



EMPLOYMENT TRIBUNALS

Claimant

Ms S Phillips

v

Respondent

Cambridgeshire and Peterborough
NHS Foundation Trust

Heard at: Bury St Edmunds (by CVP)

On: 2, 3, 4, 5 and 9 November 2020
30 November 2020 (Discussion day – no parties in attendance)

Before: Employment Judge Cassel

Members: Ms K Knapton and Mr D Hart

Appearances

For the Claimant: Mr J England, Counsel.

For the Respondent: Miss T O'Halloran, Counsel.

COVID-19 Statement on behalf of Sir Ernest Ryder, Senior President of Tribunals.

This has been a remote hearing on the papers which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform (V). A face to face hearing was not held because it was not practicable during the current pandemic and all issues could be determined in a remote hearing on the papers.

RESERVED JUDGMENT

1. The claim of discrimination arising from disability is dismissed.
2. The claim of a failure to make reasonable adjustments is dismissed.
3. The remedy hearing set down for 17 February 2021 is vacated.

REASONS

Background

1. The claimant, Ms S Phillips, submitted a claim form to the tribunal on 10 May 2019. Within the claim form there are claims of discrimination arising from disability contrary to section 15 of the Equality Act 2010 and a failure to make reasonable adjustments contrary to section 20 of the Equality Act.
2. The respondent resisted the claims and in the response submitted on 1 August 2019 gave full details of the measures the respondent took during the claimant's employment to deal with work place issues which are outlined at some length.
3. In essence the claim of discrimination arising from disability related to a grievance meeting that took place on 22 January 2019 in the claimant's absence. The issue identified was whether the grievance meeting proceeded when the claimant had requested a postponement. If so whether this amounted to unfavourable treatment because of something arising in consequence of the claimant's disability. The claimant's case is that her absence was because of sickness which arose in consequence of her disability. If so related to her disability, can the respondent show that the treatment was a proportionate means of achieving a legitimate aim? The respondent relies on the appropriate and timely management of the claimant's grievance as being the legitimate aim.
4. A case management hearing took place on 6 February 2020 when Employment Judge Ord identified the issues in this claim and outlined them at paragraph 6 of the Case Management Summary.
5. As far as the allegation of a failure to make reasonable adjustments is concerned, at paragraph 2.1 Judge Ord identified the issue as whether the respondent applied one or more of the following provisions criteria or practices ("PCP"):
 - “(i) a practice of requiring employees to “hot desk”;
 - (ii) a practice of providing storage facilities not in close proximity to an employee's place of work; and
 - (iii) requiring employees to find a room suitable for counselling sessions with patients.”
6. Judge Ord then went on to identify a further issue which was described as follows at paragraph 2.2:

“If so, did one or more of those PCPs place those who share the Claimant's disability at a substantial disadvantage in relation to a relevant matter in

comparison with a non-disabled person and did the Claimant suffer that disadvantage? In particular,

- (1) PCP1, it is said, required the Claimant to walk long distances to try and find another suitable desk or use a space to work from which exacerbated her asthma.
- (2) PCP2, meant that the Claimant was required to:
 - a. carry her work materials from her desk to the counselling rooms for appointments, in turn requiring her to walk long distances, which exacerbated her asthma; and
 - b. Carry out and walk long distances throughout the course of her working day which exacerbated her asthma.
- (3) PCP3, required her to walk long distances to locate a room suitable for counselling sessions, this required the Claimant to walk long distances which exacerbated her asthma.”

7. We heard evidence from the claimant, Ms Susan Phillips, and from Mrs Carol Proctor, Mrs Susan Watkins, Dr S O’Curry, Mrs Carol Toner, Mrs Gwen Hughes, all of whom had prepared a written statement. There were three ring binders of documents and an additional bundle and in total there were over 2300 pages of documents, the vast majority of which we were not referred to in evidence or cross examination. We explained to the parties that apart from the “pleadings” we would only consider those documents to which our attention has been drawn and in the paragraph, in which we outline our findings of fact, we again repeat that those documents we considered were those to which our attention was drawn.
8. We were also provided with a cast list and chronology and at the end of the oral evidence we adjourned the proceedings for a discussion in Chambers which took place on 30 November 2020. Submissions in writing from both counsels were provided, for which we are grateful and both counsels were able to add to those submissions orally.
9. We make the following findings of fact based on the balance of probabilities having considered those documents to which our attention has been drawn.

