EMPLOYMENT TRIBUNALS

Claimant: Louise Carter

Respondent: EDF Energy Customers Limited

Heard at: Exeter ET (in person and by CVP) **On:** 2-5 December 2024

Before: Employment Judge Oldroyd
Estelle Smillie
Rachael Barrett

For the Claimant: In person (by CVP)

For the Respondent: Mr Brown (Counsel)

WRITTEN REASONS

Introduction and summary

1. The Respondent is part of an energy retailer. It is a very significant enterprise with hundreds if not thousands of employees based in the UK alone.

2. The Claimant began her employment with the Respondent on 5 May 1992 as a Customer Services Adviser. The role was desk based and involved dealing with customer complaints and queries.

3. In November 2001, the Claimant began permanent home working with a requirement that she commute to the Respondent's Exeter office once a month. This coincided with the Claimant becoming disabled with both back pain and menopausal symptoms. The Claimant says that her disability meant that she was unable to attend the Exeter office as required.

4. The Claimant fell into dispute with the Respondent and raised a grievance in respect of issues relating to her disability and the requirement that she must commute to Exeter monthly. The grievance and a subsequent appeal were not upheld.

5. The Claimant resigned on notice on 9 November 2022 with her effective date of termination being 9 December 2022.

6. In this claim, the Claimant says that:

    a. She was the subject of discrimination arising out of her disability in that she was made the subject of performance management.

    b. She was subjected to indirect discrimination as the requirement that she attend the Exeter office monthly was policy that put her and a relevant group at a disadvantage.

    c. She was the subject of harassment in that derogatory comments were made to her about her menopausal symptoms.

    d. She was the subject of victimisation in that, following her grievance appeal, it was suggested that her ongoing employment may not be viable.

    e. She was constructively dismissed because her treatment over a period of time breached the implied duty of trust and confidence in the employee / employer relationship and left her with no option but to resign. The Claimant says that she was alternatively made redundant and entitled to a redundancy payment.

7. A claim for unpaid wages was resolved prior to the hearing.

8. The Respondent accepts that the Claimant had a disability but it denies the claims. The Respondent's very broad position is that the requirement for the Claimant to commute monthly to Exeter was one that it was able to contractually impose and it was a reasonable requirement. Further, the Respondent maintains that it properly supported the Claimant and made reasonable adjustments in respect of her disabilities and she resigned because she did not wish to commute at all. The Respondent denies that derogatory comments were made. The Respondent also says that the discrimination claims are out of time.

Detailed background and factual findings

The Claimant's conditions of employment

9. The Claimant's conditions of employment, she accepts, were subject to a collective agreement negotiated between the Respondent and the Claimant's trade union (the **Collective Agreement**).

10. There are two material terms of the Collective Agreement that are relevant to this claim:

    a. The Collective Agreement sets out a grievance procedure to which there were 4 stages. Stage 1 involved the submission of a grievance. Stage 2 requires the investigation of the grievance and the production of findings. Stage 3 involves an appeal process. If required, Stage 4 provides:

"Where a grievance is related to the application of terms and conditions of employment ... the matter may be referred to the Local Employee Committee"

There are two points to make about stage 4 as a matter of construction.

(i) First, either the Respondent or Claimant *may* invoke it, but neither is obliged to.

(ii) Second, stage 4 is limited to dealing with disputes over the application of the Collective Agreement as opposed to the particular grievances of a given individual such as the Claimant.

b. Paragraph 3.14 of the Collective Agreement relates to travel and provides:

"Most employees will normally solely work at their place of employment. From time to time however employees will be required to attend work at other locations for example to participate in meetings, training or provide additional resource … where it is necessary for employees to extend their working day … they will be entitled to either excess travel payment or time off in lieu. An agreement must be reached by both parties … car allowances will be paid … cost for travel will be reimbursed"

In respect of this paragraph:

i. It is clear that employees would be designated a home office, but they were contractually obliged to work in locations other than their home office, albeit on a "*from time to time*" basis for which they would be remunerated both in terms of travel time and expenses.

ii. If travel to another location involved an employee's usual working day being extended, the Claimant would be remunerated for that extension. The reference to both parties having to "*agree*" is a reference to how that remuneration was to be agreed. It did mean that the Claimant had the option of not agreeing to travel to another office location as the previous paragraph makes it clear this is "*required*".

Project Pluto and changes to the Claimant's home office

11. As from 1 April 2006, the Claimant's designated home office was in Plymouth and she would commute each day from her home near Victoria in Cornwall. Victoria is northwest of Plymouth. The commute time to Plymouth was about 50 minutes and to Exeter it would have been about 1 hour and 20 minutes. This assumes there are no stops and a normal degree of traffic. Obviously, these times are rough averages.

12. On or around 1 March 2020, the Claimant began to work from home. This coincided with the first national lockdown arising out of the Covid pandemic. This did not involve a formal contractual change to the Claimant's designated home office, but it was a temporary state of affairs that the pandemic brought about. This arrangement plainly suited the Claimant and the flexibility it gave her (in terms of assisting with school runs, for example). The Claimant said on one occasion that *"she loves working at home".* The Claimant certainly felt able to carry out her work remotely without any issue.

13. The Claimant was not full time at this point but was working 15 hours over 3 days in each week.

14. Around this time, the Claimant began suffering from significant health issues that saw her referred for various occupation health assessments and embark on periods of sickness absence. These health issues involved back pain and menopausal symptoms which are described in some detail in a disability impact statement that the Claimant prepared for the purposes of these proceedings. The Claimant also later began to suffer from depression as result of her health issues and bereavements.

