Case Numbers: 2203225/2022

Reserved Judgment

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondent**
Miss J Henry		**Great Ormond Street Hospital for Children NHS Foundation Trust**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

SITTING AT: London Central **ON: 16-19 May 2023**

BEFORE: Employment Judge A M Snelson **MEMBERS: Ms G Carpenter**
Ms P Keating

On hearing the Claimant in person and Ms C Musgrave-Cohen, counsel, on behalf of the Respondent;

And on reading the written representations of the parties delivered after the hearing;

The Tribunal determines that:

(1) The Claimant's complaint of failure to make reasonable adjustments is well-founded.
(2) The Claimant's complaint of unfair dismissal is well-founded.
(3) Unless resolved privately between the parties in the meantime, all outstanding remedy issues shall be determined at a further hearing by CVP to be held at 10.00 a.m. on 25 September 2023, with one sitting day allocated.

REASONS

Introduction

1 The Claimant, who is 49 years of age, was continuously employed by the Respondent from 15 October 2018 until 24 April 2022 in the capacity of Hospitality Assistant within its International and Private Patients Department. The employment ended with her resignation.

2 By a claim form presented on 28 May 2022 the Claimant complained that the Respondent had subjected her to disability discrimination by failing to make reasonable adjustments. The disability relied upon was anxiety and depression. The Respondent disputed disability and resisted the claim on a number of other grounds.

3 At a preliminary hearing for case management on 26 October 2022 Employment Judge (hereafter 'EJ') Goodman granted an application by the Claimant for permission to amend her claim form to add a complaint of unfair (constructive) dismissal. But, as we understand her Order, she did so subject to the Respondent's right to argue that the new claim, having been presented (by amendment) outside the primary three-month limitation period, was excluded from the Tribunal's jurisdiction by virtue of it not having been presented within "such further period as the Employment Tribunal considers just and equitable" (see the case management summary document, para 10).

4 Disability was later conceded.

5 The matter came before us in the form of a final hearing by CVP on 16 May this year, with four sitting days allocated. The Claimant represented herself with determination, but accepted the Tribunal's direction when offered, particularly in relation to relevance. We are also grateful to Ms Musgrave-Cohen, counsel, for her helpful advocacy on behalf of the Respondent.

6 Having read into the case on day one we heard evidence on days two and three. We then adjourned to the following day to allow the Claimant time to prepare her closing submissions, having offered some guidance on the nature and purpose of closing argument. On the morning of day four Ms Musgrave-Cohen delivered written submissions, which we took time to read before hearing oral submissions from both sides. We then reserved judgment but, before doing so, agreed a remedies hearing date (25 September) in the event of any claim succeeding.

7 In the course of our private deliberations we became conscious that one issue had not been canvassed in evidence or argument, namely the time-based defence to the unfair dismissal claim. Accordingly, we directed that a letter should go to the parties pointing out that the issue of jurisdiction had not been explored before us and inviting representations as to how we should proceed. It appears that the Claimant did not respond. On behalf of the Respondent, some explanation was offered for the fact that the time point had not been addressed and we were invited to determine it as a matter of discretion. We were not comfortable with that approach. It seemed to us that we were in no position to exercise a discretionary judgment in the absence of an evidential foundation and that none had been laid. Accordingly, we caused a further letter to go to the parties explaining that, absent a formal concession by the Respondent that the Tribunal had jurisdiction to consider the unfair dismissal claim, that question would have to be determined on the strength of evidence and argument at the hearing listed for 25 September. By an email of 6 July, the Respondent's representative then formally conceded that the Tribunal had jurisdiction to consider the unfair dismissal claim.

8 The delay in promulgating this judgment has resulted from the need to send correspondence to the parties following the hearing and was extended by an administrative oversight in failing to bring the Respondent's email of 6 July to the judge's attention.

The Legal Framework

Disability Discrimination

9 The Equality Act 2010 protects employees and applicants for employment from 'prohibited conduct' based on or connected with specified 'protected characteristics'. These include disability (s6).

10 The only form of prohibited conduct on which Miss Henry relied was breach of the (alleged) duty to make reasonable adjustments. That duty is enacted by the 2010 Act, s20, the material parts of which state:

> **(2) The duty comprises the following three requirements.**
>
> **(3) The first requirement is a requirement, where a provision, criterion or practice[1] 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.**

In this context, 'substantial' means "more than minor or trivial" (s212).

11 Failure to comply with a duty to make reasonable adjustments amounts to discrimination (s21(2)).

12 By s39(5) it is provided that a duty to make reasonable adjustments applies to an employer.

13 The duty to make reasonable adjustments does not apply where the respondent does not know, and could not reasonably be expected to know, that a an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in s20(3) (schedule 8, para 20(1)(b)). In *Wilcox v Birmingham CAB Services Ltd* (EAT 0293/2010) the EAT (Underhill J, President) held that the effect of the corresponding provision in the Disability Discrimination Act 1995 was that an employer will not be liable for a failure to make reasonable adjustments unless it had actual or constructive knowledge of *both* (a) the relevant disability *and* (b) the disadvantage resulting from the application of the relevant PCP.

