



EMPLOYMENT TRIBUNALS

Claimant: Ms C Wilson

Respondent: South London and Maudsley NHS Trust

Heard at: via CVP **On:** 10/2/2021 to 11/2/2021

Before: Employment Judge Wright
Mr M Cann
Mr R Shaw

Representation:

Claimant: In person

Respondent: Ms H Patterson - counsel

LIABILITY JUDGMENT

It is the unanimous Judgment of the Tribunal that the claimant's claims of unlawful discrimination contrary to the Equality Act 2010 (EQA) fail and are dismissed

REASONS

1. On the 5/11/2019 the claimant presented a claim form. She complains of unlawful discrimination contrary to the EQA. The protected characteristic is disability and the condition relied upon is anxiety and depression. The respondent conceded disability in the course of the proceedings. The

- prohibited conduct was identified by the claimant after a preliminary hearing on 17/6/2020 as indirect discrimination (s. 19 EQA), failure to make reasonable adjustments (s. 20 EQA) and harassment (s. 26 EQA) arising from two incidents on 26/7/2019 and 3/9/2019. The complaint is of a detriment s. 39 (2)(d) EQA. Acas early conciliation was entered into between 1/11/2019 and 4/11/2019 and as a result, the respondent takes issue with limitation/the time limit in respect of the first allegation.
2. The claimant is employed by the respondent as a band 6 Community Psychiatric Nurse, having started to work for the respondent upon completion of her training over 25 years ago.
 3. The list of issues sets out the allegations as:

JURISDICTION – OUT OF TIME

1. The claim form was presented on 5 November 2019. Accordingly, any act or omission which took place more than three months before that date (allowing for any extension under the early conciliation provisions) is potentially out of time, so that the Employment Tribunal may not have jurisdiction.

2. For any act which is potentially out of time, do any of the facts form part of a course of conduct by the Respondent extending over a period of time such as to render them in time?

3. If not, is it just and equitable to extend time?

DISABILITY

4. Was the Claimant disabled at the material time (26 July and 3 September 2019)? The Claimant says she was disabled due to depression and anxiety.

5. If so, did the Respondent know, or could the Respondent reasonably have been expected to know, about the Claimant's disability?

FAILURE TO MAKE REASONABLE ADJUSTMENTS

Meeting on 26 July 2019

6. In respect of the phone call on 26 July 2019, did the Respondent apply a PCP of: a. Requiring disciplinary investigations to take place as soon as possible.

7. If so, did the application of this PCP put the Claimant at a substantial disadvantage in comparison with persons who are not disabled? The Claimant says this put her at a

substantial disadvantage because of her disability as it impacts on her depression and anxiety.

8. Did the Respondent take such steps as were reasonable to avoid the disadvantage?

9. Did the Respondent know, or could reasonably be expected to know, that the Claimant was likely to be at a substantial disadvantage compared with persons who are not disabled?

10. Would the following adjustments have avoided the disadvantage? If so, would they have been reasonable in the circumstances?

a. Investigating the concern before calling the Claimant.

b. Taking a medical opinion before calling the Claimant on 26 July 2020.

Meeting on 3 September 2019

11. In respect of the meeting on 3 September 2019, did the Respondent apply a PCP of disallowing a support companion?

12. If so, did the application of this PCP put the Claimant at a substantial disadvantage in comparison with persons who are not disabled? The Claimant says this put her at a substantial disadvantage because of her disability, as a support companion would have compensated for the Claimant's lack of confidence, and provided comfort and reassurance for the Claimant.

13. Did the Respondent take such steps as were reasonable to avoid the disadvantage?

14. Did the Respondent know, or could reasonably be expected to know, that the Claimant was likely to be at a substantial disadvantage compared with persons who are not disabled?