Findings of Fact

10. On 1 June 2009 the claimant commenced employment as a bereavement counsellor. Her employment was with Cambridge University Hospitals (“CUH”). On 1 November 2016 her employment was transferred to that of the respondent along with four other members of the paediatric counselling service.
11. In March 2017 there was a reorganisation of the psychological medicine allocation. The impression we were given was that there was an increasing demand on the services provided by the respondent and the issue of space became one of concern. In effect the respondent became a client of the

CUH and it was to them that requests for increased accommodation had to be made. They had other calls on the use of space. We were told that for example an organisation referred to as Petals was provided with space in which to offer counselling services although the first date of that arrangement is unclear from the evidence we were provided.

12. Without doubt the work undertaken by the claimant was difficult, and at times extremely difficult and the impression that we were given was that she was conscientious. Nothing we heard suggested that she had not performed her tasks to the appropriate level.
13. We were shown a copy of the claimant's contract of employment and our attention was drawn to a mobility clause, at clause 4 of the contract of employment which was expressed in the following terms:

“[she] may be required to work at any premises managed by the Trust which may include a change of place to other areas, or in the community to meet the needs of the service.”
14. In August 2012 the mobility clause was exercised when the claimant was moved from Neonatal Intensive Care Unit (“NICU”) level 3 to the Jane Thorley Counselling Suite. We were shown a plan of the main building to which most of the evidence relates, the Rosie Hospital, which we were told is owned and controlled by CUH. We have looked carefully through the claimant's lengthy statement, which covers 37 pages, and there has been no complaints about that particular move.
15. At page 87 of the bundle of documents there is a report prepared by Dr Rachel Limbrey, who is a Consultant Respiratory Physician who examined the claimant on 4 December 2019 and prepared a report for these proceedings on 7 January 2020. Dr Limbrey noted that the symptoms of asthma were already present and indeed had been probably present since 1996. We note that there was no particular recognition of any special need connected with her asthma at that early stage.
16. We heard evidence of certain difficulties in workplace relationships. It seems to us that this was largely based in the increased pressure on the use of space.
17. Following the transfer of the undertaking to the respondent in around March or April 2017 the respondent arranged for a booking system to be implemented so that psychologists and counsellors could use one of the designated clinic 22 rooms for counselling sessions.
18. In March 2017 there was a desk reorganisation. The team in the psychological medicine department was given access to a new office in Barton House on the ground floor. We were shown a plan of the area and Barton House is a short distance from the Rosie Hospital. The claimant was able to remain in the Jane Thorley Counselling Suite. She used her desk during the two 10 hour sessions per week that she was required to work.

We were unclear as to how that desk was used when she was not at work, but it was clear from all the evidence that we heard that there was an increasing pressure on the use of space which, as we have noted above was not controlled by the respondent that by the CUH.

19. In part, to investigate the more efficient use of space, Dr O'Curry explored with the claimant the possibility of her using what was described as the "Portacabin" which we were told was 6 to 7 minutes away from the NICU. The claimant gave evidence that this journey in fact took her considerably longer. She gave evidence that it took 20 to 25 minutes each way. An alternative venue of Barton House was also explored but both alternatives were rejected by the claimant and the matter was not pursued. Dr O'Curry however did recommend a referral to occupational health and we were referred to the claimant's response which was exhibited at page 239.

20. The email from the claimant was in the following terms:

"Thank you for your concern, I don't think you need to do anything/I'm seeing my GP and asthma nurse regularly and also followed Carol's (Carol Toner) advice after she and I spoke last.

I have been giving thought to your questions in your previous email and appreciate you asking whether I need anything in the way of support – I had already addressed parking with Carol/access. Having had a look at the referral form – I am not currently absent, am fit to carry out my normal duties at present/are not currently at work with a health condition/have no in work health concerns/and facing disciplinary action or suspended.

I don't feel referral to OH is necessary. I appreciate you feel you should be asking for advice and support and to that end I may be better placed to address questions (not detailed -Our comments) and redeployment ill-health retirement are not currently applicable."

21. At page 259 of the bundle we were shown an email dated 20 October 2017 from Teresa Wood, Operations Manager, who wrote to Carol Toner, who was then the claimant's Servicer Manager in the following terms:

"Do you have any updates on your conversation with Sue (the claimant). The team are trying to work out how they make the office work. Is there is another member of the team joining shortly. They have also said they had not seen Sue in the office for quite a while."

22. There was a further email from her on 6 November, at page 258, again to Carol Toner copying in Dr O'Curry. It was in the following terms:

"Sorry to chase but I have not received a response regarding the below (her last email- Our comment). There are also some issues with room three being block booked out for two full days per week and nobody has seen Sue for a long time .I think that we need to go to slot bookings when we have patients to see otherwise rooms are booked out and nobody else is able to use them and patients are getting delayed."