14 The word 'likely' in schedule 1, para 2 to the 2010 Act (concerned with the definition of disability) has been interpreted generously. The effect of a condition is 'likely' to last 12 months or more if it 'could well' last that long (see the statutory Guidance on the Definition of Disability (2011), para C3). It is hard to imagine a reason why Parliament might have intended 'likely' to mean something different in schedule 20, para 8, and Ms Musgrave-Cohen did not suggest any such intention.

[1] In these reasons we use the conventional shorthand, PCP.

15 We remind ourselves that the reasonable adjustments jurisdiction is directed to 'steps' required to counterbalance disadvantage. It does not oblige employers to engage in particular mental processes or carry out particular investigations (see *Tarbuck v Sainsbury's Supermarkets Ltd* [2006] IRLR 664 EAT). Of course, the employer who does not ask appropriate questions or take appropriate advice may well be found liable for failing to make reasonable adjustments, but that will be because, for want of the necessary information or advice, he failed to take a reasonable step to mitigate the effect on the disabled employee of the relevant PCP. The failure to inquire is not, of itself, capable of standing as a failure to make reasonable adjustments.

16 More generally, we remind ourselves that the higher courts have often stressed the importance of a methodical approach to the reasonable adjustments jurisdiction (see *eg Environment Agency v Rowan* [2008] ICR 218 EAT).

Unfair Dismissal

17 The first prerequisite for an unfair dismissal is a dismissal. The Claimant bases her claim on an alleged constructive dismissal. By the Employment Rights Act 1996 ('the 1996 Act'), s95 it is provided that:

> **(1) For the purposes of this Part an employee is dismissed by his employer if …**
>
> **(c) the employee terminates the contract … (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.**

The provision embodies the common law. A party to an employment contract is entitled to terminate it summarily in circumstances where the other party has repudiated it by breaching an essential term.

18 Terms of employment contracts may be express or implied. Some terms are automatically implied. These include the obligation of the employer not, without reasonable and proper cause, to conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between employer and employee (see *Malik v Bank of Credit & Commerce International SA* [1997] ICR 606 HL).

19 The courts have also recognised the implied contractual duty of an employer to provide a safe place and/or system of work and a co-extensive tortious duty to provide a reasonably safe system of work (see *eg Walker v Northumberland County Council* [1995] ICR 702 QBD).

20 Breaches of the duties to preserve mutual trust and confidence and to provide a safe place and/or system of working are inherently repudiatory.

21 If there is a dispute as to whether a claimant was dismissed, the burden is upon him or her to prove dismissal. Subject to that, the outcome depends on the proper application of the 1996 Act, s98. It is convenient to set out the following subsections:

> **(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
> **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this subsection if it – …**
>
> **(b) relates to the employee's conduct …**
>
> **(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
> **(b) shall be determined in accordance with equity and the substantial merits of the case.**

22 The first effect of s98 is that, if there was a constructive dismissal, it is incumbent upon the employer to prove a potentially fair reason for it. The 'reason' for a constructive dismissal is the reason for the employer's act or omission which precipitates the resignation. If a potentially fair reason is not shown, the dismissal is necessarily unfair.

23 Subject to a permissible reason being shown, s98 requires the Tribunal to weigh the reasonableness of the employer's action. No burden applies either way. That said, given that a complaint of constructive dismissal does not get off the ground unless it is shown that the employer has committed a repudiatory breach of the employee's contract of employment, it will be a rare case in which such a dismissal is not also found to have been unreasonable and unfair.

The Issues

24 In her case management summary, EJ Goodman listed the main issues for determination by the Tribunal. The parts of her document which are now material are as follows.

> **7. Unfair dismissal claim**
>
> **7.1. Was the claimant entitled to terminate the contract by reason of the respondent's conduct?**
>
> **7.2. The conduct alleged is a requirement to return to work in [the] private and international patients hospitality team where the claimant maintains there was a bullying culture, she was being bullied, and she anticipated that there would be further complaints and disciplinary investigations were she to return without changes in the personnel, or other measures to improve relationships in the Department. She relies on the following as examples of the bullying culture:**
>
> **7.2.1 being pushed by Ursula in the presence of Katya in 2019**

7.2.2 Zahid Yasin trying to pick a fight with her in the kitchen, and the presence of Alison rudeness and aggression ported to capture (sic) [reported to Katya?] in 2020 or 2021
7.2.3 harassment during the claimant's 6 month probation period by Katya Haddad
7.2.4 a false complaint of racism being made about her in June 2020 (Magda and Barbara) and December 2020
7.2.5 failing to investigate [the] December 2020 complaint about the claimant when, after it had been overturned on investigation, the claimant complained of false complaints being made about her
7.2.6 Katya accusing the claimant of failing to restock the IV room, when a nurse confirmed that its disarray the next day was because the nightshift have been busy, not because the claimant had failed to complete her duties by 7 PM (2021)
7.2.7 permitting Diava to encourage group complaints about the claimant and others
7.2.8 expecting the claimant to return to the Department where Diava, Katya and Zahid [were] still working, without promoting conciliation
7.2.9 doing so despite the claimant bringing this to the respondent's attention and despite the claimant advising that it affected her mental health adversely

7.3 Was this tantamount to a breach by the employer of the mutual duty of confidence and trust, alternatively, the duty to ensure a safe place of work?