15. *Would the following adjustments have avoided the disadvantage? If so, would they have been reasonable in the circumstances?*

- a. *To allow the Claimant to be accompanied to the meeting by a support companion;*
- b. *To allow the meeting to be postponed.*

INDIRECT DISABILITY DISCRIMINATION

16. *Did the Respondent impose a PCP of disallowing a support companion at the meeting on 3 September 2019?*

17. *Did this place the Claimant at a particular disadvantage by reason of her disability?*

18. *Was this a PCP? If so, did the PCP apply to persons with whom the Claimant does not share the characteristic?*

19. *If so did it put, or would it put, persons with whom the Claimant share the characteristic at a particular disadvantage when compared with persons whom the Claimant does not share it?*

The Claimant relies on the substantial disadvantage contained in paragraph 12 above.

20. *Did it put the Claimant at that disadvantage?*

21. *Can the Respondent show it was a proportionate means of achieving a legitimate aim? The Respondent will rely on the legitimate aim being to enable it to manage informal issues in an appropriate way and to ensure such issues can be dealt with swiftly and efficiently.*

22. *Would the adjustments relied on by the Claimant have overcome the alleged disadvantage and was it reasonable to expect the Respondent to make the adjustments in the circumstances?*

23. *Was the Respondent aware, or ought it reasonably to have been aware, that the Claimant was likely to be disadvantaged in this way?*

HARASSMENT (DISABILITY)

24. Did the Respondent engage in unwanted conduct during the telephone call on 26 July 2019? The Claimant alleges she was accused of bullying a nurse during that phone call.

25. Did the Respondent engage in unwanted conduct during the meeting on 3 September 2019? The Claimant states she was not allowed a support companion.

26. Was the conduct related to the Claimant's disability?

27. Did the conduct have the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant? In considering whether the conduct had that effect, the Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have had that effect.

4. The Tribunal heard evidence from the claimant and from her friend and colleague Ms Virginia Maw. For the respondent it heard from Ms Nicola Gower Clinical Services Manager and the line manager of the claimant's line manager. The Tribunal had an electronic bundle of 291-pages.
5. Both parties made closing submissions and the respondent provided written submissions.
6. As the hearing was conducted via CVP and due to the claimant's disability and that of other witnesses, frequent breaks were taken and it was open for any participant to ask for additional breaks if required.

Findings of fact

7. The 26/7/2019 was the claimant's last day in work before she was about to take three weeks' annual leave. The claimant had wanted to take the day off, but that was not approved. The claimant was in the process of submitting a whistle-blowing complaint on behalf of herself and some colleagues. In so far as it is relevant and as far as the Tribunal understands it, the complainants felt they were overworked and were suffering from stress as a result.
8. In the morning of the 26/7/2019 the claimant had attended a meeting with the Interim Head of Nursing and Quality at the respondent's headquarters to discuss her reflective account on a recent medication error. When she returned to her place of work (Granville Park), the claimant approached a

work colleague – SR. It was her own case that she wanted to gather additional information for the whistleblowing case (witness statement paragraph 7) and she asked SR 'how he was getting on with his job search and if he would like to fill in a' stress risk questionnaire (SRQ) provided by Occupational Health (OH) before he left. The claimant said she would send the SRQ to him later on that day. SR was a locum nurse who had unsuccessfully applied for a permanent position with the respondent and as such, he was leaving. The claimant did not know SR and he said she had never spoken to him before this occasion.

9. SR was concerned/upset by the claimant's approach and he emailed the claimant's line manager A C-B on 26/7/2019 at 11.30am. He said (page 118):

'I would like to draw your attention to something which happened to me when I came to work and feel I need to discuss with you.

It's about [the claimant] who came to the office I am currently sitting and asked me if I feel bullied or put under pressure by you and [KD]. I told her I have had times where I had discussions but felt it's a normal process for management to assert when things are needed to be done. I gave her few examples of how I dealt with when it happened to me and I could not see if I need to see it as "bullying" or making sure the work is done as they have to account for first when something goes wrong.

She told me few other staffs have noticed pressure has increased on the work load. She told me she is planning to raise a complaint about that and would come to see me later for my opinion.

I felt confused but didn't object to it.

However it was ruminating in my mind as I have never expected such things to happen and never had it through all my experience working in the NHS.

Hence my rationale to make you aware and I hope something is done about it as I don't want to feel I am under scrutiny for raising this issue with you.