23. The following day, 7 November 2017 Carol Toner responded in the following terms:

“I have contacted Sue (the claimant) in regard to her desk use and I am awaiting a response. Unfortunately, I was unable to discuss alternative office space with Sue until recently, due to other investigations.

I have informed Sue that the possibility of desk space in the MDT large office on NICCU as previously discussed and she is considering this as an option.

In regards to room 3 my understanding was this has previously been discussed and Sue is aware that only slots can be booked. I will reiterate this however.”

24. In an email at page 272 of 15 November 2017 Carol Toner wrote to the claimant in the following terms:

“As thought, the desk you currently use in the Jane Thorley room is required back by CUH and therefore you are required to vacate this by the end of December, we will therefore need to decide where your desk will be as previously discussed, I am informed that a desk continues to be free in the MDT room on NNICU, no other room has been identified by CUH as available, the other option would be to move in with the other councillors. Please could you let me know which option is more agreeable.”

25. In her email in response, exhibited at page 285, of 30 November she responded as follows:

“One of these two options was previously put forward, when it was suggested I vacate the office for a different reasons and was disregarded for the reason explained at that time. The reason was connected to my disability which I have made you aware of. I have also disclosed to you my lung age and the fact that this time of year exacerbates this condition for reasons we discussed very recently and, subsequent to this conversation it was necessary for my GP to refer me for an emergency admission.

I have explored the only alternative remaining, with a colleague who is based in the MDT room daily. It was apparent this would mean hot desking, as the only desk/PC unallocated is used for this purpose. As introducing this practice would put me at a disadvantage, I am requesting to know what the aim is, whether what other options have been considered and why they have been discarded and for what reason I am being required to leave an office I have been based in since it was donated and purpose-built the counselling. To my knowledge I am the only councillor based on the counselling office. You have enquired whether there are any other options open to me to use a desk elsewhere and there would appear to be space in the Neonatal doctors’ office.

I am concerned that it would seem there have been various attempts to lever me, as an NHS employee, out of this office and it would appear that a reason is to accommodate a voluntary organisation. Perhaps this illustrates the fragmentation that can result from outsourcing service. As we previously discussed, I was informed by a member of the RBT that she had been “promised “that I would be vacating this office when I was TUPE’D as the RBT would like the office to be used by the voluntary organisation with whom they work closely. This was surprising to hear, as no discussion taking place with me either prior to or post

being TUP'D and the recent requirement to vacate without reason has been made more than a year after the TUPE".

26. We have recorded this email in full as it seems to us that it is at this time that the relationship between the claimant and the respondent begins to deteriorate. It is in effect as follows. The rest of the team have already moved outside of the unit in which they previously worked. The claimant had not and the respondent faced with pressure on them to find solutions to the restrictions and needs of the landlord on the available space were acting reasonably in proposing alternative solutions to try to accommodate the claimant. There was no explanation as to why the proposals were not suitable for her and it was clear that she believed that attempts were being made to remove her from the Jane Thorley Counselling Suite. We noted that her colleagues had apparently reported that she had not been seen, or at least to any extent and that there had been a block booking by her of a counselling suite, which apparently prevented working colleagues from using it. In evidence it was pointed out that she had not told Miss Turner that she would not vacate the office by the end of December 2017 as requested nor did she ask Mrs Toner for more time to vacate the office nor for any help to move her belongings.
27. On 7 December 2017 at page 282 the claimant notified Dr O'Curry that there had been a double booking for a room, counselling room 2 in the Jane Thorley suite. In giving evidence Dr O'Curry repeated the evidence that she had identified in her email in response of 13 December (also at page 282) that she had raised the issue of completing an incident form with the claimant. She could find no evidence that a report had been filed and indeed neither had reports been filed for one or two possibly subsequent double booking. We reminded ourselves that there had been just three such incidents, putting the claimant's case at its highest, and that the claimant had worked for 10 hours per day on two days per week for a number of years with four counselling sessions or so per day.
28. On 12 December 2017 Dr O'Curry wrote to the claimant in an email produced at page 281 and informed her there were three hot desks and three fixed desks available in the MDT office. We heard more evidence as to the use of those desks in the MDT office. It was apparent that three desks were used constantly and that the remaining desks were used by a number of individuals covering a number of disciplines as and when they were needed. We have difficulty in understanding the objections raised by the claimant. She had suggested the use of desks in an alternative location, the junior doctors' office but seemed adamant for reasons we don't fully understand that this proposed arrangement was not acceptable to her. We were shown a photograph of the accommodation, exhibited at page 479, and although we didn't visit the premises it was apparent that there were adequate spaces and PCs for the work that was necessary for her to undertake using a PC. In answer to questions from us we were told by Dr O'Curry that the principal work during a counselling session involved the taking of a note and the use of the PC was simply to record basic information, such as attending an interview and a brief outline of what

transpired. It certainly was not an in-depth report that was needed necessitating the use of a substantial amount of time using a PC.

