



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
Mrs J Davies

AND

Respondent
EE Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Plymouth **ON** 12 and 13 July 2021
EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: Miss Charlotte Mallin-Martin of Counsel

For the Respondent: Mr James Boyd of Counsel

RESERVED JUDGMENT

The judgment of the tribunal is that the claimant succeeds in her claim for disability discrimination to the extent explained below, and the matter will now be listed for hearing to determine the appropriate remedy.

REASONS

1. In this case the claimant Mrs Jo Davies claims that she has been discriminated against because of her disability, and that her resignation amounts to a discriminatory constructive dismissal. The respondent denies any discrimination against the claimant, and also asserts that the claimant resigned, and that there was no dismissal.
2. The parties have given their consent for this matter to be determined by an Employment Judge sitting alone pursuant to section 4(3)(e) of the Employment Tribunals Act 1996.
3. I have heard from the claimant, and I have heard from Mr Robert Hall and Mrs Tara Jackson on behalf of the respondent.
4. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
5. The respondent is part of the BT Group of companies and provides mobile network and broadband services to consumers and businesses within the UK. The claimant Mrs Jo Davies was employed by the respondent as a

Customer Service Representative at the respondent's call centre in Plymouth within the Consumer Operations team from 28 May 2019. The claimant was a full-time employee and she worked 40 hours per week on an eight-hour rotation. The effective date of termination of the claimant's employment was 27 February 2020 which was the date when she resigned with immediate effect.

6. The claimant suffers from a physical impairment in her vocal chords known as a phonatory gap. The respondent concedes that the claimant was a disabled person at all material times as a result of this impairment, but does not accept that it knew or ought reasonably to have known that the claimant was disabled with this impairment, and/or suffered any substantial disadvantage by reason of it.
7. The respondent has a number of working practices and policies which are relevant to this claim. There is a Sickness Absence Policy, and a Guide for managers in how to deal with sickness absence. In short, this Policy has trigger points, which means that if an employee is absent for a certain number of days as a result of sickness this is likely to trigger the disciplinary policy for reasons of capability or extended sickness. For instance, more than 10 days' absence in any year is likely to trigger a Stage I disciplinary hearing and potential first warning for capability under the disciplinary process. Managers are given a discretion as to whether to implement the process and/or to give a warning.
8. The respondent also has a Manager's Guide to Disability, which is a detailed guidance giving information on disability and disabled employees. Sections which are relevant to this claim include an explanation of the definition of disability; the guidance that someone may not always think (or like to think) of themselves as "disabled", even if the condition is recognised as such; medical evidence is helpful but the employer must carry out its own analysis and not rely solely on medical evidence; where an employee but might be disabled but has not formally reported the same nonetheless adjustments should be considered; reasonable adjustments are said to put an obligation on an employer to remove anything which disadvantages an employee; and examples of adjustments which might need to be considered include transferring the disabled person to fill an existing vacancy and altering working hours.
9. Other relevant working practices include closely managed performance targets; detailed record-keeping of how employees spend their working hours; and a grading system between grade 1 and up to grade 5, with grade 5 employees receiving higher pay and benefits.
10. The respondent also has an Occupational Health service which is able to provide prompt assessments and reports. Line Managers have a discretion to refer employees in their team to Occupational Health, and employees have the right to consider any report and give their input, before it is disclosed to that Manager. Where an employee exercises that right this necessarily causes a delay before the Manager gets to see the report.
11. When the claimant commenced employment on 23 April 2019 her manager was Mr Robert Hall, from whom I have heard. On 2 December 2019 the claimant moved teams and her new manager was Mrs Tara Jackson, from whom I have also heard. The claimant worked hard at her job and was well

respected by her managers. She achieved grade 5 status and was proud of doing so and wished to retain that status. The claimant felt that both Mr Hall and Mrs Jackson were supportive and considerate managers. Equally Mr Hall and Mrs Jackson both valued the claimant as a hard-working and efficient member of their teams.