I hope you understand my situation and I don't want to be involved in any stress for the future.'

10. The claimant agreed she had asked SR if he felt bullied and put under pressure by management and that accords with SR's statement to A C-B.
11. As a result of SR's email, A C-B raised the issue with Ms Gower. A C-B said the issue was damaging to the morale of the team and was causing her and KD stress (page 119).
12. Although it is not an allegation, the claimant now takes issue that Ms Gower, the Clinical Services Manager took action. The claimant relies upon this as a *heavy-handed* approach by management, however, she is

- lifting that phrase (and not being entirely transparent about the context) from a Whistleblowing Investigation Report dated 7/8/2020, which post-dated this incident (page 188). As the claimant had suggested to SR that A C-B and KD had bullied him and as Ms Gower was A C-B's line manager, it was entirely appropriate that she speak to the claimant about her approach to SR.
13. Ms Gower's concern which is accepted, was as the claimant had said she would return to speak to SR later that day, that she did not do so. The concern was that if the claimant re-approached SR, when he had informed management that he did not want to engage with the claimant (and did not feel able to say-so to the claimant) that the situation would deteriorate resulting in more serious allegations being made. As such and as she was at a different location to the claimant, Ms Gower decided she needed to speak to the claimant and called her to speak by telephone.
 14. Ms Gower knew the claimant shared an office with Ms Maw and one other member of staff. She asked KD to check whether the claimant was available and in a room by herself. KD reported the claimant was in a room on her own.
 15. Ms Gower then called the claimant and asked if she was alone. The claimant confirmed that she was. Notwithstanding that, Ms Maw returned to the room and the claimant put the call onto speakerphone so that Ms Maw could listen in, without revealing this to Ms Gower. As a result of this, the claimant accused Ms Gower of breaching confidentiality. The Tribunal was told a third person overheard the conversation, but was never told who this person was or heard from them.
 16. This is an example of the claimant's misinterpretation of the facts. Ms Gower did not breach confidentiality; the claimant did. It was open to the claimant to either ask Ms Maw for some privacy or in the alternative, to ask Ms Gower if she could call her back from a more suitable location where she could not be overheard.
 17. The claimant's interpretation of the conversation was that Ms Gower accused her of bullying SR earlier that day. Ms Maw confirmed that she did not hear the start of the conversation, that she walked in partway through and therefore she could not comment upon what Ms Gower had said to the claimant regarding confidentiality. This was despite Ms Maw's assertion in her witness statement that Ms Gower had not considered confidentiality and also, the statement was misleading as it said Ms Maw was in the office when the claimant received a call from Ms Gower when that was not the case. When questioned Ms Maw confirmed she walked into the office during the course of the conversation.

18. It was put to Ms Maw that her statement that Ms Gower said to the claimant 'do not approach SR as this could be further bullying' was a misrecollection. The reality, it was suggested, was there was a reference to 'bullying' during the telephone call Ms Maw overheard, but that was in reference to the claimant asking SR if he felt bullied and pressurised by management. It was suggested that Ms Maw's evidence was a reconstruction of events, having had conversations with the claimant about what was said over the passing of time since then and the witness statement and this hearing.
19. Ms Maw said that was not possible and she had a clear recollection of what she and the claimant heard.
20. Ms Maw was a clear and sound witness. She is however a very long-standing friend of the claimant and she accepted she was giving evidence to assist the claimant in being successful in her claims. She was also a party to a complaint about managers including Ms Gower on 5/9/2019. The Tribunal finds on balance, that the word 'bullying' was used during the call between Ms Gower and the claimant, overheard by Ms Maw, but that it was in relation to SR stating the claimant had asked him if he felt bullied and pressured by management, as both parties agree was alleged.
21. Had Ms Gower accused the claimant of bullying SR during the telephone conversation and not referred to her asking SR if he felt bullied by A C-B and KD, as recounted in the email of 26/7/2019 at 4.20pm (page 122), the Tribunal finds the claimant would have taken issue with it in her response. She did not do so. All she took issue with, as she said was her priority at the time, was a team stress risk assessment. The Tribunal finds Ms Gower did not accuse the claimant of bullying during the call. She referred to bullying and this was evidenced by her attaching a copy of the respondent's harassment and bullying policy in her email.
22. The Tribunal finds the claimant was assertive and as an established employee, she was not afraid to raise her concerns. The meeting on 3/9/2019 (page 134) did not deter her (and of course it should not) from being the lead complainant in the group whistleblowing complaint on 5/9/2019.
23. During the call, Ms Gower told the claimant there would be a follow-up meeting when the claimant returned from annual leave. She also confirmed the same in her follow-up email (page 123). The claimant was therefore on notice there would be a follow-up meeting from the 26/7/2019.
24. Ms Gower explained that the reason for the follow-up meeting was that the claimant did not understand SR's feelings. Ms Gower said if the claimant

