



EMPLOYMENT TRIBUNALS

Claimant: Mr Edwin Duah
Respondent: Financial Ombudsman Service Limited
Heard at: East London Hearing Centre [by Cloud Video Platform]
On: 20, 21, 22 and 23 October 2020
Before: Employment Judge Speker OBE
Members: Mr D J Hurrell
Mrs S Jeary

Representation

Claimant: In person
Respondent: Mr Richard Hignett (Counsel)

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is as follows:-

- 1 The claimant was not constructively dismissed and his claim of unfair dismissal does not succeed and is dismissed.
- 2 The claimant's case of discrimination on the grounds of disability is not established and is dismissed.

REASONS

1 In this case the claimant Mr Edwin Duah brought claims of constructive unfair dismissal and discrimination on the grounds of disability against Financial Ombudsman Service Limited, by whom he was employed as an adjudicator from 10 August 2012 until he resigned on 1 March 2019.

2 Case Management Orders were made on 25 November 2019 to the effect that the case would be listed for a 4 day hearing to deal with liability only. A list of issues was to be

agreed and these were provided in a document headed Agreed List of Issues dated 7 October 2020. There was also a detailed cast list of 27 persons mentioned in the hearing (added to as the case went on) and a comprehensive chronology.

3 In view of the restrictions from the Covid-19 pandemic, the hearing was conducted remotely using the Core Video Platform. Employment Judge Speker and one of the Non-Legal Members Mrs Jeary were present at the East London Employment Tribunal Office in Import House. The other Non-Legal Member Mr Hurrell, as well as the parties, legal representatives, all witnesses and observers participated in the hearing remotely by video and audio devices.

4 We were provided with an agreed bundle of approximately 600 pages of documents, statements by the claimant and 5 witnesses for the respondent as well as a file of 12 legal authorities produced by the respondent. At the beginning of the hearing the Tribunal was requested to read a selection of the documents in order to provide the essential background to the case. The reading list was agreed and included the pleadings, medical documents, key documents as to disciplinary and capability processes and the resignation, as well as documents identified in relation to various issues. A delay occurred on the afternoon shortly after 3pm on the first day of the hearing due to a fire alarm sounding at Import House, requiring the building to be evacuated. This remained the situation until the end of that day.

5 The Tribunal heard evidence for the claimant himself and from 5 witnesses for the respondent namely Rob Croucher (Team Manager Casework and the claimant's line manager), Desmond Gaffney (Head of Casework Teams), Ian Middleton (Team Manager Casework), Tara Potter (Team Manager Casework) and Shanae Donkor (Employee Relations Partner).

6 As stated, the issues were set out in the agreed list identifying specifically the issues to be resolved as to jurisdiction, constructive unfair dismissal, disability, discrimination arising from disability (section 15 Equality Act 2010 'EQA') and reasonable adjustments (sections 20 and 21 EQA). It had been conceded by the respondent that the claimant was disabled within the statutory definition in the EQA due to mental impairments of Obsessive Compulsive Disorder (OCD), anxiety and depression. In essence the claimant alleged that the respondent had treated him unfavourably in a number of identified respects arising from his disability, had failed to make reasonable adjustments to avoid the claimant suffering from substantial disadvantage and that the claimant had resigned in circumstances justifying him to do so and amounted to constructive dismissal and that this was unfair dismissal.

The Facts

7 The tribunal found the following facts:

- (a) The respondent, the Financial Ombudsman Service, was established in 2000 in order to help settle disputes between customers and UK-based businesses providing financial services such as banks, building societies, insurance companies, investment firms, financial advisers and finance companies. Customers must raise their issue with the business and allow 8 weeks to look at the complaint before the ombudsman can be asked to

make a decision on the dispute. The customer can then refer the complaint to the Financial Ombudsman Service.