29. In an email produced to us at page 283 dated 15 December 2017 Carol Toner wrote to the claimant in the following terms, that the CUH required the use of and “therefore the need to vacate this space by the end of December is not negotiable”. She referred to hot desking being offered and added “in order to support you with this I have agreed that Jo can procure lockable under desk drawers as this is hot desking to secure belongings required to be secured and Jo also has a filing cabinet in Barton House for which you may store any additional items required in the interim, Sara has also agreed with NICCU lead Mary that you may use one of the shelves”.
30. On 4 January 2018 in an email from Carol Toner at page 289 the claimant was told as follows:

“I have been informed that your personal belongings in the Jane Thorley Suite have been boxed up and ask where these need to go as you are currently on leave, I have agreed that these could be store for safe keeping at Barton house.”
31. In giving evidence to the tribunal, the claimant explained that she had returned from holiday on 10 January and first knew of the move of her personal items when she received a text from Dr O’Curry. We were shown a photograph of her possessions at page 290 and heard evidence that she was concerned to find what she described as “the entire contents of the half of the office that I had been allocated in a large metal cage left in a public area inside the Jane Thorley Counselling Suite”.
32. On 18 January 2018, produced at page 303, the claimant wrote to Carol Toner requesting reasonable adjustments. In the letter she refers to the resources that she used in connection with her work and on this we heard a considerable amount of evidence. On this issue we make no finding of fact we simply record the claimant’s assertion that the large amount of resource was needed for her to undertake her work professionally and Dr O’Curry’s comment that she had never seen the claimant with more than certain basic resources, had held many counselling sessions with her when there was no mention of these resources, and did not accept that all of the contents of the cage of property was required in the necessary performance of the tasks.
33. Also in the letter of 18 January 2018, among the other issues that were raised she repeated her concerns that an excessive distance to walk throughout a working day outside of her working environment would have triggered her asthma. She outlined steps which she stated she had taken to try and resolve the issue which included a suggestion that hot desking would be unsuitable for her, although we note that no reason was advanced as to why this the case. At the end of that letter she asked Carol Toner to consider two adjustments she stated as reasonable:

“A permanent desk located as close as possible to a counselling room I need to practice from in accordance with my working role in my job title.

A counselling room with a window as it is essential that I am able to ventilate this room.”

34. Carol Toner responded the following day, 19 January in an email at page 305 in the following terms:

“In order to assist with a reasonable adjustments application, I am required to complete a managers referral to occupational health advising them of the situation and how we can support you going forward. It may be clearer if the request to make reasonable adjustments is attached to this referral. Are you agreeable to this being attached?”

35. Although there are a number of items of correspondence in connection with the referral to occupational health nothing of substance occurs until 5 February 2018 Carol Toner again repeated her wish for referral to occupational health significantly asking:

“What aspect or impact of the disability is that you are identifying as preventing you from being able to hot desk in the NICU MDT room within the unit you work.”

36. On 8 February 2018 in an email produced at page 338 to Carol Toner the claimant responded as follows:

“This is what is being done I was removed from my usual work base/desk and given these alternatives the 1) a desk in a location which would require me to walk half mile to ¾ of mile exiting into freezing air between two very warm environments. 2) a hot desk which does not guarantee me a desk at all and which again locates me at some distance from a room which I need to do my job 3) which has now also been removed so that I have no room at all of which do my job or in order to establish a workplace/desk close to it.”

37. We heard evidence from Dr O’Curry that on the same date during a supervision meeting with the claimant she learnt that the claimant had in fact been moving around the hospital using desks in the seminar room, clinic 22 and the junior doctors’ office although the claimant did not have authorisation to do so. It occurred to Dr O’Curry that in reality the claimant had already been hot desking.