- had indicated she understood her conduct had concerned SR, there would have been no need for a follow-up meeting. As however, the claimant lacked insight in to the impact of her approach on SR, Ms Gower wanted to have a face-to-face discussion.
25. Having said that, Ms Gower only intended to deal with this matter informally. The claimant was then on annual leave for three weeks and was then unfit for work for two weeks due to 'stress at work' (page 214).
 26. Ms Gower knew the claimant was absent from work and she sent the claimant two email invitations to the follow-up meeting, both of which were declined by the claimant.
 27. Knowing the claimant was to return to work on 3/9/2019, Ms Gower invited the claimant to a meeting at 11.30am to 12.15pm. Ms Gower said that as A C-B was away, she had asked KD to attend in her stead (page 127).
 28. The claimant did not open the email and she said the first she knew of the meeting was when she was informed at her return-to-work meeting.
 29. Ms Gower was not based at the claimant's place of work and this day happened to be one of her scheduled visits. Ms Gower expressed on several occasions that she wanted to 'nip this in the bud'. She had not been able to follow it up any sooner due to the incident happening the day before the claimant was to go on annual leave. Ms Gower did not want to let this matter 'fester', wanted to address it and then to 'draw a line under it'.
 30. On the claimant's last working day before annual leave, she had attended a meeting with the Interim Head of Nursing and Quality at the respondent's headquarters to discuss a recent medication error. She had not been accompanied at that meeting.
 31. The claimant had attended a return-to-work meeting, at which she was not accompanied.
 32. The claimant was on notice of the meeting with Ms Gower, albeit she did not know until she received the email invitation (which she did not read) the meeting was to be in the morning of the 3/9/2019, her first day back.
 33. There is an individual stress risk assessment dated 7/6/2019 where A C-B discussed the claimant's situation (page 234). That SRA does not identify any need for the claimant to be accompanied to meetings, of any nature. There was a space to include staff member's comments, however the claimant had not added any information at all and nothing regarding being accompanied to meetings. Prior to that, the claimant had a consultation

with OH on 5/3/2019 and again, there was no requirement that she be accompanied to meetings identified in that report (page 206).

34. The Tribunal finds that although she would prefer to be accompanied to the meeting, that, there was no advice requiring this. The claimant had attended other meetings unaccompanied, including one off-site and to discuss a medication error. The claimant agreed she was 'challenging' in the meeting with Ms Gower. Ms Gower repeated on several occasions she had asked the claimant if she was well enough to continue and she confirmed that she was. The meeting went ahead.
35. The Tribunal finds the claimant was on notice of the meeting and it was not 'sprung' upon her. The Tribunal further finds that if the claimant had asked to be accompanied in advance (for example, if she were free and had she asked Ms Maw) that Ms Gower would have allowed this. Ms Gower was very thoughtful and considerate of her team's well-being. Ms Gower was however conscious that she was not based at the same location as the claimant, that the claimant had been away from work for five weeks and wanted to promptly conclude the matter.
36. The Tribunal finds there was no motivation to malign the claimant, the only motivation was to properly manage her.
37. The claimant was prone to exaggeration and embellishment. For example, it was her case that Ms Gower had breached confidentiality, when it was the claimant who transferred the call to speakerphone, without Ms Gower's knowledge so that others (Ms Maw and one other) could listen in to the conversation.
38. Finally, in respect of the first allegation being out of time, when this was put to the claimant, her reply was that she was 'foolish'. She did not provide any other explanation for the delay or put forward any case for the Tribunal to exercise its discretion in respect of the time limit.