7.4 Did the claimant resign her employment in response to that breach?

7.5 Did the respondent act fairly?

…

<u>9. Reasonable adjustments: section 20 and section 21.</u>

9.2 Did the respondent apply the following provision, criteria and/or practice ('the provision') generally, namely that she must return to work in the International and Private Patient team as a hospitality assistant?

9.3 Did the application of any such provision put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that it was likely to exacerbate her depression and anxiety?

9.4 Did the respondent take such steps as were reasonable to avoid the disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know the adjustments asserted as reasonably required and they are identified as follows:

9.4.1 allow her to apply for band 3 posts
9.4.2 extend her time on the redeployment pool in case band 2 vacancies because available
9.4.3 permit her to remain a temporary OP receptionist
9.4.4 meet with her to discuss measures to be taken to enable her to return to theinternational and private patients team

9.5 Did the respondent not know, or could the respondent not be reasonably expected to know that the claimant had a disability or was likely to be placed at the disadvantage set out above?

Evidence and Documents

25 We heard oral evidence from Miss Henry and, on behalf of the Respondent, Ms Claudia Tomlin, a Matron in the International and Private Care Directorate, Ms Becky Owen, at all relevant times Head of Operations in the International and Private Care Team, Ms Karen Eban, Resourcing Service Manager, and Donna Louise Richardson, at all relevant times Acting General Manager of the Sight & Sound Directorate. Statements were also served by the Respondent in the names of two further witnesses, but neither was called and the statements were not relied upon.

26 In addition to witness evidence we read the documents to which we were referred in the main bundle of 1,154 pages and the supplementary bundle of 239 pages.

27 The paperwork was completed by the chronology and cast list and the written closing submissions of Ms Musgrave-Cohen.

The Primary Facts

28 The evidence was extensive. We have had regard to all of it. Nonetheless, it is not our function to recite an exhaustive history. The facts essential to our decision are as follows.

29 As we have mentioned, Miss Henry's employment by the Respondent in the capacity of full-time Hospitality Assistant began in October 2018. Her post, which was graded at Band B, sat within the Hospitality Team, which formed part of the International and Private Care Directorate. Her appointment was confirmed in April 2019, on completion of a six-month probation period.

30 Over the period of her employment, Miss Henry's relations with work colleagues, including her line manager, were not always harmonious, although there were certainly spells of relative tranquility. She became convinced that she was a victim of bullying and harassment and that she was denied the managerial protection and support to which she was entitled. By contrast, some of those around her felt that she was the cause of the unrest and tension which arose. As we were at pains to stress during the hearing, given the way in which the case was put we did not see it as our function to resolve this underlying disagreement.

31 What is beyond question is that when Miss Henry made complaints of bullying and harassment, these were carefully examined but not upheld. She raised three grievances, on 15 and 26 October 2019 and 4 February 2021. All were dismissed by Ms Owen (a witness before us) following thorough investigations. Comprehensive reasons were given. Miss Henry appealed against the outcome of the third grievance only but, on 29 April 2021, Ms Tomlin (also a witness before us) upheld Ms Owen's decision.

32 On the other hand, complaints and allegations about Miss Henry's behaviour in the workplace resulted in disciplinary charges being brought against her. The first of these culminated in a disciplinary hearing on 6 February 2020,

following which she was issued with a final written warning for leaving her shift two hours early, refusing to perform relevant parts of her role and making a comment to a colleague which could be interpreted as racially abusive. All three allegations arose out of events on 28 June 2019.

33 At a second disciplinary hearing on 6 May 2021, Miss Henry faced five further misconduct charges. Of these, three alleging cruel and hurtful behaviour towards colleagues were upheld and she was given a further final written warning, to remain in force for 18 months. These findings were overturned on appeal on 30 September 2021, apparently on the basis that there was no directly corroborative evidence to make them good, and the sanction was revoked.

34 Within days of the outcome of the hearing of 6 May 2021 being issued, further complaints were raised about Miss Henry's conduct. In view of the rapid deterioration in working relations within the Hospitality team, a decision was taken to suspend her (on full pay) and carry out further fact-finding.

35 A third set of disciplinary charges followed, leading to a disciplinary hearing on 10 December 2021. By a letter of 20 December 2021 Ms Danielle Soar, General Manager, upheld charges of breach of a safe working policy, failure to comply with a reasonable management request and verbal abuse of colleagues. Three other allegations were dismissed. Ms Soar imposed a first written warning and directed a number of recommendations to Miss Henry and the management side. Miss Henry's appeal against Ms Soar's decision failed.