15. The Respondent accepts that Claimant had a disability in the form of back pain and menopausal symptoms for the purpose of these proceedings.

16. On 21 December 2020, the Claimant moved from Victoria to Washway in Cornwall. This move did not materially alter the Claimant's commute time to Exeter, but it would have been a theoretically longer drive to Plymouth.

17. In early 2021, the Respondent was contemplating the closure of its Plymouth office and transferring individuals such as the Claimant to its Exeter office. This potential closure was known within the Respondent as Project Pluto.

18. The Respondent duly began a period of consultation with its employees on 25 May 2021. Consultation meetings took place with the Claimant and her union representative of on 14 June 2021, 3 August 2021, 4 October 2021 and 20 October 2021.

19. Notes of these individual meeting were taken. The Claimant gave evidence in respect of these meeting as did Jo May, an operations manager who conducted 2 of the 4 meetings with the Claimant.

20. In these proceedings, the Claimant contends that there was a lack of consultation with her in respect of the closure of the Plymouth office and the change to her place of work. We do not accept this contention. In relation to these consultation meetings, we find that:

    a. The Claimant's place of work was discussed, and the notes of the meetings reveal that there was very active discussion on the issue. Indeed, it was agreed, as a result of this consultation, that the Claimant

would be re-classified as a 'homeworker' which the Claimant was very pleased with.

b. It was made clear to the Claimant in the consultation process that, although she was a homeworker, she would be required to travel occasionally to the Exeter office. We are satisfied that the Respondent was entitled to contractually require the Claimant to travel occasionally to the Exeter office - say once a month – as this was consistent with paragraph 3.14 of the Collective Agreement.

Whilst the Claimant did not agree that she should have to travel to Exeter at all, that does not mean that she was not consulted in respect of that proposal.

21. On 2 November 2021, the Claimant was formally advised that the Plymouth office would be closing at the end of the year and that she would become a 'home worker' affiliated to the Exeter office as from 1 December 2021. As the Claimant was working from home, she was not expected to attend the Exeter office every day, but about once a month for things such as training and one to one meetings.

22. From this moment, it was clear that the Respondent and the Claimant were in dispute. The Respondent was clear the Claimant should attend the Exeter office once a month (a point confirmed to her by e mail dated 8 June 2022). The Claimant was clear that she need not attend at all.

Was the request that Claimant attend the Exeter office once a month reasonable?

23. The Claimant says that the requirement that she attend the Exeter office once a month was unreasonable. We do not agree.

24. The Respondent gave evidence as to why the Claimant was required to attend the Exeter office about once a month and it is summarised by the evidence of Ms May at paragraph 13 of her Statement:

"I considered the expectation of monthly travel to the Exeter office was reasonable … I considered there were benefits to being in the office such as in-person contact with her team, opportunities for collaboration, attending training and ensuring she did not feel isolated …"

25. This evidence was supported by Mr Edwards, the Claimant's line manager in his Statement:

"Whilst I did not have any part in the decision to require Louise to attend the office once per month, as Louise's line manager I felt this was a reasonable request as it would provide contact time with the team, training opportunities, improve communication within the team, help build trust and improve our working relationship…"

26. We are very satisfied, accepting as we do the evidence of both Ms May and Mr Edwards (neither of whom are now employed by the Respondent), that it was

reasonable for the Claimant to attend the office once a month in this way and for the reasons they set out. This is of course subject to making reasonable adjustments for the Claimant's disability and having regard, in that context, to the extent to which travel was possible for her.

Was it reasonable for the Respondent to expect the Claimant to attend the Exeter office in light of the Claimant's disability?

27. The Claimant's position on this issue in oral evidence was that a commute to Exeter was simply impossible as she was unable to drive long distances because her back condition, in particular, required her to take breaks every 30 minutes. The Claimant says that the impossibility of long-distance travel was supported by medical evidence and in particular a report prepared by Dr Sarah Jackson (the Respondent's Medical Officer) dated 1 September 2022. The report states:

"Ms Carter has had lumbar back pain for three years … She has classic pain in static postures and for her driving over 30 minutes is a significant challenge and would likely necessitate multiple stops, which would further prolong her journey…"

28. The Claimant also said in evidence that her menopausal symptoms affected her ability to drive longer distances over, say, 30 minutes because these symptoms affected her ability to concentrate. Whilst we accept that the Claimant did suffer from menopausal symptoms that affected her concentration, we do not accept that these symptoms affected her ability to commute to Exeter. This on the basis that the Claimant did not ever suggest this to various occupational advisers that she met or to the Respondent. It was raised for the first time in these proceedings.

29. In terms of the Claimant's back pain, we are satisfied that it was an issue but that it did not make a monthly commute impossible (as opposed to, say, inconvenient). To this end:

    a. In the various occupational health reports we have reviewed, the Claimant did not suggest the commute was impossible but more that it could be managed with breaks or as they were sometimes referred to "*micro-breaks*". The Claimant herself acknowledged this during her grievance hearing when she said:

       "Occupational Health said I would need to get out of my car on the journey to Exeter on the journey to Exeter so the travel time would increase".