- (b) The claimant was employed by the respondent from 10 September 2012 as an Adjudicator. The role of an adjudicator is to help to resolve complaints made by customers. This includes the many complaints made as to PPI (Personal Protection Insurance), complaining that it has been mis-sold, for example where the customer is self-employed and could not benefit from the cover under the policy. Adjudicators review the evidence, communicate with the customer and the business, make a provisional assessment of the merits of the case (a 'view') which they communicate to both parties. They seek to settle cases. They also have administrative duties such as setting up cases and recording changes of addresses. They are required to progress cases in a timely and responsible manner.
- (c) Adjudicators have their own caseloads and have targets for the number of cases to resolve each month. They also undertake phone shifts to receive calls from customers, their representatives and businesses which are likely not to be about the adjudicator's own cases. The purpose is to answer queries and log calls to ensure there is progress. Enquires are made of the system as to the state of a case and accurate call notes must be made and fully logged. All activity is logged on the IT Clipper system. Adjudicators are regularly monitored as to their activity including their volume of work, meeting targets, accuracy as to issues such as CVP (caller verification process). The adjudicators work in teams.
- (d) From 1 September 2015 to 10 November 2016 the claimant was absent from work having suffered from a mental breakdown. He was diagnosed with depression, anxiety and OCD. His manager had been Syed Hussein. Following the claimant's return to work the respondent received information about the claimant's health including an Occupational Health report on 21 September 2016. There was a further Occupational Health Report on 21 December 2016. The claimant was on an Absence Improvement Plan from 10 November 2016 to March 2017. On 20 April 2017 the claimant was given a Formal Written Warning. A further Occupational Health Report was received on 27 April 2017. On 2 May 2017 the claimant was put on a Performance Improvement Plan (PIP).
- (e) In July 2018 Rob Croucher became the Claimant's team manager. He discussed with the claimant informally what he had been told by Syed Hussein as to the claimant's absence and medical history. The claimant indicated that he did not wish to go into details and Rob Croucher respected the claimant's wish for privacy as to his medical issues.
- (f) The claimant was on holiday from 25 July to 21 August 2018. While he was away, there were concerns as to his work. Another team manager, Sarah Cooper, informed Rob Croucher of a customer complaint about the claimant's delay in dealing with a case. Rob Croucher found that the Clipper details were of concern, with long gaps in activity. Rob Croucher spoke to Stewart Buss, one of the claimant's former managers about the claimant's previous PIP and was told it covered call notes, attention to detail, service and the Caller Verification Process.

- (g) Rob Croucher held a performance meeting with the claimant on 31 August 2018. Seven of the claimant's cases were found to have quality issues, which was a very high figure. His productivity levels for the last three months were low. It was decided to put him on a PIP from 3 September to 31 October to address quality issues and poor case management. The claimant said he knew he needed to be more organised. He was asked if he needed any other support.
- (h) On 12 September 2018 Rob Croucher held an investigation meeting with the claimant giving him an opportunity to explain his absence on the day before his holiday, gaps in the Clipper history, being away from his desk for long periods, repeated lateness, failure to return from holiday on the agreed date, failing to follow procedure, not progressing cases and being under productive – 15.6% for August; 1 case had been resolved as against a target of 6.4. The claimant provided a detailed response and further information as to his mental health problems and his condition. Rob Croucher decided that a formal hearing was appropriate.
- (i) During this time the claimant attended PIP review meetings.
- (j) On 28 September, Tara Palmer, a Team manager, was the independent hearing manager at the claimant's disciplinary hearing following Rob Croucher's investigation. The claimant was represented by Sharon Glynn, a member of the ICC. Shanae Donkor, an Employee Relations partner took notes. The claimant referred to his anxiety levels and his need to have additional breaks. It was suggested that he seek help from the Mental Wellbeing Network. Tara Palmer took account of all aspects which the claimant raised as to his mental health. She upheld some but not all of the allegations and imposed a formal written warning for failure to follow a absence reporting procedures and failure to progress cases. His poor productivity was thought to be more a matter of capability than conduct. The fact that he was on a PIP was considered appropriate and supportive.
- (k) Tara Palmer recommended review of the PIP to provide focus on performance, and to identify the reason for failing quality checks. She also recommended use by the claimant of the Mental Wellbeing Network, Carefirst (the external employee assistance service) and that the claimant complete a workplace adjustments passport, setting out the support he needed.
- (l) The claimant said he would follow the recommendations and mentioned that he was easily distracted and that music or sitting elsewhere may help.
- (m) The formal written warning dated 3 October was to last for 6 months. Tara Palmer discussed the outcome with Rob Croucher and Des Gaffney, his line manager, who also attended. The claimant did not appeal against the imposition of the warning.
- (n) During the reviews of the PIP which began on 3 September, a number of issues were raised including delays with casework, concerns at quality noted from Rob Croucher checking the claimant's work and listening in to calls, failure to add call notes promptly to Clipper, failure to send out

'views', logging in late to phone shifts 6 times. The claimant made good progress on some issues and met his call target for the first three weeks of the PIP. At a PIP review with Rob Croucher and Des Gaffney on 25 September only 50% of the claimant's work was 'green' against a target of 85%. Risk in his cases was getting higher rather than lower. Weekly reviews showed inconsistencies with continuing concerns as to quality. In what was to be the last week of the PIP there was noted to be a 'huge improvement' in quality. Rob Croucher decided to extend the PIP by 4 weeks to give the claimant the chance to show he could maintain the improvement, aiming for 90% and saying the claimant should be above 84%.