36 In the meantime, in early August 2021 Miss Henry had been given permission to undertake training as a 111 call handler and her suspension was interrupted for that purpose, but she abandoned the training later the same month and the period of suspension resumed, running uninterrupted from then until completion of the third disciplinary case against her in December 2021.

37 By late 2021 Miss Henry had made it clear that she was unwilling to return to her substantive role and Ms Soar was supporting her in seeking alternative positions within the Trust.

38 In December 2021 Ms Richardson (a witness before us) was appointed Acting General Manager of the Sight & Sound Directorate, taking over from Ms Soar, who was leaving the Respondent. In that capacity, Ms Richardson had primary responsibility for managing attempts to return Miss Henry to the workplace once the disciplinary proceedings were at an end.

39 Ms Richardson told us (witness statement, para 6) that she had meetings with HR advisors within her own Directorate and the International and Private Care Directorate throughout the redeployment process, although did not feel in need of much support from them. She did not mention any advice sought or received at any stage on whether and/or how disability discrimination law should or might bear upon her decision-making.

40 The Respondent through various individuals made considerable efforts to assist Miss Henry to find alternative employment within the Respondent Trust. In

email exchanges on and after 31 December 2021 she expressed interest in a Band 4 Pharmacy Procurement role. Ms Soar offered to speak to the relevant team on her behalf. It seems that Miss Henry subsequently applied unsuccessfully for two such vacancies, one at Band 3 and one at Band 4. A Band 2 Housekeeper position in the Haematology/Oncology Department arose, and Miss Henry was advised to contact Ms Richardson if she was interested. It seems that she did not do so. More generally, Ms Richardson noted that there were relatively few Band 2 vacancies and asked if she would be interested in notification of Band 3 opportunities. Miss Henry said that she would and Ms Richardson forwarded to her details of some such vacancies as they arose.[2] Ms Richardson also offered Miss Henry help and support with any applications. Miss Henry accepted the offer with thanks.

41 On 7 January 2022, Miss Henry was temporarily placed in a Receptionist role in the Outpatients Department. That position, graded at Band 3, was currently vacant, but it was anticipated that a competition for a permanent appointment would follow in fairly short order. Ms Richardson explained to Miss Henry that, if she was not redeployed during the 12 weeks following the start of the temporary placement, she would then return to her substantive role of Hospitality Assistant.

42 With effect from 10 January 2022 Miss Henry was formally placed on the redeployment register for a period of 12 weeks ending on 4 April, with a Band 2 setting. As we understand it, the redeployment scheme works in this way. Candidates on the redeployment register have early access to opportunities to apply for vacancies before they are advertised, but only at such level as the responsible manager specifies. Ordinarily, the level specified will be that of the post from which the candidate is seeking to be redeployed, but there is no rule to that effect. Candidates on the register are entitled to notification of all vacancies at the appropriate level, before they are advertised (internally or externally). If they apply, they are entitled to be interviewed and if found appointable, they are entitled to be appointed unless beaten by another candidate also on the register. The fact that placement on the register is confined to a particular level of post does not preclude a candidate from applying outside the redeployment scheme for any vacancy (at any level) of which he or she becomes aware through advertising or by any other means. The 12-week period is standard but it was not in dispute before us that there is a managerial discretion to extend it.

43 Ms Henry replied the same day, stating that she was not willing to return to her substantive role because of the alleged bullying and harassment of her former team members. Nor would she accept any (ward-based) housekeeping role across the Trust because former colleagues worked bank shifts on various wards and there would always be a risk of running into them. And despite the email exchange of 31 December, she asked for clarification as to the help she could expect with redeployment.

44 In reply, Ms Richardson advised Miss Henry that (among other things) the Outpatients Receptionist role would be available for the duration of the redeployment period and that a vacancy for the permanent post (at Band 3) would

[2] Such information was available to Miss Henry in any event, through the Trust's website and/or intranet.

be screened shortly, for which she would be free to apply (outside the redeployment scheme). She also asked what particular form of assistance Miss Henry was looking for. Miss Henry does not seem to have responded to this query.

45 On 12 January 2022 the Claimant wrote to Ms Richardson stating that she wished to be considered for non-patient-facing roles as staff in patient-facing posts needed to be vaccinated against Covid-19 and she did not wish to receive the vaccination. Miss Henry also expressed interest in an apprenticeship opportunity but wished to know if pay protection would apply. She was told that under the Respondent's arrangements it would not. She was not willing to contemplate a drop in income and accordingly, on 13 January 2022 in an email exchange with Ms McNicholas of HR, she made it clear that she was only interested in a non-patient-facing post that paid no less than her Hospitality Assistant position.[3]

46 Miss Henry told us that she felt that the training which she received for the Outpatients position was inadequate. Ms Richardson gave some evidence calling that complaint into question. Given the scope of the dispute before us, we prefer to make no finding on this aspect beyond saying that we see no evidence whatsoever to support Miss Henry's theory that defamatory comments were made about her by her former line manager in the Hospitality Team or that anything said about her (by anyone) had somehow influenced the quality of the training she had received.