       Even the report of Dr Jackson, which is the high point of the Claimant's evidence, suggests that travel to the Exeter office would not be impossible but simply '*prolonged'*.

    b. In various discussions with the Respondent, the Claimant did not suggest that commute was an impossibility. For example:

i. By letter dated 8 June 2022, the Claimant was given a detailed explanation of why she was being asked to attend the Exeter office. This followed a meeting took place on 16 May 2022 between the Claimant and Ms May. The letter notes:

"*I was pleased to hear there were no personal or health related issues that prevented you from travelling to and attending the office*".

ii. Following a discussion on 18 October 2022 between the Claimant and her then line manager Mr Edwards, Mr Edwards wrote to the Claimant on 24 October 2022 in these terms: (312)

"You said you were anxious about …. back pain".

In other words, the Claimant was not saying that travel to the Exeter office was an impossibility but a concern.

c. In neither her grievance nor grievance appeal did the Claimant actually suggest that the commute was impossible. If it was impossible, then we would have expected the Claimant to have said so.

31. In reaching the conclusion that travel to Exeter was possible albeit inconvenient, we take account of the adjustments that the Respondent put in place and notably:

a. The Claimant was to be paid travel expenses.

b. The Claimant was to be paid travel time including extra time she would need for periods of rest while driving and within her working day.

c. As set out below, the Claimant was not required to commute during periods of phased return.

d. The Claimant was offered overnight accommodation.

(The adjustments that were offered are best summarised in a letter sent by Ms May to the Claimant after her resignation on 15 November 2022).

32. It is not actually clear from the documents when some of these adjustments were offered to the Claimant, but we are satisfied that they were offered prior to the Claimant ultimately resigning. The offer of accommodation, for example, was referred to in a letter sent to the Claimant on 5 October 2022 following the outcome of her grievance appeal.

33. After careful consideration, our finding is that the Claimant simply did not wish to travel to the Exeter office because it was inconvenient and disruptive. In her own opinion, travel was simply not necessary. Having worked well at home during lockdown, the Claimant simply felt that any commute was something of an

imposition. Hence on 3 August 2021 the Claimant described travel as "*unnecessary and a waste of time*".

Project Orion and the Claimant's desire to be made redundant

34. During the consultation process relating to Project Pluto, the Respondent invited employees to apply for voluntary severance as part of a wider project known as Project Orion. Project Orion involved an updating of the Respondent's IT System and it was recognised that some employees might not wish to continue with their existing roles. For this reason, the Respondent communicated to its wider workforce that a limited number of employees in certain roles could be offered voluntary severance upon application. Project Orion was wholly separate to Project Pluto and related to offices across the country as opposed to just Plymouth.

35. The Claimant applied for voluntary severance on 26 July 2021, but this application was rejected. Because it is not part of the Claimant's case pleaded case that the rejection of her application was unfair or discriminatory, we need not dwell on whether the decision was reasonable or not. Suffice to say that severance was offered to the weakest performing employees and the Claimant was regarded as a steady performer.

36. What is clear to us, though, is that voluntary severance – or redundancy - was precisely what the Claimant wanted when she was advised that she would need to travel to Exeter once a month.

37. The Claimant made this clear in her grievance hearing when she was asked what she wanted to achieve out of the process:

"TC: What is your preference?

LC: Redundancy, as I don't feel the company is capable of changing its approach."

The Claimant's long-term absence and the provision of coaching

38. Having again been reviewed by occupational health on 10 November 2021, the Claimant started a period of absence with depression associated with her disabilities; the depression was contributed to by recent traumatic bereavements as well as her ongoing disabilities.

39. The Claimant was only able to return to work on 8 March 2022 on a phased basis and this coincided with her becoming line managed by Mr Edwards. From this time, the Claimant's workload was amended in that her targets were reduced by 50% and the Claimant was not asked to attend the Exeter office during the phased return.

40. Upon returning to work, the Claimant was placed in a coaching process. Mr Edwards says that this was standard practice once an employee, who had been

away from the business, returned. This does appear to us to be a very prudent step and we do not understand the Claimant to disagree with this.

41. However, on 11 and 15 May 2022, the Claimant underwent further coaching which she describes as performance management and about which she makes complaints. We are satisfied, though, that this coaching was not performance management, and it was not in any way linked to the Claimant's perceived lack of capability. It was provided by the Respondent in a genuine attempt to assist the Claimant and in response to her needs. This was the very clear evidence of both Mr Edwards and Ms May, which we accept To this end:

    a. On or about 6 April 2022 the Claimant spoke with Ms May.The Claimant explained that she was struggling with her return to work and was "*stressed*".

    b. It was in direct response to this, as opposed to concerns over her performance, that Ms May organised coaching for the Claimant, a first session taking place on 11 May 2022. Ms May's aim was to assist the Claimant, as she noted in her e mail of 27 May 2022:

    "… Please be assured that the purpose of the coaching is there to work with you on building you back up since your absence …"

    c. Mr Edwards, in his written evidence, agreed that this was the purpose of the coaching and it was not ever intended to be a performance management tool.

    d. The fact the coaching process was not performance management is evidenced by the fact that it did not involve the setting of targets or timescales in any way.

42. The reason why the Claimant is critical of the coaching that she received is because she did not agree with feedback that was provided to her by her allocated coach. We are satisfied that what came across to the Claimant as criticism of her performance, was intended to be constructive feedback to assist her. The fact that feedback was provided in this way does not mean that the coaching was performance management. To address the Claimant's concerns about the feedback the Claimant had received, the Respondent was prepared to change her coach.