38. An occupational health report was prepared on 20 July 2018. It is produced at page 390 to 392. It was prepared by Jill Miell, Occupational Health Adviser. There was reference to the hot desk availability in NICU and reference to a base outside of the main building which would involve a three quarters of a mile walk. Pausing there for reasons we understand the claimant rejected the outside building, but what was unclear to us was although there is reference to “Sue informed me that during the past seven months she has not been afforded a suitable working environment to include a telephone; she informed me that she’s been working in an inadequate space which has not been suitable for her needs”. It still was unclear why it was considered the “hot desk” availability in NICU was not suitable and in

the nowhere in the report is that addressed. Ms Miell reached the opinion that although the claimant was likely to be covered under the provisions of the Equality Act she was fit to carry out her duties and advised that any suitable working environment should include adequate ventilation. There was also a recommendation that an in-house workplace/DSE assessment be carried out, which seemed more likely to do with her lower back pain and stiffness rather than her asthma.

39. Miss O'Halloran at paragraph 34 of her closing submissions makes the comment, and with some force that in addition to not stating that the claimant was unable to hot desk there was no mention that this would cause any disability -related disadvantage nor did it state that the claimant had any difficulty walking or carrying items short distances or around the hospital, save the claimant's own reported difficulty walking long distances outside in the cold. These are submissions which we adopt as findings of fact.
40. Also of note is the reported conversation that the claimant had with Ms Miell regarding her "current circumstances". Ms Miell reported that "I understand from Sue that she has experienced several severe asthma attacks that have required emergency hospital admissions and that have necessitated further medical intervention". During the proceedings we were again referred to the report of Dr Limbrey on a number of occasions and of particular note is in that report, which is an extensive one covering 21 pages of medical history summary and conclusions there is mention to just one hospital admission at paragraph 2.45 relating to the evening of 21 October 2017.
41. From 24 August 2018 the claimant was signed off by her GP as not fit to work due to stress-related problems.
42. It seems to us that the respondent was placed in an invidious position. The claimant expressed her concerns about the manner of communication in correspondence that was shown to us and the inappropriate use of certain email addresses and there was clear difficulty in the respondent actually receiving the occupational health report on which the claimant placed such reliance.
43. Eventually, after some correspondence, the occupational health report was shared with Carol Toner who wrote to the claimant on 22 November 2018 inviting her to a meeting to discuss its contents on 28 November. We were referred to an email at page 424 in which the claimant wrote to Mrs Toner in the following terms:

"The GP has advised that this is not a return to work meeting and I am still signed off therefore I should not be compelled to attend meetings during this period. If you have found a way of implementing the reasonable adjustments recommendations, for example providing me with a desk to work at with secure storage for confidential information, I would be happy for you to communicate this information to me using NHS.net email. In response to your wish to ascertain my requests and how you can best assist with these to support me, to best assist your understanding and meet the purpose of the meeting it seems most helpful to refer

you to the following written communication which I believe most clearly identify my needs. I hope they will not be necessary for me to explain these further.”

She then referred to her request for reasonable adjustments from January 2018 and subsequent repeat of the request and the occupational health report.

44. On 3 December 2018 Mrs Hughes took over the claimant’s management. On 13 December 2018 the claimant informed Mrs Hughes that she was intending to submit a formal grievance in her email produced to us at page 433. She made the following comment:

“To bring you up to speed, I have been seeking reasonable adjustments before my return to work, essentially: a suitably located available desk to work; secure storage for patient confidential information; a suitably located available counselling room close to my workplace in which to see patients. Unfortunately this has now been ongoing for over 18 months.”

45. The situation however became more difficult for the respondent to manage. In response to that letter, Mrs Hughes responded in an email at page 432:

“I have sent you a letter inviting you to a meeting next week with Sara O’Curry to discuss the reasonable adjustments to support your return to work. The meeting will be held at in Wednesday at 1130 apartment house Barton House. I am sorry that the current situation has escalated to the point whereby you wish to submit a formal process. I would be really eager to be given the opportunity to resolve these issues informally.”

46. In response on 17 December, in an email produced at page 431 the claimant answered:

“Given the neglect of my needs by the trust in relation to my disability over the past year I found the request to attend a formal meeting confusing; the wording positions me as an employee behaving badly when all I want to be able to do is return to work and the failure to make reasonable adjustments has prevented this and prolonged my absence. The behaviour guided by the trust has caused a breakdown in trust and I wish to voice my experience via a formal grievance. I do not feel that my request for a suitably located desk with secure storage facilities to enable me to do the job I am employed to do is unreasonable... In view of the consequences as the trust’s in ability to make reasonable adjustments for me as notified on 30 November 2018 I feel the current work situations become untenable.”