47 On 2 February 2022 the Respondent announced that the requirement for staff in patient-facing roles to be vaccinated against Covid-19 was being 'paused'. This does not seem to have been seen by Miss Henry as a reason to expand her criteria for redeployment, perhaps because she saw all (or at least most) patient-facing posts as carrying the risk of bringing her into contact with former colleagues working bank shifts across the Trust.

48 Having applied (outside the redeployment scheme), Miss Henry was interviewed on 14 February 2022 for the permanent Outpatients Receptionist role. Shortly before, Ms Richardson had sat down with her to talk about the interview and how she might best approach it. Despite this support, the application was unsuccessful. None of the candidates was judged appointable. The vacancy was re-advertised and Ms Richardson wrote to her on 22 February pointing out that she was free to re-apply in light of the feedback which she (in company with the other candidates) had received. Miss Henry did not re-apply.

49 In an email of 22 February 2022 Miss Henry expressed concern about the fact that she was half-way through the redeployment period and there were no Band 2 posts on the register, and asked if she could be considered for Band 3 vacancies. Ms Richardson replied the same day that she could not consider her *directly* for the (still unfilled) Outpatients Receptionist vacancy because of concerns which had come to light about her performance as a temporary holder of that post. These included disappointing feedback from members of the Outpatients team about Miss Henry tending to 'disappear' during the working day, lacking initiative and motivation and making the notable error of booking a live patient into the

[3] Ms Richardson told us (witness statement, para 20) that the Outpatients Receptionist job was classified as 'patient-facing' and that she made this point to Miss Henry. Nonetheless, the absence of a vaccination was apparently not seen as any bar to Miss Henry remaining in her temporary role.

mortuary. But Miss Henry remained free to apply for any post at Band 3 (or higher) outside the redeployment scheme.

50 On 25 February 2022 Miss Henry wrote to Ms Richardson as follows:

> **Many members from hospitality are doing bank shifts on various wards. I do not want to be anywhere they are.**
>
> **As mentioned previously working with the team as worsened my anxiety, and is affecting my sleep.**
>
> **The thought alone of returning to that team is making me ill. I will be contacting my doctor for a sick note because I haven't had any assistance with redeployment. I also think it's disgusting that I am being returned to a team where I have endured bullying for 3 years..**

51 Ms Richardson replied with a series of questions and commented that it was a shame that Miss Henry was feeling ill.

52 On 28 February 2022 Miss Henry sent another email to Ms Richardson with a letter from her GP attached, asking for an extension of the redeployment period. The GP's letter included the following:

> **This woman suffers with anxiety and depression. She struggled particularly with symptoms of this due to stress in her old team at work and thoughts of going back to this team are increasing her symptoms of anxiety.**

53 Ms Richardson responded on 3 March. Among other things, she asked for clarification of what the GP's letter meant.

54 Miss Henry replied the following day, stating that the doctor meant that she should not be sent back to a team that was causing her "serious health problems."

55 Ms Richardson did not respond. She told us that she must have overlooked the email of 4 March and that if she had read it she would have: (a) arranged to meet Miss Henry face to face; (b) proposed an OH referral (subject to her consent); (c) drawn her attention to Care First, the Respondent's employee assistance programme; (d) considered short-term alternatives to an immediate return her to her substantive role; and (e) taken HR advice. She told us that these steps would have given her a "fuller basis" for decision-making and that (since they were not taken) the likely outcome was a "matter of speculation".

56 On 8 March 2022, consistent with her stated position, Miss Henry declined a Band 2 Housekeeper role.

57 On 16 March 2022 Miss Henry wrote to Ms Richardson asking what was to happen at the end of the redeployment period, given that no suitable alternative employment had been found. Ms Richardson responded, inviting her to a 'catch-up' on 24 March to discuss redeployment or return to her substantive post. Unfortunately, Ms Richardson overlooked the fact that Miss Henry was on pre-booked annual leave, from 14-31 March inclusive. Presumably this would have

dawned on her no later than 24 March, when Miss Henry did not attend the planned 'catch-up'.

58 In the meantime, on 21 March 2022 Ms Richardson received news of a Band 2 OH Administrator vacancy. She forwarded the relevant email at once to Miss Henry, but received no reply.

59 On 30 March 2022 Miss Henry received a letter from Ms Katya Haddad, formerly her line manager and now Hospitality Services Manager, welcoming her back to her substantive position as Hospitality Assistant. Ms Haddad mentioned that there had been some changes in the team and gave some information about plans for Miss Henry's first week back. The letter struck a friendly and positive note.