Discussions between Mr Edwards and the Claimant about the menopause

43. On 6 June and 15 June 2022, the Claimant had two discussions with Mr Edwards about her menopausal symptoms and the impact upon her. Mr Edwards made contemporaneous notes of both conversations. Both conversations are the subject of complaint.

44. On 6 June 2022, there was a conversation where the Claimant says that Mr Edwards asked if the menopause prevented her from doing her job. Mr Edwards

does not dispute that he made that inquiry, but we are satisfied it was well intentioned and an appropriate inquiry. Mr Edwards was simply trying to explore how the Claimant could be assisted. Given the concerns the Claimant had raised up to this point about the impact her menopausal symptoms were having on her, it was fair of him to do this.

45. On 15 June 2022, the Claimant says that Mr Edwards said that he was spending a disproportionate amount of time on the Claimant (compared to others going through the menopause) and this made her feel as though she was being difficult. Mr Edwards does not accept saying this, though he accepts the Claimant's menopausal symptoms were discussed. Whatever Mr Edwards said, we are satisfied that it was well intended and part of his genuine desire to assist the Claimant. To this end:

    a. Mr Edwards did appear to us to have a genuine desire to assist the Claimant and the comment attributed to him does not chine with his empathic approach. On the balance of probabilities, we do not accept Mr Edwards made the comment in the way that the Claimant now describes it.

    b. Second, the context of the conversation is important. Mr Edwards was discussing a legitimate issue, namely the Claimant's disability, in circumstances where it was impacting her day-to-day role. It was an emotive subject. It is perhaps not a surprise that his words were misconstrued by the Claimant.

The Claimant's grievance

46. On 17 June 2022, the Claimant raised a formal grievance. It was said that:

    a. The Claimant was not properly consulted about the closure of the Plymouth office.

    b. The Claimant's change of office location was one that was "*forced upon her*" even though her contract did not include a mobility clause.

    c. The Collective Agreement required both parties to "*agree"* that she should be required to commute to the Exeter office.

    d. The Claimant's proposed monthly travel to Exeter did not take into account her disability.

    e. Mr Edwards alleged remarks on 15 June 2022 were discriminatory.

    f. The Respondent's e-mail of 8 June 2022 made the Claimant out to be unreasonable. (This was an e-mail that Ms May sent to the Claimant setting out why she was being asked to attend Exeter each month).

47. A grievance hearing took place on 5 July 2022. It was conducted by Tracy Coughlan, a manager. There is a note of the hearing.

48. Before the meeting, Ms Coughlan undertook interviews with Ms May, Mr Edwards and Mr Jose (another manager who had an involvement with the Claimant during the consultation over Project Pluto and in respect of her sickness absences).

49. Perhaps surprisingly, Ms Coughlan did not review the occupational health reports that had been obtained, but we are satisfied that she was made aware of the material contents of those reports by Ms May and Mr Edwards and that she reasonably understood the impact of the Claimant's disability on any commute to the Exeter office.

50. The outcome of the grievance process was communicated to the Claimant on 13 July 2024 by letter. The grievance was dismissed.

51. The Claimant complains that the grievance outcome letter did not provide her with details of the interviews conducted by Mrs Coughlan. We do not consider that to have been unreasonable in that:

    a. Those meeting were confidential.

    b. What was important was that reasons for the grievance being dismissed should be explained to the Claimant, and they were.

    c. The Claimant has not explained how this disadvantaged her especially when the relevant documents were provided to her during the appeal process (see below).

52. We have considered whether the conclusions reached by Ms Coughlan in dismissing the grievance were reasonable and we are satisfied that they were. This largely flows from factual findings that we have already made. In summary:

    a. We have already expressed the view that the Claimant was properly consulted about the closure of the Plymouth office.

    b. The change in the Claimant's home office from Plymouth to being homeworker was readily agreed to by the Claimant. Monthly attendance at the Exeter office was something the Claimant was contractually obliged to agree to pursuant to paragraph 3.14 of the Collective Agreement.

    c. The Claimant's proposed travel to the Exeter office was a reasonable request, notwithstanding her disability and in light of reasonable adjustments offered by the Respondent. At this time, this included an offer to pay travel time which travel time would include breaks. The Claimant had also not been asked to travel to Exeter during her phased return.

d. Mr Edwards' discussion about the menopause was a genuine attempt to explore the Claimant's disability and to then improve her working conditions.

e. The letter written by Ms May on 8 June 2022 was intended to clearly set out why the Respondent believed a request that she should attend the Exeter office monthly was reasonable. Neither its content nor tone suggested that the Claimant was being unreasonable. The Respondent was instead setting out its disagreement with the Claimant's own position that no travel was required.

53. The Claimant also says that the grievance outcome letter was "*dismissive*" of the Claimant's views. We do not agree. The investigation was sufficiently thorough. Ms Coughlan gave clear evidence to the effect that she carefully considered matters. Also, the outcome letter made it clear that the Claimant had been listened to. More fundamentally, the outcome letter, as a matter of fact, addresses the concerns that the Claimant had raised. Whilst the Claimant disagreed with the conclusions that were reached, that does not mean the concerns were dismissed without having been considered.

The appeal

54. The Claimant appealed the grievance on 14 July 2022.

55. In addition to complaints already made, the Claimant also complained that, at the time her grievance was not upheld, she was not provided with notes of those individuals interviewed by Ms Coughlan. We have dealt with this above. These notes were subsequently provided to the Claimant on 7 September 2022 as part of the appeal process and after consents from those interviewed had been obtained.