12. The claimant's duties as a Customer Service Representative largely involved answering telephone enquiries from customers which related to their mobile phone contracts and usage. The claimant began to experience difficulty with her throat and she was sent for an endoscopy which took place on 3 August 2019. She then contracted pneumonia (which was unrelated to her throat condition) and she was absent from work on certified sickness absence from 5 August 2019 until she returned to work on 23 August 2019.
13. The claimant then attended a return to work interview with Mr Hall on 26 August 2019. They both signed a form confirming their discussion. The reason for absence is recorded as follows: "following a procedure with a camera to check a throat issue on 3 August, Jo had a cough that started that evening. Over the weekend it developed into difficulty breathing and on 5th August she saw her GP who suspected a chest infection and gave her antibiotics ... Results of an x-ray confirmed it was pneumonia ... Joe has returned today and says she feels 100%. She doesn't feel she needs any further support." Against the question "Are there any adjustments we need to make?" The claimant agreed No and against the question "is there any follow-up action support needed?" the claimant confirmed that no support was needed. This was consistent with the Statement of Fitness for Work from the claimant's GP which did not recommend any of the possible options of a phased return to work, altered hours, amended duties or workplace adaptations.
14. Mr Hall noted that after three weeks of absence the sickness absence policy trigger point had been met. Mr Hall formed the view that the pneumonia was a one-off condition which was unlikely to recur and exercised his discretion not to commence the capability process against the claimant, for which she was grateful, although the sickness absence remained a matter of record.
15. As a result of the endoscopy the claimant was diagnosed as having a phonatory gap, which is an impairment to the vocal chords, and is the disability upon which the claimant relies for the purposes of these proceedings. There is a dispute between the parties as to whether the claimant told Mr Hall about this condition as she alleges. Mr Hall accepts that he was aware that the claimant had a throat condition and then pneumonia, but denies the claimant told him that she had a phonatory gap, because the first that he had heard of that phrase was during the course of these proceedings. Mr Hall denies that he knew or ought reasonably to have known that the claimant was disabled at this stage although when questioned in relation to the respondent's Manager's Guide to Disability, he conceded that he had enough information before him to justify a referral to the respondent's Occupational Health advisers who might well have advised at that stage that the claimant was disabled.
16. The claimant and Mr Hall then had a Monthly Performance Review meeting on 3 September 2019. A number of matters relating to the claimant's performance were discussed and recorded. The claimant did not raise any

- issues or requests in connection with her throat condition. The minutes confirmed that the claimant's absence would normally have triggered a stage I meeting but that Mr Hall had exercised his discretion not to do this, although the absence would count towards future triggers if appropriate.
17. The claimant and Mr Hall then had a Quarterly Attendance Review meeting on 24 September 2019, in accordance with the respondent's normal procedures. The minutes record that they discussed the claimant's general health, and Mr Hall's notes record: "Jo was feeling fine at the moment. She says that she still has the occasional issue with her throat. Her voice goes gravelly and has done since a throat infection earlier in the year. But Jo understands that this isn't viable in her current role. Jo has recovered well from pneumonia and doesn't seem to have any ongoing effects from it. Jo was feeling healthy and well currently." They discussed the need for reasonable adjustments, and noted that none were necessary, although it was noted that Mr Hall declined to commence the sickness capability process.
 18. The claimant and Mr Hall then had a further Monthly Performance Review meeting on 1 November 2019. This was just before Mr Hall's team was disbanding and the claimant was about to be transferred to Mrs Jackson. It was at this meeting that the claimant asked to move into a part-time role. Mr Hall's minutes record: "The team is disbanding and Jo wanted part-time hours. Unfortunately none are currently available as there is no business requirement at the moment on part-time early, and the part-time late team is currently at capacity. TL [meaning Team Leader] will contact Nick Muller who runs the team so he can let her know when space is available so she can apply for it through her new TL. For now, Jo is moving to Tara Jackson on 2nd December and will carry on for the moment.
 19. Mr Hall's evidence is that at no stage did the claimant make him aware that a request to move to part-time working was linked to any problems which she was having with her voice. He accepts that he knew that the claimant had been having some problems with her voice and that it sounded a bit gravelly at times but she described it as an occasional issue and said that she would make sure that she would drink lots of water. She did not tell Mr Hall that was a serious issue, and she continued to work every day without any further sickness absence.
 20. Mr Hall's team then disbanded on about 23 November 2019 and the claimant was moved on to Mrs Jackson's team. Mr Hall completed a Handover Sheet for each employee, including the claimant, the purpose of which was to raise any matters of importance for each employee relating to performance and attendance. Mr Hall did not make any mention of the claimant's throat problems on the handover because he was not aware that it was a serious problem.
 21. On about 2 December 2019 Mrs Jackson took over as the claimant's Line Manager. Mr Hall had discussed the claimant's short history of employment with Mrs Jackson during the handover process. He explained that he had decided against triggering the Stage I capability process but did not mention that the claimant had any issues with her voice. The claimant and Mrs Jackson developed a good working relationship and had got on well, and they talked with each other about their families and work.