47. It seems to us that in effect the claimant is stating that unless she is allowed to return to her place of work on terms which she has determined appropriate that she will not return. At the same time, the respondent has indicated, and with good sound reasons it seems to us, that the demands that are being made upon them are simply not feasible, and certainly not reasonable as adjustments. We bear in mind that the claimant had been in effect hot desking any event until her sickness leave started in August, that she was contracted to work for two days per week, and the proposals that

have been made so far by the respondent are both reasonable and practicable.

48. In an email produced us at page 431 from Mrs Hughes dated 18 December she again tried to have the claimant attend a meeting on 19 December. The response from the claimant was approximately an hour and a half later and was by email to Mrs Hughes and produced at page 436. In our judgement it is important to refer to most of that email which was in the following terms:

“Further to my email to you yesterday regarding the meeting you had scheduled for 19 December, which I notified you I am unable to attend owing to ill health relating to my disability, I am writing to seek clarity as to the purpose of this meeting. In your email (in response to mine requesting a postal and secure email address and notifying you of my intention to submit a formal grievance) I understood you wish to progress matters informally. Following this, you have phoned and emailed asking me to confirm my attendance at the formal meeting, which has left me feeling confused as to your intention. This places me at a disadvantage because I have been asked to attend a meeting I cannot prepare for because I do not know the purpose of it due to the contradictions between the letter and the emails. In your undated letter, the stated purpose was a formal meeting to discuss my absence as part of the absence management process. In your subsequent email of 13 December, the purpose of the same meeting changed to discussing the reasonable adjustments to support my return to work. As there are contradictions in the nature and purpose of this meeting, I would appreciate clarification. If, as I had understood from your email, you wish to progress matters informally my understanding will be that you are not requiring me to rearrange this meeting within seven days of 19 December.”

49. In giving evidence, Mrs Hughes pointed to the fact that she had only been in a position of managing the claimant from 1 December and was anxious to meet with her. We found her evidence convincing in that she stated:

“I really wanted to have an open dialogue with the claimant so that I can understand the position and reach out to offer empathy and support. In my experience communicating in writing can feel very one sided and provides less opportunity to resolve matters in a collaborative way.”

50. The claimant formally submitted a grievance on 7 January 2019. The grievance covered 6 pages. She repeated many of the issues already raised although she raised new issues relating to communications and pay and the effects on her for what she described as a failure to make reasonable adjustments. She still did not explain to the respondent why the offer of hot desking places her at a substantial disadvantage. Of particular importance in these proceedings is the comment made by the claimant at the end of her grievance letter at page 450 in which she stated:

“I would like you to respond to me in writing by 20 January 2019 with a view to resolving my complaint. I would like the trust to explain why it failed to make reasonable adjustments in the first place. In the circumstances, please would you consider what options you may have available to me to move me to a vacant post in a similar role at an alternative and suitable location. As a reasonable adjustment, I would be grateful if you would support me by deferring any requirement for me to attend meetings at this time. Stress exacerbates asthma and I had a severe attack

only recently, and the support I need is clearly stated both this letter and the occupational health report requested.”

51. We heard evidence from Mrs Hughes who told us that she genuinely and honestly believed that the claimant wanted her to proceed with the grievance investigation without the need for her to attend. We have carefully considered the correspondence that was generated prior to the issue of the grievance letter and adopting what we can properly describe as a “common sense approach” the belief that Mrs Hughes held was a reasonable one. She was asked in cross examination whether she understood that the claimant wanted her grievance to be investigated without requiring to attend the meeting and that in effect she was requesting a postponement. Mrs Hughes understood that this was not a request for a postponement and we would have reached precisely the same conclusion.

52. Furthermore, in her acknowledgement of the claimant’s grievance produced at page 453 she added the following comment:

“I will be able to approach the investigation in an objective manner I note in your grievance you have requested to not attend any meetings at this time as a reasonable adjustment.”

53. The claimant wrote back to her by email of 16 January 2019 produced as a page 458 adding the following:

“As you are aware I had made a request for a reasonable adjustment with regard to meetings. I have spoken to the Equality Advisory Support Service who have suggested that I ask you, are you not willing to make this reasonable adjustment and, if not what is the reason? I will not be attending this meeting for health reasons... I feel that my formal grievance letters afforded me every opportunity to explain and that I have provided sufficient detail, dates and all available information to enable a full investigation.”