56. An investigation was conducted by Selina Shaw, a senior manager. Mrs Shaw actively sought the Claimant's occupational health reports and reviewed them.

57. A hearing was conducted by Mrs Shaw on 9 August 2022. There is a note of the hearing.

58. The Claimant says that during the appeal meeting Mrs Shaw gave the impression that she believed the Claimant was exaggerating or even making up her menopausal symptoms.

59. Mrs Shaw refuted in her evidence that she disbelieved the Claimant's symptoms and that she was simply establishing the actual cause of the Claimant's symptoms and their impact. We accept this evidence and note too that the Claimant very fairly accepted that Mrs Shaw did not intend to give the impression that the Claimant believes she did.

60. We accept that exploring the Claimant's symptoms was a legitimate line of inquiry in the context of the appeal process. It is unfortunate that it left the Claimant with

the impression that Mrs Shaw was doubting her menopausal symptoms. However, nothing we have read (accepting that the appeal transcript is not a verbatim note) and having regard to Mrs Shaw's general thorough approach to the appeal process leads us to conclude that the Claimant's conclusion that there was an inappropriate undertone to the line of questioning was a fair one to draw.

61. The appeal was dismissed on 5 October 2022 by way of letter. In this letter, it was confirmed to the Claimant, if it had not been before, that the Respondent was willing to adopt any recommendations made by occupational health advisers and that this would include providing the Claimant with overnight accommodation (at its expense) to facilitate a monthly commute.

62. The letter was concluded in the following terms: "…*there are points which must be addressed in terms of the long-term viability of our employment relationship*…"

63. The Claimant says that the suggestion that the relationship between the Claimant and the Respondent may not be "*viable*" was inappropriate. It left her feeling that her employment was under threat.

64. Although we find that the use of the word '*viable'* was perhaps somewhat stark, the reason for Mrs Shaw raising the issue was not at all surprising. The reality was that the parties were at an impasse: the Claimant did not wish to commute to Exeter at all and the Respondent required her to commute monthly. That impasse was certainly not one that could continue. It had to be resolved and Mrs Shaw was fairly drawing attention to that. Looked at in this way, we do not accept the comment was detrimental to the Claimant. It was addressing what was the 'elephant in the room'.

65. It is to be noted that the Respondent did not offer Stage 4 of the grievance process as provided for by the Collective Agreement. The Claimant makes a complaint about this. However, as we have set out, the Respondent was under no obligation to Stage 4 (even if it was appropriate). It was open to the Claimant to elect to pursue Stage 4 if she wished, but she did not.

66. We add for completeness, that Stage 4 would have had limited relevance to the Claimant's grievance. It would only have been relevant to the extent that there remained a dispute over the meaning of paragraph 3.14 of the Collective Agreement (and whether the Respondent was able to compel the Claimant to travel monthly to Exeter).

<u>The resignation and / or dismissal</u>

67. Ultimately, the Claimant resigned on 9 November 2022. The Claimant's resignation letter states:

"As you both know, I am currently struggling with menopausal symptoms, the loss of both parents and my best friend [for] which I am currently receiving trauma counselling as well as receiving treatment for hip and back pain. I really thought I had the support of EDF throughout all this but recent events have only reinforced

that I have not been treated as an individual but merely as a number. Your tick box approach has failed me in many ways, my requests all fell on deaf ears and your understanding of the menopause is limited. I thank you for my counselling sessions, they are providing a great help. I will not be returning to work …. Resignation letter to follow.

68. A second letter continued:

"I am giving you one month's notice and as a result I expect my last day of employment to be 9 December 2022. You should be aware that I am resigning in response to a repudiatory breach of contract by EDF and I consider myself constructively dismissed. You rejected my grievance and my grievance appeal which sets out the basis on which I believe that you have seriously breached my contract. Furthermore, as a direct result of my grievance, I have been subjected to further treatment which has meant my position at EDF is untenable leaving me no option but to resign. As I previously indicated to you that I was working under protest until my grievance was resolved. I do not in any way believe I have affirmed or waived your breach …."

The Law

Time limits

69. The time for bringing any claim under the Equality Act 2010 (**EqA**) is governed by Section 123. Broadly, the time limit is 3 months from the act that is the subject of complaint but conduct extending over a period of time is to be treated as having been done at the end of the period.

70. Time may be extended if just and equitable to do so pursuant to Section 123(1)(b) of the Act. This requires balancing the relative injustice to the parties of extending time.

Discrimination generally

71. Section 39 EqA protects employees from discrimination by reference to a number of "*protected characteristics*". This includes disability.

72. Section 136 EqA sets the burden of proof provisions that applies to discrimination cases.

73. Section 136 reads (so far as material):

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision"

74. The statutory burden of proof as set out in s.136 EqA has been explained in a number of cases, most notably in the guidelines annexed to the judgment of the Court of Appeal in *Igen Ltd v Wong [2005] ICR 931 CA.*

75. When deciding whether or not the claimant has been subject to-discrimination, the employment tribunal must consider whether there are facts from which it could decide, in the absence of any other explanation, that the incidents occurred as alleged, amounted to discrimination. If so satisfied the burden of proof shifts and, the Tribunal must find that discrimination has occurred unless the respondent proves that the reason for their action was not discriminatory '*in no sense whatsoever'*.