- (o) There were some specific issues during this period. There was delay in the referral to Occupational Health. Robert Croucher conceded in evidence that this was partly his fault due to lack of clarity and familiarity as to the procedure leading to the referral not being made until 24 October. He thought the claimant would be more aware of the procedure as he had had previous referrals. Ultimately the report was received on 14 November but was delayed by the claimant in not confirming agreement to it being seen by management until 14 December.
- (p) Rob Croucher required the claimant to work fixed hours from 9 to 5 although the claimant asked to work from 8 to 4. He did not until later suggest that his request related to health issues. Rob Croucher indicated that 9 to 5 was appropriate to facilitate monitoring of the claimant's hours and performance. He also required the claimant to communicate to him directly his arrival and departure times and the start and end of breaks. An incident occurred when having emphasised the 9 to 5 hours, the claimant left at 4. Ultimately the occupational health report suggested that 8 to 5 should be attempted on a trial basis.
- (q) The respondent takes very seriously its data responsibilities. All breaches of CVP must be reported. CVP ensures checks are made to ensure that adjudicators and others have confirmation that they are speaking to the right person. This relates to incoming and outgoing calls. Training is given to adjudicators and they are provided with prompt cards. The claimant was found to have breached CVP 4 times in September and October. He was informed on 2 October and told there must be no further breaches. Further breaches occurred on 9 and 16 October. In accordance with procedure, Rob Croucher discussed the CVP breaches. The claimant's ICC representative was involved in the discussion. The claimant referred to the OH report being outstanding but did not give mental health as a reason for the CVP breaches.
- (r) At a further PIP review meeting and investigation meeting on 24 October to discuss CVP breaches and leaving at 4pm on 15 October, there was a heated discussion. The claimant accused Rob Croucher of being unprofessional and complained about his treatment and said that it was different from others on PIPs. Rob Croucher said he would take advice from the ICC. There was email exchange and the claimant was told he could go back to working flexibly if he passed the PIP.

- (s) Rob Croucher ceased to be the claimant's manager on 5 November. Review of the claimant's PIP was taken over by Jerry Rowan and Dan Rowan. They carried out quality checks and graded the pass rate at only 38% green against a minimum target score of 84% and found that there were also gaps in the clipper history. They decided to end the PIP and begin an investigation. There were also 5 cases where Des Gaffney had flagged up action needed but the claimant had not actioned them. These were added to the investigation. There was also an allegation that the claimant had left his desk and was 'gossiping' after returning from a meeting with Mental Health Support Network, which was investigated.
- (t) On 2 November, the claimant was informed that he had failed his PIP. On 12 November he joined the team of Ian Middleton, who became his line manager. On 13 November, the claimant was moved onto 'pre-con' works, tasks usually undertaken by staff below the level of adjudicators and regarded as simpler and less likely to cause problems with deficiencies. That decision was taken by Ian Middleton after discussions with Des Gaffney and HR. On becoming the claimant's manager, Ian Middleton spoke to him and discussed the meeting he was to have with Jerry Daly and Dan Rowan about failing the PIP.
- (u) On 14 November the claimant attended an Investigation meeting after which it was decided to bring formal capability proceedings against the claimant, which were to be handled by Tara Potter. The claimant was told that the move to pre-con work was to give him a 'breather' while awaiting the outcome of his hearing.
- (v) The claimant was signed off work from 16 to 30 November. During this time he was paid only Statutory Sick Pay rather than Contractual Sick Pay. The claimant was told that SSP was paid in accordance with the respondent's policy because a disciplinary and capability hearing was pending. The claimant sent emails challenging this.
- (w) On 14 December 2019 Tara Palmer commenced the claimant's disciplinary and capability hearing, having been requested due to her previous involvement and her experience as a mental health first aider. The allegations were of failing to follow a management instruction by leaving work at 4pm, failing to complete CVP on 29 September and 9 and 16 October and failing consistently to meet PIP objectives. The hearing commenced dealing with disciplinary issues and discussed the working times. The claimant was said not to have identified mental health issues as relevant to his request to work from 8 to 4. There was discussion of the Occupational Health report which was only then available to the respondent and this recommended a trial of 8 to 4 working for 3 months. As to CVP failures, the claimant conceded that Rob Croucher had given him support and had extended the PIP to give him extra time. The claimant challenged the checks by Jerry Daly and Dan Rowan. Tara Palmer agreed to review these.
- (x) The claimant maintained he was not getting the right support and had been having panic attacks. He denied the allegations and said perhaps he had not been fit to return to work. Tara Palmer reviewed the feedback

from Jerry Daly and Dan Rowan and discussed this with another manager who was experienced in the Mass Claims division. After detailed consideration, Tara Palmer disagreed with some of the scores which produced a figure of 55% green quality checks, but still below the 84% required during the PIP extension. She found that criticism of the claimant's handling of a customer complaint was muddled, that in another case he had not been listening to the customer, that not listening to customer details was a recurring problem, that his work was sloppy and he was not being unfairly targeted.