54. Mrs Hughes dismissed the grievance. In her letter to the claimant of 1 February 2019 produced at page 472 and summarised succinctly in Ms O’Halloran’s closing submissions at paragraph 47 she concluded:

- “A the MDT office is closer in proximity to her clinical space, the NICU, and would enable better communication with the wider multidisciplinary team. It was also close to the JTCS
- B the JTC has office space had not been allocated to her personally and therefore she would have been required to share space in any event;
- C there was no difference between the MDT office and JTCS office – Mrs Hughes visited both spaces and taken photographs. The MDT office provided for a phone, computer and adequate ventilation and light
- D she was unable to find any evidence to suggest she would be disadvantaged by the office space as alleged.”

55. On 21 February 2019 in an 11 page letter the claimant appealed the decision to dismiss her grievance. For the first time at page 493 she raised the issue that she had asked for the grievance procedure to be adjourned and that the provision of hot desking disadvantaged her because only one desk was available between six teams and therefore she could not be guaranteed a desk. Pausing there, the claimant had been informed that in fact there were three hot desks available and that six people were using a hot desk as required. In evidence the claimant told us that she had reached the conclusion that there was just one hot desk available based on a comment made by a work colleague. The evidence before us however suggested that there were in fact three hot desks.
56. The appeal was dismissed and the claimant issued these proceedings in the Employment Tribunal having undertaken early conciliation through ACAS.

Relevant law

57. The Equality Act at section 4 provides for disability as being one of those protected characteristics covered by the Act.
58. Under section 6 of the Act disability is defined as:
- “(1) A person (P) has a disability if—
 - (a) P has a physical or mental impairment, and
 - (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.
 - (2) A reference to a disabled person is a reference to a person who has a disability.”
59. Chapter 2 of the Act is the section in which prohibited conduct is described. Under section 15 the Act prohibits 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.”
60. Under section 20 there is a duty to make adjustments:
- “(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

- (2) The duty comprises the following three requirements.
- (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
- (4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
- (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.
- (6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.
- (7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.
- (8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.
- (9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—
 - (a) removing the physical feature in question,
 - (b) altering it, or
 - (c) providing a reasonable means of avoiding it.
- (10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—
 - (a) a feature arising from the design or construction of a building,
 - (b) a feature of an approach to, exit from or access to a building,
 - (c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d) any other physical element or quality.

- (11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.
- (12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.
- (13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.”

61. Because of the difficulties that claimants have experienced in issuing and pursuing claims under the Equality Act and earlier legislation section 136, the burden of proof provisions, were added. Section 136 is in the following terms:

- “(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.
- (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.
- (5) This section does not apply to proceedings for an offence under this Act.
- (6) A reference to the court includes a reference to—
 - (a) an employment tribunal;
 - (b) the Asylum and Immigration Tribunal;
 - (c) the Special Immigration Appeals Commission;
 - (d) the First-tier Tribunal;
 - (e) the Special Educational Needs Tribunal for Wales;
 - (f) the First-tier Tribunal for Scotland Health and Education Chamber.”

62. Section 15, as indeed section 20, has been the subject of considerable judicial scrutiny. In Pnaiser v NHS England [2016] IRLR 170 Simler P laid down the relevant principles on which the tribunal must determine such a claim and the focus in such proceedings. As Ms O’Halloran has pointed out in her written submissions causation was considered by Simler P in Sheikholeslami v University of Edinburgh [2018] IRLR 1090. It is a 2-stage process. First, did A treat B unfavourably because of an (identified) something? And second, did that something arise in consequence of B’s disability?

63. Section 20 was considered in Project Management Institute v Latif [2007] IRLR 579 when Mr Justice Elias considered the burden of proof in reasonable adjustment cases. He approved the Code of Practice but added:

“Demonstrating that there is an arrangement causing a substantial disadvantage i engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made.”

64. The reasonableness of adjustments was considered in Smith v Churchills Stairlifts plc [2006] ICR 524 CA. The test of reasonableness, so the Court of Appeal stated is an objective one and it is ultimately the employment tribunal’s view of what is reasonable that matters. In such circumstances it is permissible for the tribunal to substitute its own view of what is reasonable.

Conclusions

Disability

65. It was not in dispute that the claimant is a disabled person and was a disabled person at the time of the relevant events. From the medical evidence and the evidence given by the claimant it is clear, and is a finding we make, that she is a person who was diagnosed with asthma, which is a physical impairment and the effects of that condition were and are substantial, have lasted for several years and have affected her ability and continue to affect her ability to carry out normal day-to-day activities.