22. On 2 January 2020 the claimant sent Mrs Jackson a text message to this effect: “Just been to see the doctor as I’ve got no voice (again) he has said I’m to have this week off and then a gentle phased return after that, you probably don’t know but in August I had a camera put down as my vocal chords were damaged from a virus, I seem to have this issue flare up again, very painful vocal chords. No talking at all for a week he said. I can see me leaving because of this issue which I don’t want to do as I like it, so I’m going to do what I’m told in the hope it recovers, Tony [the claimant’s husband] will drop doctor’s note in today. I’m sorry as I know it’s rubbish being off but I need this to mend, happy New Year x”. Mrs Jackson replied “Sorry to hear that. Hope it gets better soon, take care of yourself x”.
23. The claimant sent Mrs Jackson a further text on 7 January 2020 to this effect: “My voice is much recovered, I have ulcers down my oesophagus when these are a bit healed I’m having another camera down to my stomach as this is where the issue is coming from, I will explain when I mean if you’re interested ... Hope all is well and see you Saturday.” The claimant also asked shortly thereafter if she had retained her grade 5 rating which Mrs Jackson confirmed she had by return text on 9 January 2020. The claimant replied: “That’s great, proves to me I can do it and be a good employee. If I can sort this out I will be so happy, thank you for your support it means such a lot.”
24. The claimant returned to work on 11 January 2020. The claimant’s GP had recommended a phased return to work over six weeks, which Mrs Jackson was happy to accommodate. She agreed with the claimant that she would work four hours per day over an initial four weeks period and then review the situation after about four weeks, and to extend the phased return if necessary. They also agreed that the claimant would answer calls for an hour, and then would come off the telephone to rest her voice for another hour. Despite this agreement Mrs Jackson found that the claimant kept trying to work through the full four hours without taking these breaks, which were known as occupational health breaks, and Mrs Jackson had to keep reminding the claimant to take them.
25. Mrs Jackson was then on leave, and the formal return to work interview following the claimant’s sickness absence took place on 11 January 2020, and another team leader Gabrielle Maddock took Mrs Jackson’s place. Mrs Maddock recorded that the claimant had been absent with a vocal chord issue, and she recommended that the claimant should be referred to Occupational Health. However, under the respondent’s policies the referral had to be made by the relevant employee’s line manager.
26. This second period of sickness absence also triggered the claimant’s Sickness Absence Policy and the claimant was invited to a stage I sickness absence meeting by letter dated 16 January 2020. Meanwhile Mrs Jackson sent an email reminder to a fellow manager Mr Harrison that the claimant wished to move to part-time hours “especially now that she has issues with her vocal chords”.
27. The Stage I Absence Procedure meeting between the claimant and Mrs Jackson took place on 24 January 2020. During this meeting the claimant explained that she experienced an issue with her vocal chords before joining the respondent and was undergoing tests at the time she developed pneumonia. She said that her most recent absence was because of damaged

vocal chords, and her consultant had advised there was nothing further they could do other than to recommend a phased return to work. The claimant confirmed that the phased return had helped. This phased return to work had been in place between 11 January and 14 February 2020 during which time the claimant worked four hours per day which was just over half of her full-time contracted hours. Mrs Jackson also recommended to the claimant that she should take calls for an hour and then rest her voice for an hour, or if it became too painful to stop taking calls and to rest, by way of the so-called occupational health breaks, but the claimant chose not to do so and continued to work through her four-hour shift handling calls. Mrs Jackson also agreed during this meeting to refer the claimant to Occupational Health for advice on how to deal with her voice issues.