76. Although the burden of proof provisions provide for a two stage approach, it is permissible for the Tribunal to proceed on the basis that a claimant has established primary facts from which discrimination might be established, and to only consider whether the respondent has proved a non-discriminatory reason for the treatment that is the subject of complaint *(Field v Pye & Co [2022] EAT 68).*

77. When taking this approach the Tribunal must be mindful of the dangers of subconscious discrimination and of the need to take into account all of the factors that the claimant relies upon in respect of 'stage 1' (*Geller & Anor v Yeshurun Hebrew Congregation [2016] UKEAT 0190/15*)

Indirect discrimination

78. What is meant by indirect discrimination is set out at Section 19 EqA.

(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.

79. A provision, criterion or practice (**PCP**) is essentially 'the employer's way of doing things'. It must be something that is capable of being applied to someone other than the claimant. Otherwise, it cannot meet the element of the test in s19(2)(a).

80. The PCP must put persons who share a claimant's characteristic at a particular disadvantage when compared to persons who do not have that characteristic. The claimant must share the protected characteristic and disadvantage with the group. This is referred to as a 'group disadvantage'.

81. Not every person with the protected characteristic has to experience the disadvantage.

82. Indirect discrimination is capable of being objectively justified. In broad outline, the employer must:

    a. Identify the aim or aims that the PCP was a means of achieving.

    b. Show that the aim was legitimate; and

    c. Show that the PCP was proportionate.

83. The tribunal's assessment of proportionality involves balancing the importance of the aim against the discriminatory impact of the PCP on the group. The clearer the disadvantage, the more compelling the justification will need to be. The tribunal will also consider whether or not the same aim could have been achieved by less discriminatory means. The balancing exercise will involve consideration of the evidence, including the particular business needs of the respondent (*Hardys & Hanson plc v. Lax* [2005] EWCA Civ 846).

Discrimination arising from disability

84. Section 15 EqA provides:

(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.

85. The key elements of discrimination arising from disability can be broken down as follows:

a. Unfavourable treatment causing a detriment. Unfavourable treatment is not defined but is taken to mean that the disabled person is put at a disadvantage *(Equality and Human Rights Commission's Statutory Code of Practice on Employment).*

b. Because of "something";

c. Which arises in consequence of the claimant's disability

86. In terms of the limbs (b) and (c) above, this involves a two-step approach that was explained in *Basildon and Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305.*

"[The Tribunal] might ask first what the consequence, result or outcome of the disability is, in order to answer the question posed by "in consequence of", and thus find out what the "something" is, and then proceed to ask if it is "because of" that that A treated B unfavourably. It might equally ask why it was that A treated B unfavourably, and having identified that, ask whether that was something that arose in consequence of B's disability."

87. In *Pnaiser v NHS England and anor [2016] IRLR 170 EAT,* Mrs Justice Simler considered summarised the proper approach to determining s.15 claims as follows:

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

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

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie

case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her Skeleton).

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in Land Registry v Houghton UKEAT/0149/14 a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

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

(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in section 15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26 to 34 of Weerasinghe as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages - the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

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

the disability. Had this been required the statute would have said so. Moreover, the effect of section 15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under section 13 and a discrimination arising from disability claim under section 15.

(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

Harassment

88. Section 26 EqA sets out the requirements of a claim for 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.

89. Unwanted conduct comes within section 26 if it is either purposefully intended to violate dignity or create the relevant environment; or it has that effect. Harassment may therefore be intentional or unintentional.

90. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by discriminatory conduct (or indeed comments or conduct related to other protected characteristics), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase (*Richmond Pharmacology Ltd v. Dhaliwal* [2009] IRLR 336).

91. Many harassment complaints are brought on the basis that the unwanted conduct had the effect of creating the relevant adverse environment. Section 26 has been interpreted as creating a two-step test for determining whether conduct had such an effect. The steps are:

a. Did the claimant genuinely perceive the conduct as having that effect?

b. In all the circumstances, was that perception reasonable?

(Pemberton v Inwood [2018] EWCA Civ 564)

Victimisation

92. Victimisation is provided for by Section 27 Equality Act 2010:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because-

a. B does a protected act, or

b. *A believes that B has done, or may do, a protected act*.

93. What amounts to a protected act is defined in subsection 2 and it includes "*doing any other thing for the purposes of or in connection with this Act*". This can include raising a grievance in respect of a protected characteristic.

94. What amounts to a detriment was considered in *Shamoon v. Royal Ulster Constabulary [2003] UKHL 11.* It involves viewing matters form the employee's view point and considering whether there has been disadvantage. The threshold is not high, but there must be more than an unjustified sense of grievance.

95. A critical consideration is why the employer behaved in the way that it did. If that behaviour was not significantly influenced by the protected act but was for wholly other reasons, a claim for victimisation will not succeed. The Tribunal must be mindful of the danger of subconscious motivation.

Constructive dismissal

96. Constructive unfair dismissal arises under section 95(1)(c) of the Employment Rights Act 1996 which deems a dismissal to have arisen in circumstances where:

"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".

97. In *Western Excavating (ECC) Ltd v Sharp [1978] ICR 221, CA,* the common law concept of a repudiatory breach of contract was imported into what is now section 95(1)(c). Lord Denning MR put it as follows:

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."

98. The component parts of a constructive dismissal which need to be considered are therefore as follows:

    a. A repudiatory or fundamental breach of the contract of employment by the employer.

    b. A termination of the contract by the employee because of that breach.