60 On 31 March 2022 Ms Richardson received email notification of (it seems) a further Band 2 OH Administrator role that had become available, and forwarded a link to Miss Henry the same day. Again, she received no reply.

61 On 1 April 2022, following her period of leave, Miss Henry failed to return to her temporary Outpatients Receptionist post and was treated as absent without authorisation.

62 Miss Henry was scheduled to return to her substantive position as Hospitality Assistant on 4 April 2022. She did not do so. By an email sent that day she informed Ms Haddad that she would not be returning that week and that she had been experiencing mental health problems associated with the prospect of going back to her former role.

63 Shortly afterwards, Miss Henry commenced a period of sick leave, from which she did not return.

64 On 13 April 2022 Miss Henry resigned on notice expiring on 24 April 2022.

65 On 25 April 2022 Miss Henry took up an appointment with a new employer at a salary comparable to that attaching to the Hospitality Assistant position.

Secondary Findings and Conclusions

Reasonable Adjustments

Knowledge

66 Ms Musgrave-Cohen submitted that, while the Respondent had at all material times[4] been aware of Miss Henry's disability, it had not had actual or constructive knowledge that the PCP relied upon was likely to place her at the substantial disadvantage relied upon. The PCP was the requirement to return to the Hospitality Team. The substantial disadvantage was prejudice to Miss Henry's mental health. Those two matters are examined under separate headings below.

[4] The concession certainly applies to the period from when Miss Henry was required to return to her substantive post onwards.

67 With respect to Ms Musgrave-Cohen, we think that her case on knowledge (written submissions, paras 58-62) is more than a little ambitious. In relation to the 2010 Act, sch 8, para 20(1)(b), the EHRC Code of Practice on Employment (2011) notes at para 6.19:

> **… an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment. …**

The obstacles which the statutory defence faces are obvious and insurmountable. It is sufficient to make two points. In the first place, the defence must confront the undisputed fact that Miss Henry was, and was known to be, disabled by anxiety and depression. That being so, and given her strong resistance to the plan to return her to the Hospitality Team, it was clearly incumbent on the Respondent to make all reasonable efforts to ascertain the possible consequences for her of implementing the plan. Their decision-makers did not set themselves that task. Indeed, there is no sign of Miss Henry's needs and rights *as a disabled person* having figured in their calculations at all. Secondly, despite the Respondent's failure to make appropriate inquiries, Miss Henry conveyed to Ms Richardson in her email of 28 February 2022 her own belief that the proposed return to the Team would cause harm to her mental health and relied on her GP's letter to similar effect. As we have noted, Ms Richardson overlooked the email and took no step in response to the GP's letter. In these circumstances it is hopeless to argue that the Respondent could not reasonably have known, let alone been reasonably expected to know, that Miss Henry was likely to be put at a substantial disadvantage (as to which, see more below) as a result of being compelled to return to the Hospitality Team. We so hold on the understanding that something is 'likely' for the purposes of sch 8, para 20(1)(b) if it "could well happen". But our finding would be no different if a higher degree of probability – say, "more likely than not" – was applicable.

Was the relevant PCP applied?

68 The PCP as formulated by EJ Goodman, seemingly with the agreement of the parties, was that Miss Henry "must return to work in the … team as a Hospitality Assistant". To put it another way, it was the requirement for her to perform her substantive role. Rightly, the application of the PCP to her was not in dispute.

Substantial disadvantage to the Claimant?

69 Did the PCP put Miss Henry at a substantial disadvantage in relation to a relevant matter (her employment) in comparison with persons who were not disabled? In our judgment, it plainly did. She was vulnerable as a consequence of her mental health condition. Working relationships within the Hospitality Team had broken down. It is evident from the history that requiring her to return to that environment (despite the fact that there had been some changes in the composition of the team) would be liable to result in her symptoms of anxiety and

depression being exacerbated. Common sense says so. Miss Henry said so in her email of 28 February 2022, and it has never been suggested that her message was insincere or confected or exaggerated or even in any respect mistaken. And there is in addition the supporting evidence from the GP. In our judgment, the evidence emphatically establishes substantial (here, much more than minor or trivial) disadvantage in the form of a significant risk of material harm to Miss Henry's mental health.

70 In her determined submissions, Ms Musgrave-Cohen made a series of points. We must make an objective assessment of the disadvantage claimed. We agree: our assessment is objective. We must identify the true source of the disadvantage. We agree: it must be, as we have found it is, the PCP. We must not treat Miss Henry's perception or "self-reporting" as determinative. We agree: we have not done so (see above), although how she (as a disabled person) sees matters is an important part of the overall picture. Properly viewed, the disadvantage (if any) flows only from Miss Henry's "attitude" and/or "failure to engage". We disagree: as explained, our clear finding is that the PCP is the cause of the disadvantage. The prospect of returning to the team represented a serious threat to her mental wellbeing. Here, Ms Musgrave-Cohen's argument ignores what lies at the heart of discrimination law generally and disability discrimination law in particular. Remedies are not reserved for "deserving" or "reasonable" complainants. In disability cases, some complainants may be objectively judged as behaving unreasonably or unco-operatively precisely because of the impairment which qualifies them as disabled. It is the condition itself that entitles them to protection. And the fact that an employer may have made creditable efforts to resolve a difficult workplace issue is not of itself an answer to a good claim.