- (y) The hearing was re-convened on 8 January 2019. The adjournment had been to enable Tara Palmer to look at the evidence in more detail. She explained that there were 8 instances where she disagreed with the feedback but this re-evaluation only increased the figures from 61% to 63% over the PIP. The claimant was asked about his working pattern. He was not doing phone shifts or working cases. His hours were 8 to 4 but he was coming in at 8.30 as he said he was having trouble sleeping. He said his mental health condition was 'creeping'. He said his relationship with his new manager, Ian Middleton was fine.
- (z) Before finalising her decision, Tara Palmer reviewed the claimant's mental health. She took into account the O H report. She found that the claimant was not taking his role and the need for communication sufficiently seriously. As to conduct he was not having regard to the fact that he was already on a live warning for misconduct. She did not find that the CVP failures were connected to his condition. She decided that as to conduct she would impose a final written warning. As to capability, she decided that the appropriate outcome was a formal written warning, coupled with a further PIP with some additional support, running for 6 to 8 weeks with incremental increases in targets during the plan. It would be for Ian Middleton to implement the plan. She suggested that some headphones might help Mr Duah to concentrate. The formal written warning and final written warning were sent to the claimant on 11 January 2019. He was told of the right to appeal but did not do so.
- (aa) The further PIP was sent to the claimant on 18 January for completion and commenced on 21 January to last until 13 February 2019.
- (bb) The OH report had made the following recommendations:
 - (a) the claimant should discuss with his manager or HR his perceptions of how he was being treated
 - (b) he would benefit from a fixed pattern of working hours from 8 to 4 for a trial period of 3 months
 - (c) he should discuss taking a reduced lunch break from 60 to 30 mins with additional breaks throughout the day;
 - (d) he should attend his psychiatrist appointment and other appointments, which might require time off work;

- (e) his condition could affect his ability to concentrate, so if possible he should undertake his work in a side room.
- (f) Ian Middleton informed the claimant that he would support all of these recommendations. The only difficulty was the provision of a side room (due to lack of such available space) but instead of this the claimant could listen to classical music through headphones, to which he agreed.
- (cc) During the PIP, the claimant did not regularly email as to start or finish times or breaks and he frequently started work late. The claimant was carrying out pre-con tasks and this was continued as being simpler and less challenging work. Ian Middleton felt that to put the claimant on complaint assessment would be setting him up to fail. The claimant was also to undertake phone shifts on the PPI helplines. Ian Middleton was to check the calls and another adjudicator, Matt McManus was to check the pre con work. The claimant was offered the availability of Will Gill, one of the best regarded adjudicators, to discuss cases.
- (dd) Reviewing the claimant's work was very time-consuming. The claimant continued to make a wide range of errors despite feedback. In relation to pre con work, of 105 tasks marked by Matt McManus, 42 were passes and 63 were fails. He continued to make CVP errors. Feedback on calls showed the claimant was doing the bare minimum and not interacting with customers. There were numerous aspects in which his performance was unacceptable including quality of pre con tasks, productivity, phone adherence, compliance as to hours. For week 1 he failed to meet PIP objectives. Regular feedback and support were given. For week 2 he failed again to meet the objectives, despite having low quality targets and being on the easiest work but still requiring remedial work after checks. Ian Middleton consulted HR who felt the PIP should be stopped but Ian Middleton wanted to persevere for a further week.
- (ee) The third review on 13 February showed a pass of 71% for precon work, a fail of 53% for calls and failure of productivity, scoring only 27%. There were significant other failures as to phone adherence, a 4 hour gap on Clipper and failing to record breaks. He had not met the PIP objectives. He could not explain the 4 hour gap. He said he had a lot of external issues to deal with.
- (ff) Ian Middleton summoned him to an investigation meeting on 14 February which took place on 15 February. Mr Duah said he was finding 8 to 4 difficult, that he had a family member staying, that the timing of the PIP was not good due to his mental health and outside issues. He said he was capable and wanted another chance. There were 4 instances of him logging in late to phone shifts.
- (gg) Ian Middleton compiled an Investigation Report split into capability and conduct. Capability dealt with quality and productivity failings and he recommended a capability hearing. It was noted that all reasonable adjustments recommended in the OH report had been put in place, subject to the headphones issue. The claimant was on the easiest work, with low targets and extra support. The disciplinary investigation report

covered 3 issues: repeated late logging in to phone shifts, excessive writing up during phone shifts and a failure to explain a 4hour gap in Clipper.

