EMPLOYMENT TRIBUNALS

Claimant: **Miss Crette Berry**

Respondent: **Anglian Water Services Ltd**

Heard at: **Nottingham**

Heard on: **6 – 13 September 2024**

Before: **Employment Judge McTigue**

Members: **Mr Akhtar**
Miss Lowe

Appearances:

Claimant: **Litigant in Person**

Respondents: **Miss K Lorraine of Counsel**

JUDGMENT

1. The complaint of failure to make reasonable adjustments for disability is not well-founded and is dismissed.

2. The following complaints of harassment related to disability are well-founded and succeed;
   2.1. In respect of Issue 7 c of the agreed list of issues, contacting the Claimant while she was unwell on:
      2.1.1. 5 January 2023,
      2.1.2. 10 January 2023,
      2.1.3. 12 January 2023.

3. The remaining complaints of harassment related to disability are not well-founded and are dismissed.

REASONS

Introduction

1. These written reasons are provided at the claimant's request. She made that request at the final hearing following the delivery of oral reasons.

2. The Claimant was employed as a Contact Centre Agent by the Respondent. She claims that the Respondent failed in its duty to make reasonable adjustments and that she also suffered harassment related to her disability. She commenced employment on 23 May 2022 and her employment ended as a result of her resignation on 3 March 2023. The Claimant's case is that she was constructively dismissed and although she does not plead that as a separate complaint she seeks compensation in respect of that alleged dismissal.

3. The Claimant has presented two claims to the Tribunal. In respect of her first claim ACAS was notified of the Early Conciliation procedure on 26 November 2022 and the certificate was issued on 16 December 2022. The ET1 form was presented to the Tribunal on 19 December 2022.

4. In respect of the second claim there is no ACAS Early Conciliation Certificate, however, it has not been suggested to the Tribunal that we lack jurisdiction to hear that claim. In any event the parties agreed before Employment Judge Fredericks-Bowyer on 11 August 2023 that the second claim does not seek to plead any new complaints over and above the first claim. We should also note that the Claimant indicated in her ET1 for the second claim that she was bringing a complaint of unfair dismissal and disability discrimination. The problem with the unfair dismissal complaint is that not only does she lack 2 years' service with the respondent but, in addition, at the date of presenting her second ET1 form she had not been dismissed or indeed resigned from the Respondent. The Claimant at this hearing confirmed that she was not advancing an unfair dismissal claim and for the sake of clarity I shall issue a withdrawal Judgment dismissing that complaint.

Claims and Issues

5. The Claimant brought the following claims against the Respondent:

   5.1. a failure to make reasonable adjustments contrary to sections 20 and 21 of the Equality Act 20210;

   5.2. Harassment related to disability contrary to section 26 of the Equality Act 2010.

6. We had a list of issues which have been agreed by the parties at the Case Management Hearing before Employment Judge Fredericks-Bowyer on 11 August 2023. That list of issues is attached as an appendix to this document.

7. The Respondent's position in regard to disability that position was clarified at the start of the hearing. The Respondent accepts that the Claimant is a disabled person for the purposes of the Equality Act 2010. Helpfully, the parties agreed the relevant dates of each disability before Employment Judge Fredericks-Bowyer on 11 August 2023. The Respondent however does not accept it had knowledge that the Claimant's

endometriosis and menopause amounted to a disability until 23 September 2022. In respect of the Claimant's anxiety and depression the Respondent's position is that it did not have knowledge these amounted to a disability until 1 December 2022.

Procedure, documents and evidence heard

8. This was a remote hearing via CVP. The morning of day 1 was set aside for the Tribunal to read. The hearing was due to start at 2.00pm that day but the Claimant could not connect to the CVP room. Despite repeated attempts and assistance from the Tribunal the Claimant could still not connect and so the afternoon session did not go ahead. The parties were instructed to attempt again via a new CVP link on day 2. We make no criticism of the Claimant for those difficulties but it is only right that we record it. There were also some minor audio issues on the morning of day 4 which meant that occasionally the audio feed cut out very briefly, for less than a second or so, on an intermittent basis. All parties indicated however that they were able to participate effectively and hear the audio feed sufficiently well. In any event, the audio issues quickly resolved themselves.

9. The Tribunal heard evidence from the Claimant herself. On behalf of the Respondent evidence was heard from the following witnesses.

   - Leanne Harper, Customer Delivery Manager. Ms Harper was the Claimant's line manager and dealt with her Claimant's flexible working request and also chaired the second attendance support meeting.

   - Mark Foster, Customer Delivery Manager. Mr Foster dealt with the Claimant's appeal in respect of her flexible working request.

   - Angela Usherwood, Customer Delivery Team Manager. Ms Usherwood chaired the claimant's first attendance support meeting.

   - Ellie Thomas, Connections Service Manager. Ms Thomas dealt with the Claimant's grievance.

10. The Claimant indicated that she suffered from brain fog. As a consequence, the Tribunal had regard to the principles enunciated in **Gestmin SGPS S.A. v Credit Suisse [2013] EWCA 3560** at paragraphs 15 to 22. Leggatt J, as he then was, stated at paragraph 22:

> **"…the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a**

witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

11. There was a Tribunal bundle of approximately 1343 pages. The Claimant was asked if she required any adjustments to be made prior to the start of the hearing. The Claimant stated no adjustments were needed. However, as the Tribunal recognised the Claimant was a disabled person, extra breaks were scheduled. The Claimant was also informed she could request a break whenever one was needed.

12. The Tribunal should also record that the Claimant withdrew her complaint in respect of PCP 3 with regard to the complaint of failure to make reasonable adjustments during the course of the final hearing.

Findings of Fact

13. On 4 April 2022 the Claimant provided pre-employment information to the Respondent. She did not at that point indicate to the Respondent that she had any health conditions or indeed a disability (page 1343 of the bundle).

14. On 28 April 2022, the Claimant was sent an offer letter and contract of employment. The intention was that she would be employed on a full-time basis. The contract is at page 343-347 of the bundle. As part of the pre-employment procedure the Claimant indicated that she needed a hysterectomy in the future. She did not at that point disclose any mental health conditions and on 28 April she was declared fit to commence work but a note of her possible surgery was made by the Respondent and also the recovery time in respect of her surgery noted (page 348 of the bundle).

15. On 23 May 2022, the Claimant commenced employment on a full-time basis. She was initially employed on a flexible basis to work 1924 hours per year. That would typically mean working 37 hours a week. Her working hours and rostas were prepared and made available 3 weeks in advance. She was subject to a 6 month probation period.

16. On 15 June 2022, the Claimant raised concerns about her working hours with her manager Leanne Harper via text message. She asked to speak to Leanne Harper (page 349 of the bundle). On or around 15 June 2022 the Claimant and Leanne Harper had a conversation about the Claimant's working hours. The Claimant indicated she wished to change her hours. Leanne Harper advised the Claimant to submit a flexible work request to adjust her hours in line with the Respondent's policies.

17. The Claimant submitted her flexible working request on 23 June 2022 (pages 350-351). The Claimant indicated in that request that she currently worked 37 hours per week on a random pattern and that she was looking to alter her hours to 30 hours per week. She stated that she would like to begin work at 10.00am in the morning and finish at 6.00pm for 4 days a week and that she would like to work either Tuesday to Friday or Monday to Thursday. She also indicated that she could work on a Saturday or Sunday shift once a month. In terms of the benefits that she said this would offer her, her first benefit was that she said this would offer her some "me time". She then stated that she would be able to rest physically to help manage her menopausal symptoms and finally said that she would have reduced stress levels

because she would have time to manage her household bills and appointments, and also assist with her daughter's school pick-ups and drop offs.

18. The Claimant mentioned in the flexible work request that she struggled to maintain mental clarity and indicated that this was possibly due to menopause / brain fog. She did not in that document indicate that her application was in respect of an application for reasonable adjustments under the Equality Act. She was specifically asked that question as part of the flexible working request form and answered "No".

19. On 24 June 2022, the Claimant was sick, the absence lasted 1 day and the reason was given as gynaecological reasons (page 352 of the bundle).