The Law

39. The EQA deals with indirect discrimination at s.19 which provides:

19 Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

- (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
- (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
- (c) it puts, or would put, B at that disadvantage, and
- (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

40. Comparators are dealt with at s. 23 EQA:

23 Comparison by reference to circumstances

- (1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

41. The failure to make reasonable adjustments is dealt with at s. 20 and s. 21 EQA:

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.

(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.

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

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

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

42. The claimant also complains of harassment per s. 26 EQA:

26 Harassment

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

43. The relevant law was set out by the respondent.

44. In Environment Agency v Rowan [2008] IRLR 20, the EAT restated guidance on how an employment tribunal should act when considering a claim for failure to make reasonable adjustments. Accordingly, the tribunal must identify:

(a) the provision, criterion or practice applied by or on behalf of an employer;

- (b) the physical feature of premises occupied by the employer;
- (c) the identity of non-disabled comparators (where appropriate);
and
- (d) the nature and extent of the substantial disadvantage suffered by the claimant.

45. Paragraph 6.28 of the Employment Code of Practice (which repeats the wording of section 18B(1) DDA 1995) gives guidance as to the kind of factors which a tribunal might take into account in deciding whether it is reasonable for a person to have to take a particular step in order to comply with the duty to make reasonable adjustments. These include:

whether taking any particular steps would be effective in preventing the substantial disadvantage;

the practicability of the step;

the financial and other costs of making the adjustment and the extent of any disruption caused;

the extent of the employer's financial or other resources;

the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work);
and

the type and size of the employer.

46. The burden is firmly on the claimant to identify, at least in broad terms, the nature of the adjustment that would ameliorate the substantial disadvantage; the burden then shifts to the employer to seek to show that the disadvantage would not have been eliminated or reduced by the proposed adjustment and/or that the adjustment was not a reasonable one to make.

47. The test of 'reasonableness' is an objective one, and it is ultimately for the tribunal to decide what is reasonable: Smith v Churchills Stairlifts plc [2006] IRLR 41.

48. A proposed adjustment will not amount to a 'reasonable' adjustment if it has "*no prospect*" of removing the substantial disadvantage: Romec v Rudham [2007] All ER (D) 04 (Sep); however, when considering whether an adjustment is reasonable, it is sufficient for a tribunal to find that there

- would be “a prospect” of the adjustment removing the disadvantage Leeds Teaching Hospital NHS Trust v Foster [2011] EqLR 1075.
49. It is settled law that there is no distinct duty to consult the disabled person about possible ‘reasonable adjustments’: Tarback v Sainsbury’s Supermarkets Ltd [2006] IRLR 664 EAT, paragraph 71: “*[t]he only question is, objectively, whether the employer has complied with his obligations [to take substantive steps, not to consult about what steps might be taken] or not.*”
50. For indirect discrimination, the test for justification is a two-part test:
- does the prospective employer have a legitimate aim?
 - is the unfavourable treatment a proportionate means of achieving that legitimate aim?
51. The justification test involves striking “*an objective balance between the discriminatory effect of the [PCP] and the reasonable needs of the party who applies the [PCP]*” (Hampson v Department of Education and Science [1989] ICR 179, CA, per Balcombe LJ).
52. The test for justification is objective: e.g. HM Prison Service v Johnson [2007] IRLR.
53. The burden of establishing the defence of justification lies on the employer.
54. For an aim to be legitimate, “*[it must be] legal, should not be discriminatory in itself, and it must represent a real, objective consideration*”: paragraph 4.28 Employment Code of Practice.
55. According to the Employment Code of Practice, the health, welfare and safety of individuals may qualify as a legitimate aim provided that risks are clearly specified and supported by evidence: paragraph 4.28.
56. In order to be proportionate, an indirectly discriminatory PCP has to be *both* an appropriate means of achieving a legitimate aim *and* ‘reasonably necessary’: this was stressed by the Supreme Court (*per* Baroness Hale) in Homer v Chief Constable of West Yorkshire Police [2012] ICR 704, SC as being the correct reading of UK equality legislation in the light of European equality directives and case law.
57. The classic European test of objective justification – set out by the ECJ in Bilka-Kaufhaus GmbH v Weber von Hartz [1987] ICR 110, ECJ – is

