. The chair and other equipment supplied at work certainly are auxiliary aids but the respondent was never asked to supply them to the claimant in order to work at home. Hence, the claim will be bound to fail if aimed at the failure to provide them for the reasons already given.

74. Next we turn to the discrimination arising from disability claim under s.15. The claimant relies upon four instances of alleged unfavourable treatment and we will deal with each in turn.

    74.1 The first allegation is that Ms Shapcott made several comments in the return to work meeting on 24 November about which the claimant then complained in her grievance. As to that alleged unfavourable treatment and its consequence:

        74.1.1 Only certain of the alleged comments were made.

        74.1.2 We do not consider that any of the comments made amounted to unfavourable treatment. Ms Shapcott was fairly and sensibly setting out her view of the future and the references to how the claimant might deal with her mortgage difficulties were made when the claimant invited such comments by talking about those difficulties.

        74.1.3 Even if any of those comments regarding the mortgage could be said to amount to unfavourable treatment, their making was not influenced at all by the claimant's disability or her recent absence.

        74.1.4 The comments about future work were, of course, related to the disability but they were not made because of the claimant's recent absence, but because of her disability generally. Hence, they do not have the required link to the "something" relied upon in this case, namely the absence from 31 August. In any event, as we have found, their being made did not amount to unfavourable treatment.

    74.2 The second basis upon which the claimant alleges unfavourable treatment is by reference to Ms Shapcott authorising a reduction in the claimant's working hours with effect from 1 September 2022. Hence, we turn to consider whether that was unfavourable treatment and, if so, whether the claim is made out.

        74.2.1 The treatment was unfavourable in the sense that, at the time it was announced to the claimant she no longer wanted to make the change.

        74.2.2 The decision to change and to effect the change and announce it were unrelated either to the claimant's disability or to her recent absence. When the change process was commenced in July the claimant was at work and the need for surgery on 31 August was unknown to anyone. What happened thereafter was simply a following through of the process. No-one on the respondent's part gave any thought to the possibility that the claimant might no longer want to reduce her hours.

74.2.3 Even if the claimant's case was changed so that her complaint was that the failure to consult her about the change just before implementation became the unfavourable treatment, we do not consider that that would assist her. Had she been consulted prior to being told that she needed the surgery, which she was told of on 24 August, we think on balance that she would have said that she still did want to make the change. Any failure to ask her later had nothing to do with her disability or the absence. She was simply not asked because an assumption was made that she still wanted to make the change.

74.3 We then turn to the third alleged unfavourable treatment; this is the failure to provide the necessary equipment to enable the claimant to work from home. As to that:

74.3.1 As we have set out above, the failure related only to a very short period of time (so far as the laptop and reader were concerned) and is explicable by lack of any request (so far as the chair and so forth are concerned).

74.3.2 Such failures could amount to unfavourable treatment and we proceed on that basis although, as she could work from home from 31 October, the impact of the treatment was for a very short period of time and certainly did not impact on what she was paid.

74.3.3 Fatal to this aspect of the claim is that the failures had nothing whatsoever to do with the claimant's disability or her absence for the reasons we have set out above.

74.4 Finally, we turn to the allegations that there was unfavourable treatment by Ms Shapcott arranging to employ another person on the claimant's contract. There is a short answer to this claim. There was no such person employed as we have set out above.

74.5 We have not dealt with the justification defence because it is our view that in order to consider it against the background of our findings to the effect that this claim under s.15 fails for the reasons we have given would be entirely artificial.

75. Hence, the claim under s.15 must fail.

76. We next turn to the harassment claims. Again, four matters are relied upon this time as unwanted conduct. And again, we deal with each separately.

76.1 The first unwanted conduct is said to be Ms Shapcott's comments at the return to work meeting:

76.1.1 We have summarised our findings in this regard when dealing with the s.15 claim.

76.1.2 We consider that the comments in relation to future work did relate to the claimant's disability but were not unwanted. Even if they were, they did not have the forbidden purpose or effect.