20. On 27 June 2022, the Claimant returned to work. She had a return to work interview and provided her agreement to Leanne Harper so that an Occupational Health Report could be produced. The Claimant indicated in that return-to-work interview that her absence was caused by her being late taking one of her prescribed medications, an injection called Prostap. She also indicated in the meeting that she was fit to return to work and that she felt the grant of her flexible working request would aid her in the future. The record of that meeting appears at page 352 of the bundle.

21. On that same day, 27 June 2022, the Claimant requested time off from the Respondent's Resource Planning and Development Department. The following day, 28 June, the Claimant also requested time off from Leanne Harper. Leanne Harper arranged emergency leave for the Claimant and the Resource Planning Department arranged annual leave to cover a reduction in the Claimant's hours as per the Claimant's request. The documents relating to those interactions can be found at pages 354 and 356 to 357.

22. A probation review was undertaken by Leanne Harper in respect of the Claimant on 28 June 2022. It was positive in nature and appears at page 355.

23. On 30 June 2022, the Claimant was invited to a flexible working request meeting. The meeting was to be held on Thursday 7 July 2022 and the Claimant was informed that she could be accompanied to that meeting by either a fellow worker or recognised Trade Union Representative (pages 359-360 of the bundle).

24. On 6 July 2022, the Claimant had her first Occupational Health Assessment (pages 1107-1109). The Claimant's current health concerns was recorded as follows:

    "Crette has suffered with endometriosis for approximately 10 years and is currently awaiting a hysterectomy. She is on HRT and Prostap injections to encourage the early menopause. Due to this she can suffer with quite severe brain fog as well as the usual menopause symptoms such as hot flushes and fatigue, along with pain in her stomach from the endometriosis."

25. The Occupational Health Report also stated:

    "…Crette reports she is awaiting a hysterectomy through the NHS. She tells me that the symptoms of her conditions and the treatments cause brain fog. She also reports having neck aches at times after her shifts and that she does require a full body scan again through the NHS.

Prognosis: Due to the treatments and the conditions noted in the referral Crette does get brain fog, this is likely to be significantly increased with fatigue. I have given Crette information on methods to reduce fatigue whilst at home and work I recommend that until she had surgery she can have additional welfare breaks these would enable her to get up and move away from her workstation..."

26. We find that taken and read in its entirety the contents of this Occupational Health Report are enough to give the employer sufficient knowledge that the Claimant was disabled by reason of endometriosis and the menopause from this date, i.e. 6 July 2022. The contents of the report have been sufficient to give a reasonable employer knowledge of the fact that the Claimant was disabled by reason of those two conditions.

27. On 7 July 2022, the Claimant's flexible work meeting took place. The Claimant attended. On behalf of the Respondent, Leanne Harper and Jodie Howard-Jones attended. The Claimant's flexible work request was clarified. It became apparent that the Claimant wished to work 30 hours per week between the hours of 10.00am and 10.00pm. She was prepared to work 2 Saturdays a month and that she wished at that point to have a pattern of 4 days on and 3 days off. The following day the Claimant received the outcome offer of her flexible working request. In effect the Claimant's request was granted in its entirety apart from the fact that she was requested to work one extra hour between the hours of 10.00pm and 11.00pm in the evening. The flexible working request outcome offer was sent by Danny Green as at that point in time Leanne Harper was on annual leave. The outcome offer appears in the bundle at pages 372-374.

28. On 16 July 2022, the Claimant emailed Leanne Harper to say that her needs had changed due to a change in her personal circumstances and childcare requirements. As a result of that she wished to change her flexible work request. The email from the Claimant is in the bundle at page 375. It states:

"Good morning,

Thank you for all of the time you have spent on my flexi-working request.

I have spoken with Danny to let him know that I have just separated from my partner; who I was relying on to help with school runs and childcare when giving my availability for the FW. I am uncertain if the hours proposed can be altered at this stage. I very much hope they can be because I enjoy my work at Anglian Water and have regrettably been backed into a corner with childcare issues now that I am a single parent.

I can still work the days and patterns proposed in the flexi-working schedule attached, but I would need to rely on wrap around childcare at my child's school, so will be available during the hours of 8am and 5pm in the week. The weekends proposed are fine as I won't have my children at those times.

I hope this can be worked, and please accept my sincere apologies for the inconvenience this news brings."

29. The Claimant's reasons for seeking a further change to her working hours at this point in time were not due to disability but to the change in the Claimant's personal circumstances as she had just separated from her partner.

30. On 19 July 2022, the Claimant appealed the decision of her flexible work request. She did that following advice from Leanne Harper. Leanne Harper informed the Claimant that she could not make a new flexible work application as the Respondent's policy only allowed for one flexible working request per year. The Respondent's Flexible Working Policy and Procedure appears in the bundle at pages 1179 to 1189. The Claimant then appealed later that day (pages 379-380). On receipt of her appeal, the Claimant was asked if she wanted the appeal to be heard either face to face or via correspondence. The Claimant chose to have the appeal dealt with by means of correspondence. The document in respect of that is at page 377 of the bundle.

31. On or around 19 July 2022 Mark Foster was appointed to chair the Claimant's flexible working request appeal.

32. On 26 July 2022, Mark Foster received the appeal pack in respect of the Claimant's flexible working request appeal (page 383).

33. On 31 July 2022, Leanne Harper approved unpaid leave for the Claimant during the months of July and August 2022 pending the outcome of the flexible working request appeal before Mark Foster (page 791).

34. On 1 August 2022, the Claimant commenced working from home (page 484 of the bundle).

35. Between 1 and 8 August 2022 Mark Foster was on annual leave. That is apparent from his witness statement at paragraph 9 which we accept.

36. On 9 August 2022, the Claimant was absent from work by reason of sickness. The reason for the absence was given as flu like symptoms. This absence triggered the Company's Supporting Attendance Policy and Procedure as the Claimant was still in her probation period and at this point in time had been absent on more than two occasions. The relevant attendance policy appears in the bundle at pages 1213-1217.

37. On 10 August 2022, the Claimant emailed Leanne Harper and stated that she was only able now to work 3 consecutive days a week, this was a change from her earlier requests. The Claimant stated incorrectly that this had been recommended by Occupational Health. The Claimant also requested a response to her flexible working request as soon as possible (page 401).

38. On 15 August 2022, Mark Foster emailed the Claimant to seek further information and clarification in respect of the Claimant's flexible working request appeal. He asked

"I have been appointed as the manager responsible for hearing your appeal. I acknowledge you have requested for your appeal to be heard in correspondence and I am now in receipt of the appeal information from Leanne Harper in order to consider your appeal. As a result, could I ask you to submit any further evidence you have in support of your appeal and could you answer the following:

• Could you please give me permission to obtain and review your Occupational Health report, as you mentioned that they advised you that you should not work more than 3 days

in a row.

• What is your preference on the number of working hours per week, as you have mentioned a Max 30 hours? A usual shift pattern is based on an average over 4-week shift pattern. What's your flexibility over a 4-week shift pattern?

• What is the reason why you can not do any Sundays and why can you only do alternative Saturdays?

• Could I please obtain clarity around the point raised ref 3 days off (Mon-Sun)? On this point does that mean you are happy to work 4 days within the 7-day period.

• You mentioned in your mail that you can not sustain your hours anymore. Could you expand on this point please with reasons why you can't?"

39. The issues and questions raised were entirely reasonable. The Claimant provided that information on 25 August 2022. She stated:

"Thank you for the time you have taken to hear my appeal, especially with the extra demands on us all at the moment. Also, apologies that the information I provided was vague and confusing; I was well ready for a break!

Please find below responses to each of your queries…

1, I give my permission for you to access and review my Occupation Health report.

2, I would prefer to work an average of four days per week (Monday-Friday) I am restricted to working only when my childcare allows (see below) but can work up to 30 hours per week.

3, I am a single parent and can work any weekday around the wrap-around care the school offers (I can be ready to work from 8am-5.30pm in the week) In the school holidays I can be more flexible with regard to start and finish times; because I can work from home and am not restricted by school hours and the need to travel 20 minutes to collect my children from school.