Reasonable steps?

71 Did the Respondent take such steps as it was or would have been reasonable to have to take to avoid the disadvantage? EJ Goodman recorded that Miss Henry relied on four particular steps.

72 The fourth proposed adjustment was unsustainable and we will deal with it at the outset. It was formulated by EJ Goodman as: "Meet with her to discuss measures to be taken to enable her to return to the … team". Failing to reflect on or discuss a problem cannot, as a matter of law, amount to a failure to make a reasonable adjustment (see *Tarbuck*, cited above). The jurisdiction is concerned with practical interventions, not mental processes which may (or may not) prompt or otherwise lead to such interventions. In any event, there is nothing of practical substance in this part of Miss Henry's case and she did not appear to rely on it. To the contrary, her prime contention was that it was futile and unreasonable to try to encourage her to return. Besides, there was no failure to communicate with, or engage with, Miss Henry. The Respondent through Ms Richardson and others made determined efforts to lay the ground for her orderly return and promote the restoration of proper working relations within the team. These efforts could not overcome her implacable hostility to the notion of returning. (There was, of course, the failure to appreciate that Miss Henry was away on leave for the second half of March 2022, but self-evidently that error does not engage the reasonable

adjustments jurisdiction.) We acquit the Respondent of any actionable failure to take any further step to encourage her to return.

73 The first proposed adjustment was framed as: "Allow [Miss Henry] to apply for Band 3 posts". This did not quite capture what was intended, namely that she should have been enabled to pursue vacancies at Band 3, as well as Band 2, through the redeployment process. In our judgment, the first proposed adjustment was one which the Respondent *could* have made but not one which it would have been reasonable to *have* to take to avoid the disadvantage. Miss Henry was substantively in a Band 2 post. Giving her early access to Band 3 posts would have run the risk of prejudicing the quality of the service by giving her priority over other putative candidates who might (in an equal contest) prove to be more capable and/or committed than her and/or better team players. All the more so given permissible findings of disciplinary breaches and permissible ongoing concerns about her performance in the temporary Band 3 position. Moreover, being on the register for the purposes of Band 2 vacancies only did not exclude Miss Henry from competing for any vacancy at a higher level in the ordinary way – as she did.

74 The second and third adjustments can be taken together. In our judgment, the Respondent wrongfully failed to take the step of permitting Miss Henry to remain for a further limited period in the temporary Outpatients role and/or any comparable post, and extending her time in the redeployment pool for the same period. Seeking to compel her to return to the Hospitality Team was obviously a very bad idea, to be avoided if a sensible alternative could be found. It was, as we have found, likely to put her mental health at risk. It would destabilise the Hospitality Team and engender anxiety and bad feeling on the part of other team members, some of whom (as unchallenged evidence before us shows) saw her proposed return with as much dismay as she did. Staff sickness absences were likely to go up, further prejudicing the service offered. (As we have noted, when the Respondent declined to reconsider, Miss Henry took sick leave.) In short, there was obviously a compelling case for averting not only the substantial disadvantage to Miss Henry, but also the deleterious consequences for other staff members and the wider service, which the PCP was likely to cause.

75 For the reasons just summarised, broad pragmatism and considerations of fairness seem to us to argue powerfully *against* the course of action to which Ms Richardson seemingly felt drawn. But we have not lost sight of the statutory language. The central question is as, as we have noted, framed in positive, not negative, terms. Why are the adjustments on which we have alighted "such steps as it was reasonable to have to take" to avoid the relevant disadvantage? We have several reasons.

76 First, the disadvantage which needed to be redressed was significant and serious. There was a real risk of material harm to Miss Henry's mental health. The more substantial the disadvantage, the more powerful the case for managerial intervention becomes.

77 Second, this is a case in which it is conceded that the employer knew at all material times that the employee was disabled, and we have found that the

employer knew or ought to have known at all material times that the requirement to return to her substantive role was likely to place her at a substantial disadvantage by seriously prejudicing her mental health. The knowledge made the case for adjustment compelling throughout.

78 Third, the case for adjustment became all the more compelling from late February 2022 onwards, given that the Respondent had wholly failed to engage with Miss Henry's case concerning her mental health as conveyed most importantly in her email messages of 28 February and her GP's letter of 25 February. In our judgment, the information in those documents made it, at that point if not before, a critical *necessity* to implement, at least on a short-term basis, an adjustment to avoid the disadvantage which the PCP was liable to cause.

79 Fourth, the reasonableness of the adjustment contended for becomes yet more obvious when the narrative is examined afresh as at 21 March and again, 31 March, 2022, when the realistic prospect of a solution in the form of redeployment of Miss Henry to an OH Administrator position had suddenly come into view.