- (hh) HR decided that the hearing manager be Helen Tideswell, a team manager. She requested additional information about the claimant, previous PIP and medical condition. She asked whether he had a workplace adjustments passport and whether the OH adjustments had been put in place, which the claimant confirmed. Both hearings were held on 28 February. Shanae Donkor attended as HR representative.
- (ii) As to capability and failure of the PIP the claimant said he had a lot going on in and out of work. He said he would see his therapist, be more open with his manager, 'get his head down' and work hard to implement the feedback. As to failure to email starts, breaks etc he said he forgot. He thought he could get up to standard throughout the PIP. He thought his relationship with his manager was good and so was the support. It had slipped his mind to complete the workplace adjustments passport.
- (jj) The Disciplinary hearing dealt with late logging in and using too much writing up time. The claimant said this was not intentional, and he would use reminders in future. He still could not account for the 4 hour gap. Both hearings were adjourned for Helen Tideswell to give her decisions at 3.30pm next day.
- (kk) The claimant was due to attend with his representative. On 1 March before the time of the hearing the claimant enquired whether, if he were to resign immediately, he would still receive a reference. This was confirmed to him. The claimant attended at the HR office on the 15th Floor (the hearing was to be on the ground floor). He produced a letter of resignation which included no reason for the resignation. As a gesture of goodwill, the respondent paid him in lieu of notice and provided a standard reference.
- (ll) The claimant notified ACAS on 16 May 2019 and an ACAS Early Conciliation Certificate was issued on 15 June 2019. The claimant presented his claims in the tribunal on 13 July 2019.

Submissions

8 On behalf of the respondent Mr Hignett provided detailed written submissions which he supplemented orally. He also produced a file of authorities to which he referred. He suggested that the case concerned a balance needing to be struck between the employer's right pursuant to the contract of employment to have work performed to the required level, and the protection and allowances to be made under the Equality Act to an employee who suffers from disability. He submitted that the tribunal have regard to four particular features in this case:

- (i) The nature of the claimant's role
- (ii) The support measures in place to assist him
- (iii) The extent to which the claimant helped or did not help himself, and

- (iv) The duration of time in which the claimant had experienced difficulties with his capability and conduct under various managers.

9 He outlined the various support measures in place and pointed to various ways in which the claimant did not take reasonable steps to help himself, including not being open, not attending medical consultations, not having medication reviewed, not using support services or following Occupational Health recommendations.

10 As to jurisdiction in respect of the claims he submitted that the constructive dismissal claim and the argument about recent internal proceedings were in time but that all other aspects in particular most of the complaints of disability discrimination, were out of time, in most cases very substantially so. Mr Hignett denied that this was a case where it could be said there was an 'ongoing situation or a continuing state of affairs' with linked acts of discrimination and he referred to the case of *Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686*. Many of the allegations were during the period when the claimant was managed for two months by Rob Croucher but that ended in late October 2018, 6 months before the claim was issued. In the meantime he was managed by Ian Middleton who the claimant found to be reasonable and fair.

11 As to the section 15 of the EQA, if the tribunal found jurisdiction, it was necessary to test the evidence as to various symptoms and effects and the extent to which they arose from disability to which the claimant attributed all his problems and failures at work.

12 With respect to the reasonable adjustments claim it was important to look at the many adjustments made for the claimant, the adherence to OH recommendations and the many resources made available to the claimant. These were reasonable adjustments and it was no fault of the respondent that the claimant did not take advantage of many of these. It was also necessary to limit the case to the three PCPs identified in the List of Issues:

- (a) Delay of OH report
- (b) Requirement to work 9 to 5
- (c) Requirement to email start and finish time and breaks

13 It was submitted that these were out of time, that in any event with b) and c) the claimant was not substantially disadvantaged and that there was justification in each instance by being a proportionate means of achieving a legitimate aim. As to a) the claimant was not put at substantial disadvantage and the delay with the report was not intentional and due to numerous factors including the claimant's own delay.

14 As to constructive dismissal, the claimant relied substantially on the management by Rob Croucher, ended by November. The claimant resigned on 1 March 2019, clearly not in response to that conduct if, which was denied, it amounted to a breach. The use of PIPs and the management of the claimant as well as the capability and conduct hearings were no breach upon which the claimant could rely. There was no evidence that he considered that there was an express or implied breach or that the claimant had resigned in relation to it. He feared that he would be dismissed on 1 March particularly as he was already on a final written warning. He chose to resign rather than being dismissed and did so after checking he would get a reference.

15 Mr Hignett referred in particular to the cases of *O'Hanlon*, *RBS v AshtonRowan*, *Salford and Basildon*. He submitted that all of the claims should be dismissed.

16 Mr Duah was afforded further time to consider Mr Hignett's submissions and prepare his own. He asked that the tribunal take account of concessions made by Mr Croucher of various respects in which his management of the claimant could have been better and how he could have done more to help the claimant. He argued that the case involved a chain of events from September 2018 (when Rob Croucher became his manager) through to March 2019. He referred to his detailed witness statement and the unreasonable stance towards him. He challenged the suggestion that he should have done more in relation to his own mental health needs.