99. In terms of the alleged breach of contract, it may be breach of an express term or an implied term.

100. As far as implied terms are concerned, *Malik and Mahmud v BCCI [1997] ICR 606* held that an employer is under a duty maintain the relationship of trust and confidence that should exist between employer and employee and that the employer shall not:

    "Without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

101. Something more that unreasonable conduct is required. In *Frenkel Topping Ltd v Ms G King: UKEAT/0106/15* the EAT confirmed that establishing a breach of the implied term is a "*demanding test*" and the employee must "*demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract".*

102. A breach of such an implied term is repudiatory in nature *Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666, 672A.*

103. The question of whether there has been a breach is viewed objectively *(Buckland -v- Bournemouth University [2010] IRLR 445).*

104. It is accepted that a breach of trust and confidence might arise not because of any single event but because of a series of events. In such a case a claimant can rely on a 'last straw' which does not itself have to be a repudiation of the contract, but a contributing factor see *Waltham Forest v Omilaju [2005] IRLR 35*, and *Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978*. In *Kaur* it was also confirmed that an employee can rely upon earlier conduct by the employer even if they affirmed the contract after those earlier matters, as long as the last straw adds something new and effectively revives those earlier concerns.

105. Whether breach of an express or implied term, the fundamental breach of contract by the employer need only be a single reason for the resignation of the claimant. It does not matter if there are other reasons (*Wright v North Ayrshire Council [2014] IRLR 4).*

106. Even if there is a fundamental breach, the contract may be affirmed if, after the breach, an employee behaves in a way which shows that they intend the contract to continue notably by reason of delay, but delay of itself is not sufficient. It all

depends on the circumstances. It must be accepted that the paradigm case of the worker downing tools and walking out immediately rarely happens in modern life, particularly in professional or managerial occupations. It may take some time for an employee to consider whether to accept the breach and resign or not. In 'a last straw' case, the key is to consider whether there has been affirmation that postdates that last straw.

107. If it is established that there has been a constructive dismissal, the next stage is for the Tribunal to consider whether the dismissal was nonetheless fair. The burden lies on the employer in this regard.

The List of Issues

108. The claim was subject to case management and an Order dated 13 September 2023 sets out a List of Issues that was agreed between the parties and the Tribunal.

Conclusions on the Issues

109. We shall now set out our conclusions on the matters set out on the List of Issues by reference to the findings we have made.

Time limits in respect of the discrimination claims

110. It is not in dispute that any discriminatory acts that predate 23 August 2022 are out of time such that the Tribunal does not have jurisdiction to consider them. The only relevant acts that postdate 23 August 2022 are the sending of the grievance appeal outcome letter and the Claimant resignation or dismissal.

111. The Tribunal, though, has the power to extend time pursuant to the Section 123 Equality Act 2010 if it is just and equitable to do so. We do so on this occasion taking into account:

a. The fact that the Claimant was affected by her disability at all material times.

b. The fact that the Claimant was plainly affected by bereavement at key times.

c. The fact that the Claimant was trying to resolve matters for periods of time through a grievance process.

d. The fact that the Respondent has not been unduly prejudiced by the delay in terms of the cogency of the evidence that it has been able to present.

112. In exercising our discretion in this way, we very carefully balanced the relative prejudice to both parties and had regard to what is fair in the round.

Claim for indirect discrimination

113. The Claimant says that the Respondent had a policy of requiring its employees to attend the Exeter office and that this put her and others with her disability at a disadvantage.

114. The Respondent, in written closing submissions, did not take issue with the fact that there was a policy of this kind and it that it put the Claimant and others who shared her disability at a disadvantage.

115. However, the Respondent says that the policy was a proportionate means of achieving a legitimate aim and therefore objectively a justifiable policy.

116. We agree this to be the case when matters are viewed objectively.

117. The aim of the policy was legitimate. It was designed to improve team integration, collaboration and training in respect of which some personal contact was crucial. That was the view of Ms May and Mr Edwards also.

118. The policy also proportionate. The Respondent was no insisting on daily or even weekly travel. It only required monthly travel which we consider is the minimum amount of personal contact that would be needed to achieve the aim. The policy was made all the more proportionate by the fact that it was accompanied by the payment of travel expenses (including overnight accommodation) and travel time. Viewed in this way, the policy met the reasonable needs of the Respondent when balanced against the needs of employees.

119. We have considered whether there was a way the Respondent might have achieved its aims in some other way. As stated though, accepting anything less that monthly travel would not have allowed the Respondent to achieve its aims. Moreover, it must be remembered the Claimant's position was a stark one: she was not prepared to travel at all.

120. In arguing that the policy was unfair, the Claimant does not, in our judgment, pay sufficient regard to the needs and reasonable requirements of the Respondent as opposed to her own requirements and preferences. Simply because working at home all of the time suited the Claimant and she thought travel was a waste of her time, does not mean that it that it was unreasonable for the Respondent to require her to travel to Exeter from time to time to meet its business needs.

121. The indirect discrimination claim is therefore dismissed.

Discrimination arising from disability

122. The Claimant says that she was treated unfavorably because she was placed in performance management coaching to help her with time management and performance issues that arose because of the symptoms related to her disability and in particular her menopausal symptoms.