76.1.3 Of themselves, as we have just found, those remarks did not have the forbidden effect. The claimant's reaction to and re-casting of what was actually said was a product of her reaction to the comments made with regard to her mortgage problems. We doubt that they could be said to have had the forbidden effect but, even if they did, and even if they did when taken together with the other comments, it was not reasonable for them to have done so. Ms Shapcott was setting out her position as to the future and her comments on what the claimant was saying as regards her mortgage problems, both fairly and sympathetically. In so far as the employment future was concerned, it was her job so to do and so far as the mortgage related comments were concerned, she was doing it in response to the claimant appearing very upset as regards her financial position.

76.1.4 Indeed, we do not consider the mortgage problem comments to have been unwanted. The claimant told the respondent of her problems. It does not seem to us fair or sensible then to characterise a perfectly reasonable and understandable response as being unwanted. But even if we are wrong on that, Ms Shapcott did not so respond because of the claimant's disability, he was simply trying to be sympathetic to a colleague who had explained her financial difficulties to her.

76.1.5 For the avoidance of doubt, the making of any of those comments did not have the forbidden purpose. We say that by way of summary of points that we have made at various places above. We doubt that the claimant's adverse reaction later amounted to evidence of the required effect. But, in any event, that effect was unreasonable. As we have said, the claimant initiated the conversation and invited the comments and they were made by someone who she herself described in relation to aspects of the meeting as being helpful and sympathetic.

76.2 We then turn to the repeated sending of emails about work related matters to the claimant's private email address:

76.2.1 This was undoubtedly unwanted conduct.

76.2.2 It is equally beyond doubt that it did not relate to the claimant's disability.

76.2.3 The first such email was not, in our view, a work related email at all. It was certainly sent to the claimant's email address quite deliberately. The remaining three were sent to that private email address in error.

76.2.4 In no case was the purpose the forbidden purpose.

76.2.5 Nor do we think that the sending and receipt of those emails had the required forbidden effect. The claimant's emails complaining of the receipt of work related emails on her private account are mild mannered and do not display even significant annoyance. She seemed more concerned with the respondent's procedural failings and risk to the respondent of sending such information to an unsecured email address. In any event, in all the circumstances, it would not be reasonable for the conduct to have that effect.

76.3 Next, we turn to Ms Shapcott asking the claimant about the grievance on 16 December 2022:

76.3.1 Although we disagree with the claimant's description of what happened at that meeting, the approach by Ms Shapcott to discuss the grievance was clearly unwanted conduct.

76.3.2 However, it did not relate to the claimant's disability. Ms Shapcott approached the claimant because she learned that she had upset the claimant and she wanted to address this.

76.3.3 Ms Shapcott did not act with the forbidden purpose.

76.3.4 We doubt that the approach by Ms Shapcott had the forbidden effect but, if it did have that effect on this claimant, that was unreasonable. Ms Shapcott was seeking to address the claimant's concerns by talking to her, and the cause of the concerns was a mischaracterisation, in the main, by the claimant of the meeting giving rise to the concerns.

77. Finally, we turn to the alleged giving of bad looks to the claimant by Ms Shapcott. There is a short answer to this. There were no such bad looks.

78. Hence, the harassment claim in each of its aspects must fail.

79. Finally, we turn to the claim in respect of notice monies.

79.1 We consider that there was no repudiatory breach of contract on the part of the respondent. We have criticised several aspects of the respondent's conduct over the period from mid-2022 onwards but neither singly, nor taken together, do they amount to a repudiatory breach of contract.

79.2 In any event, the claimant did not resign for that reason, she resigned because the respondent would not discipline Ms Shapcott in circumstances where the respondent had no basis to discipline her.

We also note that, having reviewed the evidence, there was objectively no justifiable basis for disciplining Ms Shapcott even had a full investigation taken place. Hence, the claim for notice monies must also fail.

80. For all of those reasons, each claim brought by the claimant must fail and is dismissed

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Employment Judge Andrew Clarke KC

Date: 12 September 2024

Sent to the parties on:
16 November 2024

T Cadman
For the Tribunal Office

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