17 The claimant pointed to some of the charges made against him which were not upheld and how marking had been changed. As to jurisdiction he said that he was concentrating on his mental health needs and trying to get on with his job while being under successive PIPs and he lacked understanding of proceedings and time limits.

18 He submitted that he had resigned because of the conduct of the respondent which had gone on for months and that he had had a panic attack on the morning of 1 March 2019.

The Law

19 Employment Rights Act 1996:

20 Section 95(1)(c) Definition of constructive dismissal

Employment Rights Act 1996 Section 95(1)

For the purposes of this Part (of the Act) an employee is dismissed by his employer if

(C) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

Equality Act 2010

Section 15 Discrimination Arising from Disability

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

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

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

Section 20 Duty to make adjustments

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

(2) The duty comprises the following three requirements.

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

(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.

Section 21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with that duty in relation to that person

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

Section 123

Time Limits

Proceedings.....may not be brought after the end of-

(a) the period of three months starting with the date of the carpet to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable

Findings

21 The tribunal notes the nature of the work of the respondent. It performs an important function in enabling members of the public to lodge complaints against financial institutions and seeking to achieve resolution. Customers are often feeling aggrieved and are entitled to expect a professional and responsive service from the FOS. Those who take on this work are properly held to high standards. It is entirely justified to expect Adjudicators such as the claimant, to perform to these standards and to be regularly monitored. It is reasonable for standards and targets to be set and to hold adjudicators to account if they fail to meet the standards whether as to productivity, performance, accuracy and compliance.

22 The tribunal also has in mind the need for the respondent, like all employers, to be fair to their employees, to take account of disabilities and to give support and make reasonable adjustments and to be aware of the responsibilities to their employees under the Equality Act 2010.

23 In this case the respondent concedes that the claimant was disabled and therefore entitled to the protections afforded by the 2010 Act in relation to his diagnosed mental illness.

24 The tribunal noted that up until the time that the claimant suffered his breakdown in 2015 leading to him being off work for a year, he had been regarded as a competent employee although he had received a warning and been on a PIP. Following his return to work in March 2017 he did experience difficulties. Even before he came under the management of Rob Croucher in July 2018 as stated he had received a formal written warning and been under a PIP in May 2017. Therefore, his problems with his work predated Rob Croucher becoming his manager.

25 It was from the time that Rob Croucher became his manager that the claimant raised the majority of his issues. That period of management was from July 2018 until 5 November 2018. The claimant regarded the management steps put in place by Rob Croucher, lack of support and use of PIPs to have been discriminatory. The claimant accepted that from 12 November 2018 he was part of Ian Middletons's team and that he had a good relationship with Ian Middleton who he found to be fair. We noted that the claimant's difficulties at work continued for three and a half months during which despite many supports being put in place for the claimant, supportive and necessary PIPs, allowances, adjustments, encouragement to seek assistance from resources, lowering of targets and move to simple work, the claimant faced capability and disciplinary processes. He received warnings and continued to fail to perform adequately leading to a further hearing ending on 28 February 2019. He was to receive the outcome on 1 March 2019 at 3.30pm but handed in his written resignation to the HR office that day before 3.30. It is noted that he thanked HR for their help and support.

26 We acknowledge that Mr Duah experienced problems with his mental health during the months leading up to his resignation. For most of the time he continued at work attempting to fulfil his employer's expectations but realising that he was not doing so. When warnings were imposed, he did not appeal. He lodged no grievance to suggest that his management or treatment was unfair.

27 As to the general impression of how he was managed, we found that in some respects Mr Croucher was less accommodating than others would have been. This was due in part to the claimant wishing to retain his privacy and not being open with Mr Croucher as to his problems or the reason why the claimant behaved as he did. We found that Mr Croucher was entitled to expect the claimant to meet targets and to make use of PIPs. It was significant that he extended the PIP to help the claimant and made allowances for him.

28 It was clear that Mr Middleton established a good relationship with the claimant and was committed to make all reasonable adjustments for him. He wanted to give the claimant every opportunity to succeed and to continue in his role. Others such as Mr Gaffney, Shanae Donkor and Tara Potter were also supportive and accommodating

and in various ways attempted to get the claimant to take advantages of resources and treatment to assist him.

29 Against this background we addressed the specific issues set out in the Agreed List.

Jurisdiction

30 Were the claimant's complaints of discrimination presented within the time limit specified within section 123 Equality Act 2010? The timing of the discriminatory acts complained of is from September 2018 to 1 March 2019. The claim was issued on 13 July 2019.