123. We do not accept, though, that providing the Claimant with coaching was unfavorable treatment. This results from our finding that the coaching that was offered was not performance management, but it was standard coaching that was genuinely intended to assist the Claimant in response to her own description of herself as being "*stressed*" and it was designed to "*build her back up*" after a period of recent absence. The offer of coaching was not a reaction to the Claimant's disability as set out in occupational health reports.

124. The fact the Claimant did not find that coaching assisted her does not alter matters.

125. In any event, we are also satisfied that providing the Claimant with coaching was a proportionate means by which the Respondent was able to achieve a legitimate aim.

126. Coaching was designed to assist the Claimant who, by her own admission, was in need of assistance. The coaching process was intended to provide that assistance and meet an obvious business aim; to improve the Claimant's efficiency and wellbeing and thereby her contribution. Coaching was plainly a proportionate step to take. It was not at all heavy handed.

127. The claim for discrimination arising out of disability is therefore dismissed.

Harassment

128. In terms of harassment, the Claimant makes three complaints.

129. The first two complaints relate to comments that were made by Mr Edwards on 6 and 15 June 2022 about the menopause. We have made findings about these comments, namely that the comments were well intended and appropriate in the context of the Claimant having herself noted that her disability was affecting her working day. Mr Edwards, as her manager, had a desire and indeed a responsibility to provide assistance in light of the concerns that had been raised. Therefore, we do not accept that these comments can be fairly categorised as "unwanted conduct" (in a harassment sense) or that the Claimant ought reasonably to have perceived them to have created an intimidating, hostile, degrading or offensive environment or to have violated her dignity.

130. The third comment relates to the appeal process and the suggestion that Mrs Shaw disbelieved the Claimant's account of her menopausal symptoms or gave that impression.

131. We have found that this was not the case and that this was not a conclusion which the Claimant ought fairly to have reached in the context of the appeal investigation that the Respondent was carrying out.

132. Accordingly, the claims for harassment are dismissed.

Victimisation

133. We accept that in the course of raising her grievances, the Claimant made a protected act. This was not disputed by the Respondent.

134. The Claimant says that Mrs Shaw's comment in the appeal outcome letter that the 'viability' of her employment should be the subject of further discussion was a threat to her future employment that was made because of her protected act.

135. We do not accept this to be the case.

136. Whilst we find that, in the absence of any other explanation, that the comment may have amounted to discrimination, we are satisfied that the Respondent is able to establish that it was made not because of the protected act (even on a subconscious level) but because the parties were at an impasse that required resolution. As we have described, the impasse was that the Claimant was refusing to commute to Exeter at all whilst the Respondent was demanding she attend the Exeter office about once a month. The issue had been under discussion for nearly a year. It had to be resolved. That was why the issue was raised.

137. In addition, we have rejected that the suggestion that the viability of the Claimant's employment required discussion was detrimental to the Claimant. It was a reference to a dispute that required resolution for the benefit of both parties.

138. The claim for victimisation is therefore dismissed.

Constructive dismissal

139. The Claimant identifies 12 matters that, when taken together, had the effect of breaching the implied duty of trust and confidence that should exist between an employer and employee. The Claimant says that as a result she had no option to resign and so she was constructively dismissed.

140. We have already made findings in relation to the matters that are the subject of criticism. Namely we have found that:

    a. The Respondent consulted meaningfully.

    b. The Respondent's redesignation as a homeworker was reached by agreement and not forced upon her.

    c. The Collective Agreement allowed the Respondent to require the Claimant to travel to Exeter once a month.

    d. The Claimant was not the subject of disability discrimination.

e. We have not found there to be evidence that the Claimant was bullied or harassed.

f. The fact that the Claimant was not immediately provided with evidence that Mrs Coughlan collated had no material impact on the Claimant.

g. The grievance outcome was fair and addressed all relevant matters.

h. The Respondent took account of the Claimant's disability and the recommendations of occupational health advisers.

i. The request that the Claimant commute monthly to Exeter was reasonable.

j. The grievance outcome letter was not dismissive.

k. The comment by Mrs Shaw that the viability of the Claimant's employment was a matter to be discussed was reasonable.

l. The Claimant was under no obligation to unilaterally offer Stage 4 of the grievance process.

141. Considering these findings, we do not accept that the Respondent was in breach of the implied duty of trust and confidence.

142. Even if that were incorrect, we have found that the Claimant did not resign because of any breach but because she simply did not wish to commute at all to the Exeter office as the Respondent was insisting she should do monthly.

143. For this reason, the claim for constrictive dismissal is dismissed.

144. We do note the Respondent additionally argued that the Claimant affirmed her contract by not resigning earlier than she did. Had we found that the Respondent was in material breach of contract, we would not have found that the Claimant affirmed the contract in circumstances where she did not waiver in asserting that she did not accept that she should have to travel to Exeter as the Respondent required her to do. Whilst the Claimant may have delayed in resigning and even resigned on notice, mere delay does not amount to affirmation.

Redundancy

145. The Claimant finally claims a redundancy payment pursuant to Section 139 Employment Rights Act.

146. Given that we have found the Claimant resigned and was not dismissed, this claim must be dismissed

147. For the avoidance of doubt though, we have not found that the Claimant's role was redundant. There is no evidence that it was. Further, by allowing the Claimant to work from home but commuting to Exeter once a month, the Respondent provide suitable alternative employment.

Employment Judge Oldroyd
Dated 6 February 2025

Sent to the parties on:

3 March 2025

Jade Lobb
For the Tribunal Office