I have requested that I do not work Sundays so that I have at least one day per fortnight in my own company, to recharge. I have four children in total and they spend alternate weekends with me. As a single parent I am either at work or at home running the house and taking care of the children (except when travelling to and from work) It would make a huge difference to my wellbeing by being sure of when I would next be able to properly recharge. In summary, the Sunday that the children are with me is valuable and important family time. Much like the weekends when I am able to recharge and I am alone.

4, Although the OH Report recommends working a maximum of three days in a row, I feel I could manage four maximum if the company needs the manpower. This would be much easier to achieve both mentally and physically if I knew that I had a couple of days off coming up to allow me to rest.

Once again, apologies for the lack of clarity. I hope the above information gives a clearer picture of my case."

40. By providing that information it became apparent that the Claimant sought to work 30 hours a week between the hours of Monday to Friday 8.30am to 5.30pm in term time. The Claimant was, however, prepared to be more flexible in school holidays.

She wished weekend working around childcare and also not to work on Sundays and ideally she wished to only work 3 consecutive days but could be prepared to work 4 consecutive days, that is at page 407 of the bundle.

41. On 30 August 2022, the Claimant was invited to an Attendance Support Meeting scheduled to take place on 6 September 2022. That was as a result of triggering the Absence Policy. The invite appears at page 409.

42. On 2 September 2022, Mark Foster provided the appeal outcome in respect of the Claimant's flexible working request. He provided 2 offers to the Claimant. One provided for only 3 consecutive days of work a week, the other provided for the occasional 4 consecutive days in a week. His letter is at pages 412-415 of the bundle.

43. The next day, 3 September 2022, the Claimant accepted what was called offer two i.e. 4 working days together within a 4-week schedule based over a 4-week rolling schedule averaging 30 hours per week. She stated:

"Many thanks to yourself, RPD and others for working so hard to accommodate by request. I cannot express how much I anticipate these changes will benefit my mental and physical health and wellbeing thank you so much.

I would like to take Option 2 as soon as practically possible please." (page 417 of the bundle).

44. The next day, 4 September 2022, the Claimant commenced sickness absence of 5½ days. The half day was in respect of 4 September 2022. The reason given was gynaecological issues. The Claimant returned to work on 10 September (page 422).

45. On 13 September 2022, the Claimant was sent an invite to a rescheduled Attendance Support Meeting which was now scheduled to take place on 22 September. The earlier Attendance Support Meeting had to be cancelled as the claimant was absent from work. She was advised again of her right to be accompanied and the letter also stated:

"When you come to the meeting it would be helpful if you have familiarised yourself with the Supporting Attendance Policy and if you have gathered your thoughts and recollections regarding the reasons for your sickness absence." That is at page 425 of the bundle.

46. The next day, 14 September 2022, the Claimant provided her consent to a further Occupational Health referral (pages 427-428).

47. On 15 September 2022, the Claimant commenced sickness absence for 2 days, the reasons given were headache/migraine, that is apparent from pages 431-433.

48. On 16 September 2022, the Claimant's flexible working change was progressed through the Respondent's payroll. Her hours would be reduced to 30 hours a week from 19 September 2022 (page 429).

49. A further probation review took place with the Claimant on 19 September, it was noted that the Claimant was performing well but that she had triggered an absence trigger point.

50. On 22 September 2022, the Attendance Support Meeting took place via Teams. The Claimant attended and Angela Usherwood attended on behalf of the Respondent. Marie Ginley was also present as a notetaker on behalf of the Respondent. The notes of the meeting are at pages 441-447. By this point in time the Claimant had 9½ days absence. There was discussion about various matters including discussion about the weekend of 4 and 5 September. The Claimant was asked by Angela Usherwood, *"I understand you asked to take the weekend of the 4th and 5th of September off as short notice leave but there was no availability and then you opened a sickness absence for that weekend – Can you explain this to me?"* This was, however, a mistake as the weekend in question was in fact the 3rd and 4th September 2022. This was because the 5th September in 2022 was a Monday. The Claimant answered, *"I worked the Saturday all day and half day on Sunday but couldn't do anymore as migraine was starting to kick in so I went before it got any worse."*

51. At that meeting the Claimant disclosed that she had depression and that she was taking medications in respect of the same. The meeting itself was adjourned so that Occupational Health advice could be obtained in order to check whether the Claimant's endometriosis was affecting her absence. Another meeting was scheduled which was intended to take place in 10 days' time. That did not happen.

52. On 23 September 2022, another Occupational Health Report was prepared. The report is at pages 1124-1126 of the bundle and the Respondent accepts at this point in time that the Claimant's endometriosis is a disability and that it may have impacted on a number of her previous absences.

53. On 27 September 2022, Leanne Harper renewed welfare breaks for the Claimant. The Claimant was provided with one additional 10-minute welfare break each day until the end of November (page 449). Also, on that date the Claimant commenced long term sickness absence. The Claimant never physically returned to work for the Respondent after that point in time.

54. On 17 October 2022, the Claimant moved to half pay (page 452).

55. On 31 October 2022, Leanne Harper invited the Claimant to another Attendance Support Meeting regarding her long term sickness absence. That meeting was scheduled to take place on 4 November 2022. As the Respondent now deemed the Claimant's absence to be long term sickness absence Leanne Harper was the appropriate person to deal with the matter. This was because she was trained in dealing with long term sickness at that point in time, whilst Angela Usherwood was not.

56. On 1 November 2022, the Claimant informed the Respondent that she could not attend the Attendance Support Meeting scheduled for 4 November 2022 (page 852). She also consented to a further Occupational Health Report being obtained in order to ascertain whether or not she was fit to attend future meetings.

57. On 7 November 2022, the Claimant raised a grievance. Her grievance appears at pages 486-490. On page 490 the Claimant makes the Respondent clear that she is unfit to drive and expresses her desire that her grievance be dealt with by means of correspondence. She also states she will be making a claim.

58. The Tribunal also finds that on 7 November 2022 the Claimant's relationship with the Respondent had broken down in her opinion and the Claimant had decided from that point in time that she was not going back to work. That point was put to the Claimant during cross examination and the Claimant accepted it. We accept that as a finding of fact.

59. On 11 November 2022, Ellie Thomas invited the Claimant to a grievance hearing scheduled to take place on 22 November. Miss Thomas stated:

"You have noted in your letter that currently driving is not something you are able to do at the moment. I would be happy to arrange a taxi for you to attend, as meeting with you would ensure I can find you a resolution quicker and it would enable me to understand the issues raised fully without the need to go backwards and forwards over emails."

The full letter is at pages 500-501.

60. On 16 November 2022, the Claimant wrote to Ellie Thomas stating:

"Thank you for your reply dated 11th November and received 15th November by signed for mail. I appreciate your reply, and offer to fund a taxi to attend a meeting regarding my grievance. I reiterate the fact that my disability to drive is due to pain; and also medication I need to take in order to sleep and manage my physical pains and severe anxiety. At this point in my recovery I am limited in the amount of stress I can manage, and fear that another meeting would trigger my depression and suicidal thoughts.

In my experience I could not undertake a physical meeting at this time without risking my fragile mental health further. Furthermore, my medication slows my thought processes, and therefore my ability to stay focused and express myself is greatly reduced. Written communication is preferred due to difficulties arising from my disability (Anxiety) and medications to treat it (both Endometriosis and Anxiety) Any communication from me will be via email. Getting out to the post office is not possible because my anxiety prevents me leaving my house. As there is an evident delay caused by using the postal service, and although ACAS have extended my dates because of early conciliation notice, I feel email would be a more appropriate approach.

I am nearly finished preparing a timeline of events and evidence for my solicitor and I will speak to my solicitor about what information should be shared with you. I will provide you a chronological account of my case once advised to do so by my solicitor. I trust that this will satisfy your questions and enable you to perhaps work out a response, even in my absence. I am working on early conciliation with ACAS . I am also creating a statement of losses to assist in calculating a compensatory figure with the help of my solicitor, ACAS and Citizens Advice. Either my solicitor or myself will be in contact with the above mentioned details as soon as they become available." (page 503)

61. The Claimant's statement that she had instructed a Solicitor and that she had been working on Early Conciliation with ACAS was not true. The Claimant admitted during cross examination that she had not instructed a Solicitor at this point in time. The Claimant had also not taken part in any Early Conciliation.