- (a) Complaints about disciplinary and capability proceedings were still in existence on 1 March 2019 but if not part of an act extending over a period of time, are out of time.
- (b) Claims about start, finish and break times are in time as they were still in place at the time of resignation.
- (c) The fixed hours 9 to 5 issue ceased on 14 December 2018 and is 4 months out of time. Similarly the claim as to the allegation of 'gossiping' is 4 months out of time.
- (d) The issue about not paying Occupational Sick Pay was out of time by the end of February 2019.
- (e) The alleged delay with the Occupational Health Report ought to have been brought within three months of 24 October 2018 or alternatively within 3 months of 14 December 2018 (when the OH was released to the respondent). The complaint was therefore 4 or 6 months out of time.

31 Do we find that the respondent was responsible for an ongoing situation or a continuing state of affairs to link these issues as laid out in *Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686*? We are prepared to so find as the presence of the claimant's mental health difficulties was well known within the service throughout the period referred to and was effectively on the agenda as progressive attempts were made to manage him. We therefore find that the tribunal has jurisdiction. We do not need to exercise discretion as to whether it is just and equitable to allow the claims to proceed out of time.

Constructive Unfair Dismissal

32 This claim depends upon the claimant being able to persuade us that he was entitled to resign pursuant to section 95(1)(c) of the Employment Rights Act 1996 'in such circumstances that he is entitled to terminate it without notice by reason of the employer's conduct'.

33 The leading case is *Western Excavating (ECC)Ltd v Sharp 1978 ICR 221 CA*. To establish a claim of constructive dismissal the employee must establish that:

- (i) There was a fundamental breach of contract on the part of the employer

- (ii) The employer's breach caused the employee to resign
- (iii) The employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

34 The claimant maintains that the respondent conducted itself, without reasonable and proper cause, in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the claimant. He relies upon the conduct set out in 2 a) to k) in the List of issues. Items a b d e f g h l and k all relate to management by Rob Croucher. In each respect they are part of the management of the claimant to deal with his failures in his conduct and performance. They were before 5 November when Rob Croucher ceased to be his manager. We do not find that any of the listed items amounts in any respect to a breach of the contract of employment, express or implied. In any event the claimant affirmed the contract by working under Ian Middleton with whom he had a good relationship. In addition, we do not find that the claimant resigned in relation to any of these matters concerning Rob Croucher. The fact that we are willing to consider these as part of a series for the purpose of jurisdiction, does not mean that we find them to produce a finding of a breach sufficient to amount to justification for resignation.

35 Similarly in relation to the other items, we do not find there was any breach of any express or implied term. The very detailed evidence which we heard including scrupulous monitoring of the claimant's performance, his failure to meet targets, his repeated errors of a serious nature despite detailed support and encouragement led to the PIPs and the capability and disciplinary processes. These were all carried out in accordance with the respondent's contractual policies and on the basis of substantial evidence carefully investigated and assessed. We found no basis for any suggestion than the conduct of the respondent led to a breakdown in the duty of trust and confidence.

36 We find that the claimant acknowledged the fairness of the processes. He did not appeal against any warning. He had indicated he was proposing to attend the outcome hearing on March 1 but decided to resign before hearing the outcome. He claimed he had suffered a panic attack but he requested reassurances from the respondent before handing in his resignation. He gave no appearance of having had a panic attack. We find on the clear evidence before us that he did not resign in response to any breach. He was not constructively dismissed and that claim is not made out.

Dismissal arising from disability - section 15 EQA

37 Did the respondent treat the claimant unfavourably in the following ways?:

- (a) September 2018 to February 2019 three disability and capability hearings. The claimant attributed these to failure to concentrate due to attention span, repetitive work affecting speed and anxiety requiring breaks. The tribunal did not find any clear evidence that the claimant's conduct and poor performance were arising from his mental health. He gave other explanations as to problems outside work.
- (b) September 2018 to February 2019. Need to email arrival departures and breaks. The claimant was permitted to take extra breaks to assist him. The need to email was for monitoring and was not unfavourable treatment arising from disability.

- (c) September 2018 to March 2019 claimant on continuous PIPs. As with a above the PIPs were deemed necessary as with all underperforming employees and this is not unfavourable treatment. The claimant had been on such a PIP before his breakdown.
- (d) September 2018 to October 2018 refusal for a time of flexible hours (later allowed). This was in accordance with working practice and was not unfavourable treatment.
- (e) September 2018 to December 2018. Required to work fixed hours. This was not unfavourable treatment.
- (f) 15 October 2018. Claimant was accused of gossiping. This was not arising out of disability and was normal management.
- (g) December 2018. Respondent deducted occupational sick pay and paid only SSP. This was standard policy for any employee absent when subject to pending discipline. It was not unfavourable treatment arising out of disability.

34 In addition to the points made above and in any event we find that the respondent satisfied the justification test in section 19(2)(d) of the Equality Act 2010 in that the management steps taken as described in each paragraph were a proportionate means of achieving a legitimate aim. It was of great importance to the respondent and to the public that the service delivered by the respondent was of a high standard and in accordance with what is expected. They owe a high duty to customers and to the financial organisations affected. Substantial and sustained efforts were made to attempt to manage the claimant to get to what would a satisfactory level. The actions taken were in his own interests to help him succeed and remain in employment in the organisation.