80 Fifth, the redeployment machinery in Ms Richardson's hands was inherently flexible: there was a built-in discretion to extend the 'default' 12-week period and exercising that power would not do any violence to the scheme or set a harmful precedent.[5] No such argument was advanced. Nor was it suggested that there was any particular magic in 12 weeks as opposed to any other choice of redeployment period. Ms Richardson's approach really amounted to saying little more than that the 'default' should be respected, but this badly misunderstands the reasonable adjustments jurisdiction, which challenges decision-makers to look energetically, flexibly and imaginatively for workable solutions to disability-related problems. Policies and procedures exist as a means to an end, not an end in themselves.

81 Sixth, as Ms Richardson candidly and explicitly accepted in evidence, there was no practical or organisational obstacle to extending Miss Henry's occupation of the Outpatients role for a limited further period or placing her in another position on a short-term basis.

82 Seventh, contrary to Ms Musgrave-Cohen's submission, this is not a *Tarbuck* case: the adjustment is not to inquire or reflect but to allow a reasonable time for one of several possible solutions to be given the chance to eventuate.

83 Eighth, the adjustment would certainly not have simply delayed the inevitable, as Ms Musgrave-Cohen also submitted. It represents a proportionate and necessary step which could well have avoided entirely the disadvantage which the PCP was likely to cause.

[5] In many a case there will be a duty to adjust even where the PCP has no built-in flexibility and is presented as an entirely rigid rule or scheme.

Unfair Dismissal

Breach of contract?

84 We start by reminding ourselves of two things. First, the law does not require an employer to act *reasonably*. The *Malik* test, which sets the bar much higher, means what it says.

85 Second, the breach of any protection under the anti-discrimination provisions does not *automatically* connote a breach of the duty to preserve mutual trust and confidence: there *may* on the facts of any particular case be a sound basis for reaching a contrary view (see *Amnesty International v Ahmed* UKEAT/0447/08, paras 66-72). But that said, it seems to us fair to start from the premise that an employer who has failed to abide by a statutory duty not to discriminate is likely to be found by the same act or omission to have breached the implied term. That, for example, was seen by the Court of Appeal as the natural, and almost self-evident analysis in *Meikle v Nottinghamshire County Council* [2005] ICR 1, CA, where a failure to make reasonable adjustments was relied upon as also constituting a breach of the implied term (see especially para 34).

86 Was there a breach of the implied term here? In our judgment, there plainly was. Absent any special grounds of the sort that justified a different outcome in the *Amnesty International* case, it would, we think, be permissible to rest our conclusion on our legal finding of a failure to make reasonable adjustments alone. But here the breach is aggravated and compounded by the factors and errors which we have identified, particularly in the first to sixth points discussed under *Reasonable steps?* above. It seems to us impossible to say that the breach did not go to the heart of the contract of employment.

87 The case could equally be seen as entailing a clear breach of the implied duty to provide a safe place and/or system of work.

Resignation in response?

88 The Claimant resigned in response to the breach. Her reason for resigning was that she was being compelled to return to her substantive position.

Affirmation (or waiver)?

89 There was no affirmation or waiver. Miss Henry did nothing to affirm the contract as breached. She was consistent in treating the breach as entitling her to regard the contract as discharged. There was no material delay and such delay as there was neither evidenced nor suggested affirmation.

Reason?

90 It follows from the reasoning so far that Miss Henry was constructively dismissed. The Respondent has not demonstrated a potentially fair reason for repudiating her contract of employment.

Fairness?

91 The inevitable result is that the dismissal was unfair.

Outcome and Postscript

92 For the reasons given, both claims succeed.

93 We are not without sympathy for the Respondent. We accept that the main decision-makers were faced with a difficult problem and did their best to resolve it in a fair way in the interests of the individuals concerned and the vital service which the Trust exists to serve. But a lesson should be learned about the special need for managers to seek advice early and often when dealing with cases which involve, or may involve, disability in any form.

94 Because Miss Henry took up fresh employment immediately after leaving the Respondent, the remedy claims do not appear to have a high monetary value. The parties should work hard to resolve them swiftly through private dialogue, with or without the assistance of the conciliation service, ACAS. If any such dialogue does not produce a settlement, the Tribunal will determine all remedy claims on 25 September. In that event, neither party will be permitted to tell the Tribunal anything about the settlement discussions.

95 For a remedies hearing, there should be a very slim bundle of documents, a schedule of remedies setting out all sums claimed and how they are justified, and, if Miss Henry intends to give evidence (for example about injury to feelings or calculation of losses, if any are claimed), a brief witness statement in her name. The parties should be able to agree a short timetable for these steps (for which an overall period of about a month should be allowed). If not, the Tribunal should be asked to set one.

Employment Judge Snelson

26/07/2023

Judgment entered in the Register and copies sent to the parties on : 26/07/2023

For Office of the Tribunals