62. On 17 November 2022, Ellie Thomas wrote to the Claimant offering a meeting in respect of the Claimant's grievance to be heard by way of MS Teams on 22 November 2022 (page 504).

63. On 19 November 2022, the Claimant wrote to Ellie Thomas accepting the offer of a meeting to discuss her grievance via MS Teams. She stated she could not attend a meeting until 28 November and also asked permission for her partner to attend the meeting. The Respondent agreed to the Claimant's partner attending on 22 November and on 23 November a Microsoft Teams invite was sent to the Claimant in respect of that grievance meeting. (page 510).

64. On 26 November 2022, the Claimant commenced Early Conciliation with ACAS.

65. On 28 November 2022, the Claimant's grievance meeting with Ellie Thomas took place. Also in attendance was Miss Libiszewski from the Respondent plus John Johnson who attended to support the Claimant. John Johnson was the Claimant's partner at the time. (pages 527 to 542 of the bundle). The Claimant clarified that she wished Ellie Thomas to investigate 3 key points, namely (1) The speed and outcome of the Flexible Working Process; (2) The failure to provide adjustments and (3) The lack of support/ harassment during the Attendance Support Meeting process.

66. Ellie Thomas then interviewed a number of further individuals as part of the grievance investigation. These individuals were:

    66.1. Angela Usherwood on 30 November 2022 (pages 549-555);

    66.2. Mark Foster on 30 November 2022 (pages 585-682);

    66.3. Laura Hoverd on 1 December 2022 (pages 603-605);

    66.4. Leanne Harper on 2 December 2022 (pages 615-633).

67. On 1 December 2022, there was a further Occupational Health consultation. The Occupational Health consultation is at pages 153-155. The view expressed by Occupational Health is that the Claimant is fit to attend meetings remotely and Occupational Health are of the view that the Claimant's mental health conditions amounts to a disability by this point in time. The report is received by the Claimant's Manager on 6 December 2022. The report states the following:

    "*Crette tells me that she has access support through her private health care and has her planned surgery on 22 December for a hysterectomy. She is also awaiting a psychiatry review to support her mental health, however, continues to wait for an appointment. In this case I have signposted Crette to access a mental health self-referral also available through her private health care to support her wellbeing. Crette also reported a provisional diagnosis of fibromyalgia following recent tests and remains under the care of her GP. Based on my assessment I feel that Crette remains unfit for work at present I am aware that Crette has a current fit note which expires on 19 December, however, is due to attend surgery shortly after and therefore this is likely to be extended to cover a period of recovery. Based on the type of surgery proposed recovery may take approximately 3 to 4 weeks, however, this will depend on the actual type of surgery and her individual rate of recovery. Crette remains unfit for work and I have planned to review her in 5 weeks following her operation or before should this be required."*

68. On 2 December 2022, there was a letter from Angela Usherwood to the Claimant which summarised the contents of the Attendance Support Meeting which had taken place earlier that year on 22 September 2022. The letter can be found at page 611

of the bundle.

69. On 8 December 2022, the Claimant provided additional comments in respect of the Attendance Support Meeting (page 645).

70. On 16 December 2022, the outcome letter in respect of the Claimant's grievance was sent by Ellie Thomas to the Claimant. The letter appears in the bundle at 679-684. Ellie Thomas upheld part of the Claimant's grievance, specifically her complaint that the outcome of the Attendance Support Meeting of 22 September 2022 had not been provided to the Claimant. All other elements of the Claimant's grievance were not upheld. The Tribunal finds that a fair and reasonable grievance investigation had been undertaken and that a fair and reasonable decision had been made by Ellie Thomas.

71. Also, on 16 December 2022, the ACAS Early Conciliation Certificate was issued. The Claimant then submitted the ET1 form in respect of her first claim on 19 December 2022.

72. On 22 December 2022, the Claimant underwent surgery for her hysterectomy that is apparent from documents including the Claimant's witness statement at paragraph 13 which we accept.

73. On 5 January 2023, the Claimant was invited to a re-arranged Attendance Support Meeting which was scheduled to take place on 13 January 2023. The letter was sent by Leanne Harper and reads as follows:

*"**Invitation to an Attendance Support Meeting***

I hope this letter finds you feeling better than when we last spoke. My reason for writing at this time is to invite you to an Attendance Support Meeting so that we can work together to put plan in place hopefully to aid your recovery and to help you get back to work. The meeting will be held on Friday 13 January at 11:30 via Microsoft Teams. I've enclosed a copy of our Supporting Attendance Policy for your reference.

At the meeting we will review your current absence (a copy of your absence record is enclosed), together with other relevant information such as Occupational Health reports or recommendations from your GP as we discuss the possibility of helping you return to work and the support required to help you achieve this.

There are many ways we can support you and we will discuss this at the meeting. It would be helpful if you would give some thoughts to this before we meet. Often people have quite unique requirements depending on their medical condition; however, typical adjustments may include a temporary reduction in working hours or location, being buddied with a colleague, or being provided with different tools or equipment to help you.

At the meeting I will be accompanied by Neville Maddison, Employee Relations Advisor… who will be acting in an advisory capacity. You are entitled, if you wish, to be accompanied at this meeting by a fellow worker or a recognised trade union representative.

Please confirm your attendance at this meeting and if you are bringing someone with you, can you please let me know their name at the same time. You can do this by contacting me by email …or by phone to mobile:….

For ease of reference and to ensure accuracy, we typically do an audio recording of these meetings, unless you advise me in advance of the start of the meeting in which case, I will make arrangements for written notes to be taken. Following this formal meeting, a copy of the recording will be sent to you via email and a copy will also be retained for our files.

Possible outcomes of this meeting may include:

• Identifying a suitable return to work plan.

• Identifying suitable workplace adjustments.

• Submitting a referral for a specialist medical, report or physiotherapy.

If you have any special requirements to support your attendance at the meeting, please let me know straight away so I can look into making any necessary adjustments for you.

I am mindful that being away from work can lead to anxiety and stress about returning. Therefore, until you are fit to return, I am very keen that we keep in touch and maintain an appropriate level of contact to help keep you up to date. If at any time you would like to come in to visit myself or the team, we would be very happy for you to join us for a chat or coffee if you wish.

Finally, I would like to remind you about the range of health and wellbeing tools and services we have available to support you. You can find details of these on Lighthouse / Boost, which range from a Virtual GP service through to Private Healthcare, physiotherapy and much more.

If you have any questions about the meeting, please do not hesitate to contact either myself or Neville Maddison." (pages 686-687).

74. On 6 January 2023, an updated Occupational Health Report was prepared (pages 1158-1159). The report states that the Claimant is fit to attend meetings remotely after surgery. It also states that frequent breaks should be provided to the Claimant and that she could be accompanied by a close colleague of representative. With those steps it was felt the Claimant would be fit to attend a meeting.

75. At 10 January 2023, Leanne Harper contacted the Claimant via WhatsApp asking the Claimant if she had received the invite to the re-arranged Attendance Support Meeting. Leane Harper states at 10.40am:

"Hi Crette, hope you are feeling a bit better. Did you receive the invite letter over the weekend. Can you confirm your attendance for me please, thanks".

At 11.20am the Claimant replied:

"Good morning Leanne. I am very poorly at present as my post surgery infection is not responding to the antibiotics I was put on. I have just been switched to some new meds. I received your letter yesterday, thanks. The doctor has ordered complete bed rest to relieve the symptoms I'm experiencing. I may be well enough for Friday but I'm sorry I don't know yet how these meds will work."

The WhatsApp messages can be seen at page 868 of the bundle.

76. On 12 January 2023, Leanne Harper received a WhatsApp message from the

Claimant's phone stating:

"Hello Leanne this is John on behalf of Crette. I'm afraid Crette is still unwell enough to attend a work meeting with her infection" (sic).

Leanne Harper then replied at 16.23 stating:

"Hi John, this is a message for crette if you can Please ensure she receives it. I'm sorry to hear you are not feeling well, it is important that we catch up so we can discuss your current absence and what support is available to you at this time. I understand you may be feeling fatigued too which is why I have arranged the meeting to be held via teams. Please be reassured there will be breaks available throughout the meeting should you need them."