28. During this meeting the claimant confirmed that she wanted to go part-time, and Mrs Jackson agreed to discuss what further support might be offered once they had heard from Occupational Health.
29. Mrs Jackson also confirmed in evidence that the claimant's husband and daughters wanted her to resign so she could spend more time with her family. The claimant said to Mrs Jackson during this meeting: "I do not want to leave, my daughters and Tony want me to leave they keep telling me to, but I love the job and the challenges."
30. Following this meeting Mrs Jackson issued the claimant with a stage 1 warning under the sickness absence procedure. The claimant accepted this and confirmed that she felt she had been treated fairly. On 27 January 2020 Mrs Jackson completed the referral to occupational health seeking advice on the claimant's condition.
31. On 26 February 2020 the claimant informed Mrs Jackson that she had an appointment at the hospital, and Mrs Jackson confirmed that she would either have to use annual leave, or she could take time out and make up the time later on. The claimant was dissatisfied with this approach because Mr Hall had apparently allowed her to take paid time off for medical appointments before. The claimant telephoned her husband about the issue and Mrs Jackson then felt that she became extremely unhappy about the position. They then had a further chat about it and Mrs Jackson confirmed that she had explained the correct process. Mrs Jackson also emailed another manager to check that this was the correct way to proceed under the respondent's procedures, and she received confirmation that it was.
32. On the following day the claimant then resigned her employment. She wrote to Mrs Jackson: "I am giving my notice, I will leave tomorrow at 9 pm as we talked this over today. Thank you for everything ... PS if a part time vacancy arises let me know please."
33. The claimant also sent Mrs Jackson a text on 28 February 2020 to this effect: "Morning, I've decided to finish last night, I'm very sad and you know that. I feel that no matter how I tried to be good at my job EE were not going to step in and try to help me stay, getting good results really didn't mean a lot and it feels like I was just another number to them. Never mind it's over now. I can't thank you personally enough, you are a lovely lady and will make a fantastic manager (that's where you will end up) I hope EE see your value to the business as we all do, give my best wishes to the team was a bunch of crazies they are! I will miss everybody I don't mind you telling them about my voice

issue, some already know. I'm off today as Tony is taking me for a break, huge relief to him I've left. Love to everyone x PS if a part-time comes up please don't forget me"

34. Mrs Jackson was surprised and disappointed to receive the claimant's resignation which she felt was prompted by the claimant's family who wished to have more time with her. Mrs Jackson replied to this effect: "you have been an absolute treasure on the team and I can honestly say I am sad to see you leave, I know how much you enjoyed it and the challenge, I just wish there was a part-time space for you because you are an asset to the business as I've always told you. Of course I won't forget you with regards to a part-time space when one becomes available. I want you to go away now and have a lovely time with Tony. I know he desperately wants you home, I can't blame him, you are such a sweetie and will be missed ..."
35. I find that the claimant's resignation was in response to a combination of factors, including initially Mrs Jackson's refusal to allow the claimant to have paid leave for a hospital appointment; the respondent having failed to find an alternative part-time position; and the claimant's family wishing her to leave her employment so that she could spend more time with them. The claimant had not objected to the stage 1 absence warning, indeed she commented that she approved of the respondent's procedures in this respect and that she had been treated fairly.
36. Mrs Jackson accepts that the claimant had asked her whether there were any part-time roles available when she first joined the team, but she had not explained that this was because she was having trouble with her voice. The respondent has full-time teams and part-time teams, and part-time roles were available for those working in the part-time teams. There were no immediate vacancies at the time of the request but the claimant's request for a move had been noted.
37. Meanwhile the claimant had been assessed by Occupational Health and the Adviser had prepared a report dated 10 February 2020. This recorded that the claimant had been diagnosed with a gap in the vocal chords which had led to hoarseness, pain when talking for long periods, and an overall loss of voice. It was not known whether this would be permanent, and the claimant was awaiting an appointment with a Speech and Language Therapist. The claimant recorded that she was only able to speak for four hours at a time because of these symptoms. The report recommended that the claimant should undertake a Health and Well-being Passport with her line manager to record her health condition and to consider any workplace adjustments. It was noted that the claimant wished to reduce her hours on a permanent basis and the report suggested that this should be discussed with management who would then have to make the decision.
38. Mrs Jackson had not received this report at the time of the claimant's resignation, and had not seen it, although the claimant had received a copy and had earlier offered to discuss it with Mrs Jackson. Mrs Jackson preferred to wait to be notified formally by occupational health with a copy of the report.
39. There was then an exchange of emails between the claimant and the respondent's HR department on 3 March 2020 during which the claimant confirmed that she felt that she had to leave because it was not possible to accommodate her request for part-time hours. She explained that she could