Unfavourable treatment

66. The findings of fact that we have made are in terms that we do not accept that there was a request to postpone the grievance meeting. In our judgment that is the end of the matter and there is nothing to which the respondent needs to respond. In any event, on the evidence before us, we fail to see any connection with disability. In contrast when she sought to appeal, the language was clear and the intention equally clear. There is some force in the respondent’s submission that the decision to proceed with this limb of her claim only arose in retrospect as the grievance outcome was not to her liking. Applying the test in Sheikholeslami there was no unfavourable treatment.

Hot desking

67. Effectively she had been doing this for some considerable period of time. Dr O’Curry’s investigations that we referred to in our findings of fact made that quite clear. The evidence that we heard in answer to our questions was that the physical recording onto EPIC, which was the programme onto which notes were recorded, showed in effect that it was something akin to the brief notes recorded at a GP doctor’s surgery. There was nothing that was so urgent to be recorded such that she couldn’t wait. She was resistant to

trying out any of the proposals made by the respondent and she gave no sensible response to a question in evidence as to why she hadn't asked any colleague to assist. In any event in evidence she described her shifts as being of 10 hours with four sessions per day which according to the evidence of Dr O'Curry would last no more than six hours. We accept that evidence and the inevitable conclusion that there was a period of four hours per day or thereabouts for her to record those notes.

68. We also find that the respondent had acted in a reasonable and measured way by accepting the claimant's objection to walking outside in conditions which could exacerbate her asthma. In this regard we also note that the rest of the team had moved to an area outside of the Rosie Hospital, in Barton House and the portacabin, and the claimant was not required to do so.
69. The respondent accepts that it applied to the claimant the PCP of requiring employees to hot desk. On the evidence that we have heard in the findings of fact that we have made we do not accept that it put her at a substantial disadvantage in comparison with a nondisabled person. There was no requirement on her to walk long distances and the proposals that were made, mirroring in many ways the arrangements that she had already worked by, did not place her at a disadvantage.

Storage

70. We found it difficult to accept her evidence that the substantial amount of equipment/boxes were necessary in the normal performance of tasks and prefer the evidence of Dr O'Curry who had supervised her on many occasions and in looking through her notes of those sessions, which were produced in the bundle of documents, we could see little reference to such items as being necessary in the performance of her tasks. She gave evidence of sand trays, magazines and art materials as being necessary tools in counselling. The precise contents of those items shown in the photograph at page 290 was not given but shown in the picture are at least six boxes and a large number of other items which were not immediately identifiable. It seems to us that the proposal for a lockable drawer was a perfectly reasonable one given that essentially the requirements of her counselling work were to record notes on paper. In any event we were told in evidence that had this been raised by the claimant as a as an adjustment that she needed while at work a trolley would have been provided to her. The respondent denies that it had a PCP of providing storage facilities not in close proximity to an employee's place of work and that this was applied to the claimant. We accept that submission and do not accept that even if this PCP applied, it would have put the claimant at a substantial disadvantage in comparison with a nondisabled person. Given the findings of fact that we have made we do not accept that the claimant was required to carry items from her desk, or at least anything apart from fairly manageably portable items, and a requirement that she would have to walk long distances. Given the facilities that were available, a short walk of a few minutes was all that was needed at most.

Counselling room

71. The evidence in this regard was that the claimant had managed to work successfully for a considerable period of time using the counselling facilities that were made available to her. On no more than three occasions was there any real difficulty in her using the facilities that were available. We heard from Dr O'Curry that there was no evidence that incident reports had been completed and in reality we could see no disadvantage at all to her to use the facilities that she had previously used.
72. As far as we can determine there were no incident reports within the bundle of documents, certainly none that were brought to our attention. There was adequate facility for the claimant to pre-book counselling rooms. They were all within close proximity. If there was a PCP requiring employees to identify a room suitable for counselling sessions with patients, which the respondent neither accepts nor denies, it certainly didn't put the claimant at a substantial disadvantage in comparison with a nondisabled person requiring her to walk long distances to locate a suitable room, exacerbating her asthma.
73. On the facts that we have found in this case there is nothing on which the respondent needs to respond bearing in mind the provisions of section 136.
74. As a tribunal we found it quite remarkable that the bundle of documents comprised over 2300 pages, the claimant's evidence extended to 214 paragraphs over 37 pages and in reality the issues were not difficult ones. It is always a matter of regret when such matters, which in our judgement the respondent used reasonable means to try to resolve during her working time, have had to be discussed in tribunal at such length.
75. For all these reasons we dismiss the claims.

Employment Judge Cassel

Date: 22 December 2020

Sent to the parties on: ...6/1/21.

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For the Tribunal Office