At 17.31 Leanne Harper sent a further WhatsApp message to the Claimant stating:

"*Thanks for the update, with this in mind I am sorry that you are not well enough to attend tomorrow. I hope that you are OK and will soon be feeling better. I need to speak with you directly in relation to your absence so can you contact me as soon as you can. You have been cleared by occupational health to attend company meetings therefore it is important that I meet with you regarding your ongoing absence and as I mentioned previously there are also things I need to discuss. I will rearrange this meeting to Friday 20th January at 12:20pm, as before we will do this on teams while you are still recovering, thanks Leanne*" (pages 868-869).

77. On 13 January at 9.29 a message was sent from the Claimant's phone to Leanne Harper. It stated:

"Hello. Crette is not fit to attend and at this point in her recovery the demands for meeting are making her anxiety worse. She feels under pressure to be well anyway and has already torn stitches doing too much through anxiety. The health interview she had before was before we knew the antibiotics weren't working and to be up to date you would probably need weekly health interviews. I understand you want to put support in place. How can you expect Crette to know what support she will need before she's even recovered from her operation properly, or seeing the psychiatrist to address her anxiety or insomnia. I recommend writing to Crette with any information and when she has a good half hour she will get your information to you, if it is something that she can answer at this point. I will protect her mental health from becoming damaged further to make her suicidal again. The pressure you are putting on her is unfair and immoral." (page 870).

78. On 16 January 2023, Leanne Harper agreed to postpone the Attendance Support Meeting that had been rescheduled for 20 January 2023. The intention of Leanne Harper was to postpone the Attendance Support Meeting until after a further Occupational Health Report had been obtained (page 871).

79. On 24 January 2023, a further Occupational Health Assessment was completed. The Claimant, however, did not consent to the release of that document to the Respondent.

80. On 27 January 2023, Leanne Harper asked the Claimant for an update in respect of the ongoing absence situation, there was no response from the Claimant (page 691).

81. On 3 February 2023, Leanne Harper attempted to telephone the Claimant without success. Leanne Harper than sent a message to the Claimant and requested that

the Claimant call her as there had been no contact for some time. The Claimant stated to Miss Harper that she would not speak on the phone and wished to have a record of what was said for the Tribunal. The relevant documents are at pages 836-842. The Claimant then does not contact either the Respondent or Leanne Harper again until after her resignation.

82. On 13 February 2023 Leanne Harper invited the Claimant to a further re-arranged Attendance Support Meeting, stating that the meeting will take place in the Claimant's absence if she does not attend. The meeting is scheduled for the 17 February 2023. The Claimant is informed that she may be accompanied by a fellow worker or trade union representative. The invite letter is in the bundle at pages 702-704.

83. On 17 February 2023, the Attendance Support Meeting regarding the Claimant's long-term sickness took place. It was held in the Claimant's absence as she did not attend. Following that meeting a letter was sent to the Claimant, the letter is at page 710-713. It is a lengthy letter and includes the following paragraphs:

"*I would still welcome the opportunity to talk to you I would urge you to contact me over the telephone or leave me a message stating when would be convenient for me to speak with you. However, I do ask that future contact be over the telephone and not through text or WhatsApp. The business cannot sustain your non-attendance to work indefinitely therefore after careful consideration I will be arranging a probationary review meeting with you at which your attendance will be discussed further. One possible outcome of this meeting could be the consideration of your ongoing employment.*

Please remember that we are very keen to support your ongoing recovery and wellbeing and to help you back to full duties, to help with this please make certain that you are familiar with the wide range of health and wellbeing services and support tools we offer and make full use of them where appropriate. If you need any advice or signposting to the most appropriate pathways I am happy to help, however, I have provided the EAP details."

84. The Claimant then resigned with notice on 25 February 2023. Her resignation letter is in the bundle at page 715. The Respondent responded on 27 February rather confirming that the Claimant's notice period was in fact one week and so her last working day of employment would be 3 March 2023 (pages 717–718).

Law

Burden of proof

85. Section 136(2) and 136(3) Equality Act 2010 (EqA 2010) provide that the tribunal must take the following approach to the 'shifting burden of proof':
    85.1. the initial burden is on the claimant to prove facts from which the tribunal could decide, in the absence of any other explanation, that the respondent contravened the provision concerned (i.e. a 'prima facie case');
    85.2. the burden then shifts to the respondent to prove that it did not contravene the provision concerned. If the respondent is unable to do so, the tribunal is obliged to uphold the claim.

86. The claimant must show a probability, rather than a mere possibility, that the respondent has committed the unlawful act: **Igen v Wong [2005] ICR 931, CA**. As

Elias P put it in **Laing v Manchester City Council and anor [2006] ICR 1519**, "it is for the employee to prove that he suffered the treatment, not merely to assert it, and this must be done to the satisfaction of the tribunal after all the evidence has been considered" (para. 64). As Mummery LJ said in **Madarassy v Nomura International plc [2007] ICR 867**, "[*t]he bare facts of a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination*" (para. 56).

87. As was confirmed by the Supreme Court in **Efobi v Royal Mail Group Ltd [2021] ICR 1263**, the initial burden is on the Claimant to establish facts from which the tribunal could conclude, in the absence of an adequate explanation, that an unlawful act of discrimination, harassment or victimisation had been committed. In establishing the facts, the claimant can rely on both primary facts and also inferences that can be properly drawn from those facts.

88. The approach was summarised by the EAT in **Qureshi v Victoria University of Manchester and another [2001] ICR 863** per Mummery J at 875C – H; "The process of making inferences or deductions from primary facts is itself a demanding task, often more difficult than deciding a conflict of direct oral evidence. In **Chapman v Simon [1994] IRLR 124**, 129, para 43 Peter Gibson LJ gave a timely reminder of the importance of having a factual basis for making inferences. He said, "*Racial discrimination may be established as a matter of direct primary fact. For example, if the allegation made by Ms Simon of racially abusive language by the headteacher had been accepted, there would have been such a fact. But that allegation was unanimously rejected by the tribunal. More often racial discrimination will have to be established, if at all, as a matter of inference. It is of the greatest importance that the primary facts from which such inference is drawn are set out with clarity by the tribunal in its fact-finding role, so that the validity of the inference can be examined. Either the facts justifying such inference exist or they do not, but only the tribunal can say what those facts are. A mere intuitive hunch, for example, that there has been unlawful discrimination is insufficient without facts being found to support that conclusion*."

89. Where a claimant compares his treatment with that of another person, "it is important to consider whether that other person is an actual comparator or not. To do this the Employment Tribunal must consider whether there are material differences between the claimant and the person with whom the claimant compares his treatment. The greater the differences between their situations the less likely it is that the difference of treatment suggests discrimination": **Virgin Active Ltd v Hughes [2023] EAT 130**.

90. The burden of proof rule "*need not be applied in an overly mechanistic or schematic way*": **Khan and anor v Home Office [2008] EWCA Civ 578, CA**.

91. An employment tribunal may consider all relevant evidence at the first stage of the burden of proof test: **Commissioner of Police of the Metropolis v Denby EAT 0314/16**.

92. If a tribunal can make positive findings as to an employer's motivation, it does not need to make use of the burden of proof test at all: **Hewage v Grampian Health Board [2012] ICR 1054, SC**.

93. In **Leicester City Council v Mrs B Parmar [2024] EAT 85** the EAT confirmed that it is not necessarily an error of law for the tribunal to take a blanket approach to multiple allegations of discrimination rather than apply s136 EqA 2010 individually to each one.

Disability

94. Section 6 EqA 2010 provides the definition of disability.

> *A person (P) has a disability if—*
> *P has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*

95. A reference to a disabled person is a reference to a person who has a disability.

96. Schedule 1 contains various supplementary provisions. Paragraphs 2(1) and 2(2) of the Schedule provide:

> *The effect of an impairment is a long-term one if either it has lasted for at least 12 months or it is likely to last for at least 12 months (or it is likely to last for the rest of the life of the person affected.)*
> *If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day to day activities it is to be treated as continuing to have that effect if it is likely to recur.*

97. Sub paragraphs 5(1) and 5(2) provide:

> *(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—*
> *(a) measures are being taken to treat or correct it, and*
> *(b) but for that, it would be likely to have that effect.*
>
> *(2) "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.*

98. In summary, the tribunal must consider whether the person has a physical or mental impairment; whether the impairment affects the person's ability to carry out normal day to day activities, whether the effects on such activities are substantial (which means more than trivial) and the effects must be long-term. The third and fourth matters, long-term and substantial, can be analysed separately but also they go hand in hand with each other. The substantial effects must also be long-term.