tripartite: the employer is required to show to the satisfaction of the tribunal that:

the PCP alleged to be discriminatory corresponds to a real need on the part of the employer;

the policy is appropriate with a view to achieving the employer's objective;

the policy is 'reasonably necessary' (following Hardys and Hansons plc v Lax [2005] ICR 1565, CA) for this purpose.

58. When deciding proportionality, the employment tribunal is likely to carry out a "*balancing exercise ... a proper evaluation of the discriminatory effect of the [PCP] as against the employer's reasons for applying it, taking into account all the relevant facts*": paragraph 4.30 Employment Code of Practice. The tribunal must decide whether the justification outweighs the discriminatory effect: Craddock v Cornwall CC and anor EAT 0367/05.
59. According to Pill LJ in Hardys and Hansons plc v Lax, the 'reasonably necessary' test is much stricter than the 'range of reasonable responses' test applicable in unfair dismissal law, but "*[t]he employer does not have to demonstrate that no other proposal is possible*"; rather, the tribunal has to make its own judgement, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the PCP is reasonably necessary.
60. Although the employer's decision and business reasons should not be uncritically accepted by the tribunal, they should be respected by the tribunal: British Airways v Starmar [2005] IRLR 862, EAT.
61. If a claimant puts forward a non-discriminatory alternative for achieving the employer's legitimate aim, a tribunal may well decide that that alternative ought reasonably to have been adopted and find that, because it was not adopted, the defence of justification has not been made out: Cobb and ors v Secretary of State for Employment and anor [1989] ICR 506, EAT. However, when considering less discriminatory alternatives which might have been available, tribunals need to keep in mind the aim that the employer was seeking to achieve in the first place.
62. In Barry v Midland Bank plc [1999] ICR 859, HL, the House of Lords explained the 'principle of proportionality' referred to in ECJ jurisprudence as follows: "*[t]he ground relied upon as justification must be of sufficient importance for the national court to regard this as overriding the disparate impact of the difference in treatment, either in whole or in part. The more serious the disparate impact on [persons with a protected characteristic],*

the more cogent must be the objective justification.” However, the House of Lords’ rendering of the principle has been doubted by Sedley LJ in British Airways plc v Grundy (No. 2) [2008] IRLR 815, CA, who described following the principle to the letter as “*an elephant trap*”.

63. For a claim under s.26 EQA, In considering whether the treatment complained of had the proscribed effect. The Tribunal should take care to ensure that it makes clear findings about the three obligatory factors that must be taken into account under s26(4) and explain its conclusion by reference to those findings (see Peninsula Business Services Ltd v Baker [2017] ICR 714, EAT, para 62 *per* Elisabeth Laing J). In particular, the test for whether the treatment had the proscribed effect is not purely subjective: the Tribunal must take into account whether the claimant’s subjective perception was reasonable.
64. If the Tribunal concludes that the treatment had the proscribed effect, it should then consider whether that treatment was ‘*related to*’ disability. That test is theoretically broader than the formulation that applies in respect of direct discrimination, requiring an associative rather than a causal connection (R (Equal Opportunities Commission) v Secretary of State for Trade and Industry [2007] ICR 1234, QB, paras 10-14 *per* Burton J).