cope with the soreness in her voice but after four to six hours it became very painful but she was told that there was no opportunity to reduce her hours. There was a further exchange of emails on 4 March 2020 during which the respondent offered the claimant the opportunity to discuss the idea of returning but the claimant felt that she had not been supported and wanted to consider her options. By email dated 5 March 2020 the claimant notified the respondent that they were advertising for a part-time customer service representative role and it was strange that this had not been offered to her. The respondent replied to the effect that they were prepared to meet with the claimant to discuss these matters although that would not necessarily guarantee the return to that role. The claimant did not accept that invitation.

40. The claimant subsequently entered the Early Conciliation process with ACAS and issued these proceedings on 19 May 2020. The issues to be determined by this tribunal were clarified by consent in a case management order dated 21 January 2021.
41. Having established the above facts, I now apply the law.
42. This is a claim alleging discrimination because of the claimant's disability under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges discrimination arising from a disability, failure by the respondent to comply with its duty to make adjustments, and a discriminatory constructive dismissal.
43. The protected characteristic relied upon is disability, as set out in section 6 and schedule 1 of the EqA. A person P has a disability if he has a physical or mental impairment that has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months, or is likely to last the rest of the life of the person.
44. As for the claim for discrimination arising from disability, under section 15 (1) of the EqA a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. Under section 15(2), this 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.
45. The provisions relating to the duty to make reasonable adjustments are to be found in sections 20 and 21 of the EqA. The duty comprises of three requirements, of which the first is relevant in this case, namely that 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, there is a requirement to take such steps as it is reasonable to have to take to avoid that disadvantage. A failure to comply with this requirement is a failure to comply with a duty to make reasonable adjustments. A discriminates against a disabled person if A fails to comply with that duty in relation to that person. However, under paragraph 20(1)(b) of Schedule 8 of the EqA A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know – (a) in the case of an applicant or potential applicant, that an interested

- disabled person is or may be an applicant for the work in question; (b) ... that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.
46. Subsection 39(2)(c) EqA confirms that dismissal can be an act of discrimination, and subsection 39(7)(b) EqA confirms that this includes constructive dismissal.
 47. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides in section 136(2) that 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. However by virtue of section 136(3) this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
 48. I have been referred to and I have considered the EHRC Statutory Code of Practice and the following cases: Chandok and Anor v Tirkey [2014] UKEAT/190/14; Gallop v Newport City Council [2013] EWCA Civ 153; Lamb v The Garrard Academy UKEAT/0042/18/RN; A Ltd v Z [2020] ICR 199 EAT; Pnaiser v NHS England [2016] IRLR 170 EAT; City of York Council v Grosset [2018] IRLR 746 CA; Chief Constable of Gwent Police v Parsons UKEAT/0143/18/DA; Birtenshaw v Oldenfield EAT; Chief Constable of South Yorkshire Police v Jelic [2010] IRLR 744 EAT; Environment Agency v Rowan [2008] IRLR 20 EAT; Royal Bank of Scotland v Ashton [2011] ICR 632 EAT; Archibald v Fife Council [2004] IRLR 651 HL; Project Management Institute v Latif [2007] IRLR 579 EAT; Malik v Bank of Credit and Commerce International SA [1997] IRLR 462 HL; Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978; De Lacey v Wechsels Ltd [2021] IRLR 547; Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA; Nottingham County Council v Meikle [2005] ICR 1 CA
 49. Disability:
 50. The claimant relies on an impairment to her vocal chords known as a phonatory gap, and although this was not formally diagnosed until her endoscopy on 3 August 2019, nonetheless it was an impairment for which the claimant already suffered. From Easter 2019 the claimant began to suffer from problems with her voice which caused pain and discomfort, and her voice became increasingly gravelly and broken. This had an impact on her ability to communicate and speak to other people. The impairment had an adverse effect on her day-to-day activities, which was substantial in the sense that it was more than minor or trivial. As at the time of the endoscopy it was confirmed that the condition could not be cured and it was therefore a condition which was long-term in the sense that it was likely to last more for than 12 months, and has indeed done so. The respondent has conceded that the claimant was a disabled person at all material times, and I so find.
 51. Knowledge of Disability:
 52. The respondent has denied that it had actual or constructive knowledge of the claimant's disability during her employment. I accept Mr Hall's evidence that he did not have actual knowledge that the claimant was disabled during the time that he was her line manager. The respondent argues that he had constructive knowledge at the quarterly attendance review meeting on 24 September 2019. At this meeting he recorded that the claimant's voice was