Reasonable Adjustments: Sections 20 and 21 Equality Act 2010

35 Did the respondent apply the following provision, criterion or practice

- (a) requiring the claimant to work 9am to 5pm (PRP 1)
- (b) Requiring the claimant to email his team manager when he started and left and at breaks (PRP 2)
- (c) Delaying the claimant's occupational health assessment (PCP 3)?

36 Did such PCPs put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time? The claimant relied on the following disadvantages:

- (a) PCP 1 – likely to have panic attacks in traffic
- (b) PCP 2 – Poor concentration means he forgets to do it
- (c) PCP 3 – Delay made condition worse

37 If so, did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at any such advantage.

38 If so, were there reasonable steps that that were not taken that could have been taken by the respondent to avoid any such disadvantage? The claimant says that the

respondent should have (a) allowed him to work from 8am to 4pm; and b) arranged the occupational assessment more quickly.

39 We heard detailed evidence on the question of reasonable adjustments generally on which we comment further below. As to the three PCPs raised by the claimant we find as follows:

PCP 1 The claimant had been performing poorly and was a very bad timekeeper. He did not keep to his hours. He was often late. He would miss telephone shifts booked for him. His manager directed him to work fixed hours from 9 to 5 so that he could be monitored. Also more support was available if he started work at 9. He did not explain that his request to start at 8 was anything to do with his mental health or any symptoms and the respondent could not have been reasonably expected to know this. He did not refer to panic attacks. We find that the respondent could not have been expected to know that the PCP would place the claimant at a substantial disadvantage. Steps were taken as soon as the OH report suggested that the 8 to 4 be started on a trial basis for three months.

PCP 2 The instruction to email his manager was a standard type of checking. The respondent could not have been reasonably expected to know that this would place the claimant at a significant advantage and we do not find that it did. In order to undertake his work as an adjudicator, the claimant would need to be able to remember many things including how to undertake important checks such as CVP, monitor cases, make prompt and accurate records. It would be expected that the claimant would be able to remember to communicate with his manager as he knew there were concerns about his timekeeping. The manager was not aware that the claimant's mental health would prevent this. Reasonable adjustments were taken throughout as set out below to support the claimant, help him with problems occurring in relation to his condition and encourage help himself in various ways including accessing available resources.

PCP 3 Delaying the claimant's Occupational Health Assessment. We did not find that the respondent had a PCP of delaying the assessment. Mr Croucher cooperated with the claimant as to the referral although he acknowledged there was some uncertainty as to the procedure. The history showed that the claimant had had an earlier OH assessment and was more familiar with the process. As soon as it was clarified Mr Croucher worked with the claimant. In the event a month's delay occurred because when the report was prepared the claimant was requested to consent to it being released to the respondent and he delayed by a month. We find that the claimant was not put at any or any substantial disadvantage by any delay on the part of the respondent. The respondent through HR and within the capability hearing was prompting the claimant further as to help with his mental health.

39. We noted in the evidence that the respondent made a large number of adjustments for the claimant and as an organisation had various relevant resources available:

- (a) provision of a mental health first aider, Robin Smith
- (b) access to an on-site mental health network
- (c) access to Carefirst, an external organisation offering free advice and support
- (d) support from ICC rep Sharon Waters who attended meetings with the claimant and took up issues on his behalf
- (e) time of for medical appointments including psychiatric
- (f) changes to the claimant's work pattern giving him extra breaks
- (g) changing hours to help him with claimed anxiety in traffic
- (h) having more regular meetings with his manager to review progress and offer extra support
- (i) allowing the claimant to listen to music on headphones when working
- (j) reducing productivity targets such as 2 pre con tasks per hour as against the usual 4
- (k) temporary reduction in quality targets from 55% rising to 90%

40 It was also noted that there were a number of respects in which the claimant did not do as much as he could have done to help himself:

39 Not attending his GP to have his medication reviewed, for example. Between September 2018 and March 2019 the medical records showed he attended his GP only once namely on 16 November. In addition to this:

- (a) Not attending treating professionals eg for CBT
- (b) Not seeing his psychiatrist as recommended by the OH report
- (c) Not making use of the Disability Passport System
- (d) Not being open with his managers to tell them about mental health problems

40 The above were relevant in assessing what the respondent did to assist the claimant and whether anything further could reasonably have been expected of them.

41 We sympathise of course with the claimant who had been with the respondent for some time. However, for the reasons set out we do not find that any of his claims is successful and all claims are dismissed

**Employment Judge Speker OBE
Date: 9 November 2020**