Conclusions

65. Any allegation prior to 2/8/2019 is out of time as per s.123 EQA. The incident on 26/7/2019 was therefore out of time and the Tribunal was not invited to exercise its discretion. Nor did the claimant advance an argument that there was a continuing act (conduct extending over a period per s.123(3) EQA). Although there was a link between the two incidents, in that the telephone call on the 26/7/2019 led to Ms Gower calling the meeting on 3/9/2019, the Tribunal finds they were two self-contained acts.
66. Irrespective of that conclusion, the Tribunal finds there was a PCP applied that disciplinary investigations take place as soon as possible. The telephone call on 26/7/2019 was not however a disciplinary investigation. The purpose was to put the claimant on notice that her actions towards SR earlier that day had been unwelcomed and to advise her not to follow up the earlier interaction as she had indicated she intended to do. Had the claimant accepted that, Ms Gower would not have taken any further action.
67. The claimant did not provide any evidence as to how the telephone call put her at a substantial disadvantage by it impacting upon her depression and anxiety. There were no reasonable steps the respondent could have taken to avoid any disadvantage. The respondent is entitled to manage its

- staff and to draw to a member of staff's attention that her advances towards SR were unwelcomed by him. Ms Gower did not have knowledge of the claimant's depression. Ms Gower was aware in August 2016 the claimant had been absent due to anxiety and depression, however, she did not have any up-to-date knowledge or indeed, any particular reason to recall the claimant's previous absence.
68. The claimant contends for the reasonable adjustments of investigating the concern before she was called. That was exactly what Ms Gower was doing. SR had made a report in writing and had indicated the claimant had said she would reapproach him and that approach was unwelcomed. The natural next step for Ms Gower to take was exactly what she did. She could not speak to the claimant in person as she was based in a different location. Ms Gower telephoned the claimant as she wished to tell the claimant not to approach SR and to investigate SR's concern by speaking to the claimant.
69. The claimant also contends it would have been a reasonable adjustment to have taken a medical opinion before Ms Gower called her. This is fanciful. Ms Gower is entitled to manage the claimant, by means of speaking to her by telephone. The claimant engaged in the conversation and as she did not appreciate the impact her behaviour had on SR, Ms Gower decided she needed to follow the matter up. These are reasonable management actions and do not require any form of medical opinion before they were undertaken.
70. In respect of the meeting on 3/9/2019 the Tribunal found there was no PCP of disallowing a support companion. The Tribunal found that had the claimant arranged for a companion, as long as that did not delay the meeting Ms Gower would have agreed to that.
71. The claimant's claim is that a PCP of not allowing her a support companion put her at a substantial disadvantage because of her depression and that a support companion would have compensated for her lack of confidence and provided comfort and reassurance.
72. The Tribunal found the claimant knew there was to be a follow up meeting when she returned to work and the meeting was a discussion regarding her behaviour. She had attended other meetings unaccompanied and there was no other evidence that she should be accompanied (e.g. from OH). On the claimant's own case, she was 'challenging' in the meeting. It is not accepted there as any substantial disadvantage for the claimant. Again, Ms Gower is entitled to have a discussion with a member of staff if their behaviour is of (albeit low level) concern.

73. Besides the prohibited conduct of a failure to make reasonable adjustments, the claimant also claims a PCP of disallowing a support companion amounted to indirect discrimination. The Tribunal has found there was no such PCP.
74. Turning to the claimant's claim she was subjected to the prohibited conduct of harassment, the Tribunal has found that Ms Gower did not accuse the claimant of bullying during the telephone call on 26/7/2019. The prohibited conduct alleged therefore factually did not take place.
75. The claimant also alleges that not allowing her a support companion at the meeting on 3/9/2019 was an act of harassment.
76. The claimant has not evidenced how not allowing her a support companion was conduct related to her disability. It is accepted that she would have preferred to have been accompanied, it is not however clear how the meeting going ahead without one, was related to her disability.
77. In any event, the meeting went ahead and the meeting did not have the purpose of effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Ms Gower checked the claimant was well enough to continue and she confirmed she was. The claimant was on notice of the meeting and was 'challenging' in the meeting. This was a perfectly normal management meeting and it did not amount to any form of conduct which could be considered to be harassment under the EQA.
78. Following those conclusions, the claimant's claims fail in their entirety and are dismissed.

10/3/2021

Employment Judge Wright

JUDGMENT SENT TO THE PARTIES ON

22/03/2021

FOR THE SECRETARY OF EMPLOYMENT
TRIBUNALS