gravely and the condition was likely to be ongoing and that there was damage on her vocal chords. Mr Hall accepted in evidence that he had enough information to refer the matter to Occupational Health for further advice on the matter. It was incumbent upon the respondent this stage to make enquiries as to whether the claimant's impairment amounted to was connected to a disability (and in support of that contention the claimant refers to paragraphs 5.14, 5.15 and 6.19 of the EHRC Statutory Code). For these reasons I find that the respondent did have constructive knowledge of the claimant's disability in the sense that at about this time it ought reasonably to have known that the claimant's impairment amounted to a disability.

53. In any event it is clear that after Mrs Jackson became the claimant's line manager the respondent ought reasonably to have known that the claimant was disabled. The claimant's sickness absence in early January 2020 was because of her disability, and her GP's Statement of Fitness confirmed the condition and suggested adjustments, and this was discussed with the claimant on 2 January 2020 and on 11 January 2020. Furthermore, Mrs Jackson conceded in her evidence that at the Stage I Absence Meeting on 24 January 2020 she had sufficient information from the claimant in connection with her condition to conclude that she was disabled.
54. I therefore find that the respondent had constructive knowledge of the claimant's disability with effect from 24 September 2019, and actual knowledge of the claimant's disability from 24 January 2020.
55. Reasonable Adjustments
56. The constituent elements of claims in respect of an alleged failure to make reasonable adjustments are set out in Environment Agency v Rowan. Before considering whether any proposed adjustment is reasonable, the Tribunal must identify: (i) the provision, criterion or practice applied by or on behalf of the employer; (ii) the identity of the non-disabled comparators (where appropriate); and (iii) the nature and extent of the substantial disadvantage suffered by the claimant.
57. Environment Agency v Rowan has been specifically approved by the Court of Appeal in Newham Sixth Form College v Sanders - the authorities make it clear that to find a breach of the duty to make reasonable adjustments, an employment tribunal had first to be satisfied that there was a PCP which placed the disabled person at a substantial disadvantage in comparison with persons who were not disabled. The tribunal had then to consider the nature and extent of the disadvantage which the PCP created by comparison with those who were not disabled, the employer's knowledge of the disadvantage, and the reasonableness of proposed adjustments.
58. The case management order dated 21 January 21 confirms that the claimant relies upon two PCPs. The first is a requirement for employees including the claimant to complete a full-time working pattern of 40 hours per week with each shift approximately 9 ½ hours in length. The second PCP is requiring employees to complete the shifts without agreeing any reduction in hours. In my judgment neither PCP can be made out on the facts of this case.
59. At the time of the claimant's resignation the respondent employed some employees on a part-time basis in a part-time team; the respondent had accepted and acted on the recommendations of the claimant's GP to allow a phased return to work with reduced hours; Mrs Jackson had authorised and