99. In **Walker v SITA Information Networking Computing Ltd [2013] 2 WLUK** the Employment Appeal Tribunal noted that when considering whether an individual is disabled, the tribunal must concentrate on the question of whether she has a physical or mental impairment. The cause of the impairment (or the apparent absence of a cause) is not of zero significance, but the significance is evidential rather than legal. In other words, a cause identified by a medical expert might corroborate that the evidence that impairment actually exists. Or the lack of a proven cause might lead the tribunal to conclude that the claimant does not genuinely suffer from the alleged impairment. However, provided the tribunal is satisfied that the symptoms are genuine, then lack of a specific diagnosis of the cause does not mean that the claimant cannot have an impairment.

100. Day to day activities are things that people do on a regular or daily basis. Examples include shopping, reading, writing, having a conversation, using a phone, using the internet, watching TV, getting washed, getting dressed, preparing food, eating food, carrying out household tasks, walking, travelling by various modes of transport and talking part in social activities. Activities which are not performed by the majority of the population can still be day to day activities and activities. Some activities which are usually only performed in connection with work (such as – say - attending job interviews or maintaining shift patterns) might potentially be considered day to day activities. If the activities are highly specialised or they involve high levels of attainment, then that might mean that they are not normal day to day activities. It is a matter for the tribunal to decide.

101. The issue of whether the claimant meets the definition is to be decided as of the date of the alleged contravention of the Equality Act. This is particularly important when considering the part of the definition that refers to long-term. If, by the time of the alleged contravention the impairment already had a substantial adverse effect on the ability to carry out normal day to day activities for at least 12 months then it is unnecessary to consider the alternative parts of the definition of long-term. However, if that is not the case it is necessary for the tribunal to analyse the situation as of the date of the alleged contravention and ask itself whether as of that particular date the effects were likely to last for 12 months in total (or until death, if sooner). The tribunal has to avoid hindsight. Having said that, the fact that there might not have been - by the date of the contravention - a diagnosis from the doctor does not in itself prevent the tribunal deciding that it was likely - as of the date of the contravention – that the adverse effects were likely to last for 12 months.

102. The employer's knowledge or opinion is not relevant to this part of the analysis. The fact that, as of a particular date, the employer did not know the impairment (existed or) was likely to last for 12 months does not prevent the tribunal deciding that, as of that date, the Claimant had met the definition in section 6.

Reasonable adjustments

103. In relation to failure to make reasonable adjustments s.20 and 21 of the Equality Act 2010 says in part

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.

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.

105. Paragraph 20 of Schedule 8 states in part:

A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know …. … that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

106. The expression provision criterion or practice or PCP is not expressly defined in the legislation, but we must have regard to the guidance given by the EHRC, and its Code of Practice on Employment, to the effect that the expression should be construed widely so as to include for example any formal or informal policies, rules or practices, arrangements, criteria, etc.

107. The claimant has to clearly identify the PCP to which it is asserted that adjustments ought to have been made. We must only consider the PCPs so identified by the claimant. When considering whether there has been a breach of s.21 we must precisely identify the nature and extent of each disadvantage to which the claimant was allegedly subjected. Furthermore, we must consider whether there is a substantial disadvantage when the relevant alleged PCP is applied to the claimant in comparison to when the same PCP is applied to persons who are not disabled. The claimant bears the burden of establishing a prima facie case that the duty to make reasonable adjustments has arisen and there are facts from which it could reasonably be inferred that the duty may have been breached. If she does so, then we need to identify the step or steps, if any, which the respondent could have taken to prevent the claimant suffering the disadvantage in question (including taking account of the Claimant's suggestions of possible steps). If there appear to be such steps the burden is on the respondent to show that the disadvantage would not have been

eliminated or reduced by the potential adjustments and/or that the adjustment was not a reasonable one for it to have to had to make.

104. There is no breach of s.21 if the respondent did not know and could not reasonably have been expected to know that the claimant had the disability. Furthermore, in relation to a specific disadvantage there is no breach of s.21 of the employer did not know and could not reasonably have been expected to know that the PCP would place the claimant at that disadvantage.

Harassment

105. Section 26(1) EqA 2010 provides that a person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

106. Section 26(2) EqA 2010 provides that tribunals, when deciding whether conduct has the effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B, must take each of the following factors into account:

106.1. the perception of B;
106.2. the other circumstances of the case;
106.3. whether it is reasonable for the conduct to have that effect.

107. There are three essential elements of a harassment claim under s.26(1) EqA 2010:

107.1. unwanted conduct;
107.2. that has the proscribed purpose or effect, and
107.3. which relates to a relevant protected characteristic.

108. Guidance on how tribunals should approach cases where harassment is alleged has been set out in the context of racial harassment by Underhill P in **Richmond Pharmacology Ltd v Dhaliwal** [2009] IRLR 336, paras 7-16). In summary, the relevant principles are as follows:

108.1. the various elements of the definition give rise to overlapping questions that are likely to be answered by reference to the same findings of fact (para. 11);
108.2. the breakdown of subsection 1(b) into 'purpose' or 'effect' means that a respondent may be held liable on the basis that the effect of his conduct has been to produce the proscribed consequences even if that was not his purpose (para. 14);
108.3. in determining whether the consequences set out under subsection 1(b)(i) or (ii) have occurred, the tribunal should apply an objective test bearing in mind all the circumstances of the case (para. 15).

109. Some key concepts set out in **Dhaliwal** and **Grant v Land Registry [2011] ICR 1390** are as follows:

109.1. when assessing the effect of a remark, the context is always highly material. Context will also be relevant to deciding whether the response of the alleged victim is reasonable (**Grant**, para. 13);
109.2. tribunals must not "cheapen the significance" of the meaning of the words used in the statute (i.e. intimidating, hostile, degrading, etc.). They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. Being "upset" is far from attracting the epithets required to constitute harassment (**Grant**, para. 47);
109.3. it is not enough for an individual to feel uncomfortable for them to be said to have had their dignity violated, or the necessary environment created (**Grant**, para. 51);
109.4. if a tribunal finds that a claimant was unreasonably prone to take offence, then, even if he did genuinely feel his dignity to have been violated, there will be no harassment (**Dhaliwal**, para. 15).

Submissions

110. Submissions were made by both parties. The Claimant provided an email, dated 12 September 2024, that she wished to stand as her submission. She indicated that she did not want to make an oral submission. The Respondent made oral submissions. The Tribunal considered the submissions carefully before reaching its decision.

Conclusions

111. For the Tribunal to reach its conclusions, we return to the list of issues which had been agreed between the parties. What follows is the unanimous decision of the Tribunal.

112. In respect of the question of disability we note that issue 1 is narrative only. As the Respondent accepts that each of the Claimant's impairments amount to a disability we are not required to address issue 2. So we now turn our attention to issue 3, which is:

"Did the Respondent have actual or constructive knowledge of the Claimant's disabilities at the material times?"

We find that the Respondent had constructive knowledge that the Claimant's endometriosis and menopause were disabilities from 6 July 2022. We find that the information in the Occupational Health Report of that date together with the information provided by the Claimant up until that point in time is sufficiently detailed to give a reasonable employer knowledge of disability.

113. In terms of anxiety and depression we find the employer had knowledge from 6 December 2022 that those impairments amounted to disabilities. In reaching that

conclusion we take into account that it was not until the Attendance Support Meeting with Angela Usherwood on 22 September 2022 that the Claimant mentioned her mental health issues to the respondent. At the meeting on 22 September we conclude that the Claimant had not made it sufficiently clear to the Respondent that her anxiety or depression were affecting her ability to undertake normal day to day activities to the required extent. The Claimant primarily spoke about the effect of her endometriosis and menopause at the meeting and made only a brief reference to being prescribed Duloxetine for stress and anxiety at the end of that meeting. We conclude it was not until the Occupational Health Report was received by the Respondent on 6 December 2022 that the Respondent had knowledge that the Claimant's anxiety and depression amounted to disabilities i.e. that they had the requisite affect on her ability to undertake normal day to day activities. It was at the meeting on 6 December that the Claimant informed Occupational Health of her mental health issues and the long-term affect that those impairments could have upon her ability to undertake normal day to day activities.