- encouraged the claimant to take occupational health breaks within those reduced hours; and the respondent had made enquiries of a potential transfer of the claimant to a part-time shift if and when a vacancy arose.
60. It is simply not the case that the respondent required its employees to complete a full-time working pattern of 40 hours per week (the first PCP). It also not the case that the respondent required employees to complete their shifts without agreeing any reduction in hours (the second PCP).
 61. For these reasons I dismiss the claimant's claim that the respondent failed to make reasonable adjustments. Applying Environment Agency v Rowan and Newham Sixth Form College v Sanders the PCPs relied upon to establish substantial disadvantage did not exist.
 62. Discrimination Arising from Disability s15 EqA:
 63. The proper approach to section 15 claims was considered by Simler P in the case of Pnaiser v NHS England at paragraph 31: (a) Having identified the unfavourable treatment by A, the ET must determine what caused it, i.e. what the "something" was. The focus is on the reason in the mind of A; it involves an examination of the conscious or unconscious thought processes of A. It does not have to be the sole or main cause of the unfavourable treatment but it must have a significant influence on it. (b) The ET must then consider whether it was something "arising in consequence of B's disability". The question is one of objective fact to be robustly assessed by the ET in each case. Furthermore: (c) It does not matter in precisely what order the two questions are addressed but, it is clear, each of the two questions must be addressed, (d) the expression "arising in consequence of" could describe a range of causal links ... the causal link between the something that causes unfavourable treatment and the disability may include more than one link, and (e) 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.
 64. In this case I find that the absence-related written warning which was issued by Mrs Jackson to the claimant on 24 January 2020 amounted to unfavourable treatment. Although the claimant felt that she been treated fairly beforehand, and she was generally in favour of the respondent implementing its procedures, nonetheless it put the claimant in a detrimental position because she had then reached stage I of a formal capability process. This only happened because of the claimant's sickness absence in early January 2020 which arose in consequence of her disability. Her sickness absence was added to the previous absence because of her pneumonia and Mrs Jackson has accepted that the reason for the stage I warning was the second period of absence being added to the first period. I find that the stage I written warning was unfavourable treatment which had arisen in consequence of the claimant's disability (namely her second period of sickness absence).
 65. The next question which arises is whether this treatment was justified. The respondent relies on a legitimate aim of ensuring appropriate attendance at work from its employees and/or protecting colleagues from undue absences of others such as to increase pressure at work. I accept that this is a legitimate aim, but the otherwise discriminatory treatment will only be justified if the respondent's actions were a proportionate means of achieving that legitimate aim.

66. I find that the respondent's treatment of the claimant cannot be objectively justified because the stage I warning was not a proportionate means of achieving the respondent's legitimate aim relied upon. There were a number of lesser non-discriminatory measures which could have been taken. One obvious example is delaying the decision to issue the warning pending receipt of an occupational health report and discussion of potential adjustments, and the extent to which adjustments might have reduced the sickness absence, or might do so in the future. Put another way, Mrs Jackson have the discretion to disregard the disability-related sickness absence pending further consideration implementation and review of potential adjustments.
67. Accordingly, I find that the claimant succeeds in her claim for discrimination arising from her disability under section 15 EqA.
68. Constructive Dismissal
69. The claimant's case is that the approach taken by the respondent to the claimant's disability and to her sickness-related absence, as well as its failure to make reasonable adjustments, cumulatively breached the implied term of trust and confidence between the parties and that the claimant elected to resign in response to this repudiatory breach of contract.
70. I have found that there was no failure to make reasonable adjustments, but that the respondent did act in a discriminatory manner in relation to the stage I absence warning, which was not justified. This amounts to a breach of the implied term in the contract of employment that an employer will not act in a discriminatory manner and/or 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.
71. However, I am not satisfied that the stage I absence warning was a material or substantial part of the reasons for the claimant's resignation. The resignation was in response to a combination of factors, including initially Mrs Jackson's refusal to allow the claimant to have paid leave for a hospital appointment; the respondent having failed to find an alternative part-time position when requested; and the claimant's family reasons. The claimant had not raised any objection or appeal against the stage I absence warning, indeed she had commented that she approved of the respondent's procedures in this respect, and she confirmed that she felt that she had been treated fairly.
72. Applying Meikle, the repudiatory breach (that is the discrimination arising from the claimant's disability) was not at least a substantial part of the reasons for the claimant's resignation. I therefore find that the claimant did not suffer a discriminatory constructive dismissal within the terms of section 39(7)(b) EqA, and that claim is also dismissed.
73. The matter will be now be listed for a remedy hearing to determine any potential award for injury to feelings arising from the successful section 15 EqA claim, but it follows from the above that there is no loss of earnings claim because the discrimination was not causative of the claimant's resignation or dismissal. It would appear therefore that compensation is likely to be limited to an award for injury to feelings relating to the section 15 EqA discrimination only.

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74. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 5 to 40; a concise identification of the relevant law is at paragraphs 42 to 48; how that law has been applied to those findings in order to decide the issues is at paragraphs 49 to 73.

Employment Judge N J Roper
Date: 16 July 2021

Judgment and Reasons sent to the Parties: 22 July 2021

FOR THE TRIBUNAL OFFICE