114. We now move the complaint in relation to a failure to make reasonable adjustments. The Claimant is now relying on 5 PCP's having withdrawn PCP 3 during the course of this hearing. The first PCP, PCP 1, is as follows:

"Requiring employees to attend a Flexible Working Request Meeting in order to progress their flexible working requests"

115. We conclude the Respondent did have this as a PCP. That has not been disputed by the Respondent. However, this PCP did not have a substantial disadvantage on the Claimant. The Claimant's case is that the application of this PCP increased her stress and anxiety, and left her feeling humiliated and tired due to the symptoms of her disability being exacerbated. There is insufficient evidence before us that the Claimant suffered that disadvantage or indeed any disadvantage as a result of the application of this PCP. We note that the Claimant's health did deteriorate over her time with the Respondent but there is no evidence that this was due to any action on the part of the Respondent, or the application of any PCP. Following that point in time, i.e. in respect of the flexible work request appeal meetings, there was no requirement for the Claimant to attend a meeting personally. The Claimant wished the matter at the appeal stage to be dealt with by correspondence and it was.

116. If we are wrong on that, we also conclude there is insufficient evidence the Respondent was aware of any disadvantage. In reaching that decision we note that the first flexible working request meeting took place on 7 July 2022. At that meeting the Claimant said she was happy to proceed as can be seen from page 362. She was also asked in advance of that meeting if she wished any adjustments to be made and she did not request any. The Claimant was then ultimately provided with a change in her hours which she indicated she was happy with.

117. At no point did the Claimant express any displeasure in how her Flexible Working Request was dealt with. Instead, she expressed how pleased she was with Leanne Harper's initial decision on 16 July 2022 and also stated how pleased she was with Mark Foster's decision after her appeal was heard on 3 September 2022. It was only after the Claimant decided in November 2022 that she was not going to return to work for the Respondent that she expressed any displeasure with how her Flexible

Working Request had been dealt with. The complaint in respect of PCP 1, therefore fails it is not well founded.

118. Moving to PCP 2 which is worded as:

"Requiring employees to work their contractual hours unless and until agreement was reached in relation to a flexible working pattern."

We find that is a valid PCP. That was not disputed by the Respondent. However, again this PCP did not have a substantial disadvantage on the Claimant. The Claimant's case is that the application of this PCP increased her stress and anxiety, and left her feeling humiliated and tired due to the symptoms of her disability being exacerbated. There is insufficient evidence before us that the Claimant suffered that disadvantage or indeed any disadvantage as a result of the application of this PCP.

119. At no point after making her initial Flexible Working Request on 23 June 2022 did the Claimant request a formal reduction in her hours until after a decision had been made in respect of her Flexible Working Request. We also observe that she did not indicate in her initial Flexible Working Request that that her application was in respect of an application for reasonable adjustments under the Equality Act. She was specifically asked that question as part of the flexible working request form and answered "No".

120. As already noted the Claimant's Flexible Working Request Meeting took place on 7 July 2022. The Claimant was promptly provided with the outcome on the next day. The Claimant received what she requested at that point in time and expressed her pleasure with the proposed change.

121. The Respondent sought to accommodate, as far as it could, the Claimant's nebulous ongoing requests regarding flexible working. We conclude that the Claimant's flexible working request as put forward at the appeal stage was not related to her disability but rather her changed personal circumstances i.e. that by that point in time her partner had left her and she was now a sole parent. If the Claimant did suffer any disadvantage after changing her request on appeal stage, that disadvantage was due to her status as a sole parent and not as a disabled person.

122. If we are wrong on that, we also conclude there is insufficient evidence the Respondent was aware of any disadvantage. The Claimant did not express dissatisfaction at having to work her contractual hours until any of her Flexible Working Requests were concluded. The complaint in respect of PCP 2 therefore fails.

123. We now move to PCP 4 repeating that PCP 3 is now no longer for us to consider after having been withdrawn by the Claimant. PCP 4 is worded as follows:

"*Requiring employees to work their contracted hours without additional welfare breaks."*

Based on our findings of fact, we are not persuaded this is a valid PCP. It is apparent to us from the evidence before us that the Claimant was provided welfare breaks. She indicated that clearly in the Attendance Support Meeting on 22 September 2022. She clearly stated in that meeting that welfare breaks had been provided. In addition,

prior to that meeting, on 27 June 2022, the Claimant requested time off from the Respondent's Resource Planning and Development Department. The following day, 28 June, the Claimant also requested time off from Leanne Harper. Leanne Harper arranged emergency leave for the Claimant and the Resource Planning Department arranged annual leave to cover a reduction in the Claimant's hours as per the Claimant's request. The documents relating to those interactions can be found at pages 354 and 356 to 357.

If we are wrong on that, we have insufficient evidence that the Claimant suffered the disadvantages she alleges i.e. that PCP 4 increased her stress and anxiety, and left her feeling humiliated and tired due to the symptoms of her disability being exacerbated.

There is also insufficient evidence that the Respondent knew of any disadvantage. The Claimant never expressed her displeasure at having to allegedly work without additional welfare breaks until she submitted her grievance to the Respondent on 7 November 2022. By that point in time, she was no longer working and she had already decided that she had no intention of returning to work for the Respondent.

The complaint in respect of PCP 4 fails.

124. Moving to PCP 5, that is worded as follows:

"*Following the Attendance Support Policy and requiring employees to attend Attendance Support Meetings trigger point were reached and maintaining regular contact with the Claimant."*

This is a valid PCP which was applied to the Claimant. However, the Respondent did not have knowledge of any disadvantage to the Claimant at the relevant point in time. The Occupational Health Reports which were obtained by the Respondent indicated that the Claimant was fit to attend meetings. The Claimant then attended those meetings, said she was happy to proceed with the meetings and participated fully in those meetings.

We cannot find that any element of this PCP had a substantial disadvantage on the Claimant. The Claimant's case is that the application of this PCP increased her stress and anxiety, and left her feeling humiliated and tired due to the symptoms of her disability being exacerbated. There is insufficient evidence before us that the Claimant suffered that disadvantage or indeed any disadvantage as a result of the application of this PCP. In reaching that conclusion, we have considered; (a) the following of the Supporting Attendance Policy and Procedure by the Respondent; (b) requiring employees to attend Attendance Support Meetings; (c) the Respondent's Trigger system (pages 1219-1221); (d) the maintenance of regular contact with the Claimant.

Attendance Support Meetings were intended to support absent employees and it was made clear to the Claimant, in the invite letters she received, that possible outcomes of the Attendance Support Meetings could include:

124.1. Identifying a suitable return to work plan.

124.2. Identifying suitable workplace adjustments.

124.3. Submitting a referral for a specialist medical, report or physiotherapy.

At no point was it suggested that attending an Attendance Support Meeting would result in the administration of any sanction against the Claimant. The Respondent's Attendance Support Meetings were not disciplinary meetings.

125. The Claimant contends that it would have been reasonable for her not to have to attend absence support meetings. We do not find that to be a reasonable adjustment. Contact with absent employees is necessary in order to ascertain how, if at all, they can be supported back to the workplace. The Claimant also contends that it would have been reasonable for the Respondent to have reduced the amount of contact with the Claimant. We do not find that made out. The Respondent maintained a reasonable level of contact with the Claimant whilst she was absent. No reduction in contact was necessary.

Taking all matters into account, the complaint in respect of PCP 5 fails.

126. Moving to PCP 6 this is worded as follows:

"*Following the Attendance Support Policy and requiring employees to attend Occupational Health appointments."*

This is a valid PCP and we note there is some overlap with PCP 5 here. Again, we cannot find that this PCP had a substantial disadvantage on the Claimant. The Claimant's case is that the application of this PCP increased her stress and anxiety, and left her feeling humiliated and tired due to the symptoms of her disability being exacerbated. There is insufficient evidence before us that the Claimant suffered that disadvantage or indeed any disadvantage as a result of the application of this PCP. The Claimant also received no sanction as a result of the Respondent following the Attendance Support Meeting. Even after the Claimant decided to resign, the Respondent was supportive and cordial in its letter of 17 February 2023.

There is also no evidence that the Claimant was put to any disadvantage by her referrals to Occupational Health. The referrals were done with the consent of the Claimant and helped ascertain knowledge of the Claimant's health and also what steps could be taken by the Respondent to assist her. The Claimant did not at the time complain about any of the referrals and so even if she were disadvantaged by the application of this PCP, the Respondent could not and did not have knowledge. The complaint in respect of PCP 6 therefore fails.

127. In summary the complaints in respect of failure to make reasonable adjustments are not well founded and do not succeed.

128. Moving to the complaint of harassment at Issue 7. The Claimant relies on the following conduct:

a. The conduct of the Attendance Support Meeting conducted by Miss Usherwood on 22 September 2022.

The Claimant states that she was tested to recall dates and also accused of being absent at times when she was not. The Tribunal does not accept that the Claimant was tested to recall dates in the meeting on 22 September 2022. The Claimant was provided with the dates of her absence at the start of that meeting and was merely asked to provide explanations regarding those absences and also provide context. That was entirely reasonable for Miss Usherwood to do so. We also do not accept that the Claimant was accused of being absent at a time when she was not. We have read the record of the Attendance Support Meeting transcript and at no point does Miss Usherwood accuse the claimant of being absent when she was not. Indeed, it is apparent that the meeting was polite in nature as demonstrated by the claimant stating that she loved work and also that she felt the respondent had done everything to support her. The complaint is not well-founded.

129. Moving to issue 7(b), that is:

b. Dismissing points of the Claimant's grievance, Not acknowledging that C was not able to drive or attend meetings

It is apparent to us that the Claimant's grievance was largely dismissed. Ellie Thomas only upheld the Claimant's complaint that the outcome of the Attendance Support Meeting of 22 September 2022 had not been provided. All other elements of the Claimant's grievance were not upheld. However, the rejection of the this was not for reasons related to the Claimant's disability but simply because the facts of the Claimant's grievance were not made out. The Tribunal finds that a fair and reasonable grievance investigation had been undertaken and that a fair and reasonable decision had been made by Ellie Thomas.

We also do not accept that there was no acknowledgement the Claimant was not able to drive or attend meetings. The fact that the Claimant was not able to drive was clearly acknowledged by Ellie Thomas on 11 November 2022 as is apparent on page 500 of the bundle. In addition, Ellie Thomas offered a taxi for the Claimant and also for the grievance meeting to be held by video. The complaint in respect of Issue 7b is not well founded.

130. Issue 7(c) is

c. Contacting the Claimant while she was unwell between 22 September 2022 and 3 March 2023

We find that the overwhelming majority of contact from the Respondent and its employees was polite and appropriate. However, the Claimant had a hysterectomy on 16 December 2022. It is clear from the text message that appears in the bundle at page 861 that Leanne Harper was aware of that surgery at that point in time. In addition, the Respondent had knowledge that the Claimant would need a recovery period of approximately 3 to 4 weeks after that surgery. That fact was made clear by the Claimant at the start of employment in her pre-employment check which took place on 29 April 2022 (page 348). It was also made clear in the Occupational Health Report of 6 December 2022 (page 1155). The consequence of that is that contact with the Claimant should have been avoided until after 13 January 2023 in order to allow the Claimant to recover from her surgery.

131. Instead, the Claimant was contacted by Leanne Harper on 5, 10 and 12 January about attending an Attendance Support Meeting. Reading those messages and taking into account that the Claimant had undergone surgery related to her disability, we find that each instance of contact, i.e. on 5, 10 and 12 January 2023, was unwanted conduct related to the Claimant's disability. We conclude that although Leanne Harper of the Respondent did not intend to humiliate the Claimant, it did have that effect on her. We accept the Claimant's evidence on that point as set out in paragraph 17a of her witness statement. In addition, we also feel that that it was reasonable for the conduct to have that affect. The complaint in respect of harassment in respect of Issue 7c is therefore well founded and the Claimant's complaint succeeds on that point.

130. As the Claimant succeeds in part, the matter will now be listed for a remedy hearing to determine compensation. In order to assist the parties in respect of that hearing, the Tribunal makes the following conclusions in respect of issue 9(a). That issue is:

9 The Claimant alleges that her resignation on 3 March 2023 amounts in law to a discriminatory constructive dismissal, relying on the allegations of discrimination above as fundamental breach(es) of her employment contract.

> *a. Has the Claimant established that the termination of her employment was caused by one or more of the acts of discrimination complained of?*

The discriminatory conduct undertaken by the Respondent occurred on 5, 10 and 12 January 2023. Prior to that, on 7 November 2022, the Claimant decided that her relationship with the Respondent had broken down and so she had decided that she was not going back to work from that point in time. The Claimant accepted that point during cross examination. In addition, on 16 November 2022 the Claimant falsely informed the Respondent that she had instructed a Solicitor and that she had been working on Early Conciliation with ACAS. This further underlines the fact that the Claimant had decided to resign in November 2022. The Tribunal therefore cannot conclude that the Claimant left in response to discriminatory conduct which occurred after she had already decided to leave the Respondent's employ. The discriminatory conduct undertaken by the Respondent occurred on 5, 10 and 12 January 2023 played no part in her decision to resign.

Employment Judge McTigue

Date: 23 September 2024

JUDGMENT SENT TO THE PARTIES ON

....26 September 2024.....

.....

FOR THE TRIBUNAL OFFICE

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Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/"

Appendix

The agreed list of issues

Disability

1. It is agreed that the Claimant a disabled person within the meaning of section 6 of the Equal Act 2010 at the material times The Claimant relies on the condition(s)of:

   a. Endometriosis June 2014 – Dec 2022
   b. Menopause Dec 2021 – Dec 2022
   c. Anxiety March 2017 – ongoing
   d. Depression November 2005 – ongoing

2 In relation to (a) – (d) above, did the condition amount to a physical or mental impairment which (at the material time) had a substantial adverse effect on the Claimant's ability to undertake normal day to day activities and had lasted (or was likely to last) at least 12 months or was likely to recur?

3 If so, did the Respondent have (actual or constructive) knowledge of the Claimant's disability(ies) at the material times?

Reasonable adjustments

4 What are the provision, criteria or practices (PCPs) the Claimant asserts the Respondent applied and which the Claimant asserts put her at a substantial disadvantage compared with those not suffering from the Claimant's disabilities?

   a. PCP1 of requiring employees to attend a Flexible Working Request meeting in order to process their FW requests

   b. PCP2 of requiring employees to work their contractual hours unless and until agreement was reached in relation to a flexible working pattern

   c. PCP3 of not offering disability leave to employees who have made flexible working requests pending the outcome

   d. PCP4 of requiring employees to work their contracted hours without additional welfare breaks

   e. PCP5 of following the attendance support policy and requiring employees to attend attendance support meetings when trigger points were reached and maintaining regular contact with the Claimant

   f. PCP6 of following the attendance support policy and requiring employees to attend OH appointments

5 What is the substantial disadvantage that C alleges each PCP placed her at?

a. PCP1 increased stress and anxiety and feeling humiliated and tired due to the disabilities exacerbated symptoms

b. PCP2 increased stress and anxiety and feeling humiliated and tired due to the disabilities exacerbated symptoms

c. PCP3 increased stress and anxiety and feeling humiliated and tired due to the disabilities exacerbated symptoms

d. PCP4 increased stress and anxiety and feeling humiliated and tired due to the disabilities exacerbated symptoms

e. PCP5 increased stress and anxiety and feeling humiliated and tired due to the disabilities exacerbated symptoms

f. PCP6 increased stress and anxiety and feeling humiliated and tired due to the disabilities exacerbated symptoms

6 What reasonable steps does C allege ought to have been taken by R to alleviate the substantial disadvantage

a. PCPs 1-3 -Flexible working policy –
- Not requiring C to attend a FW meeting
- Reducing C's hours pending the FW decision
- Providing disability leave to C pending the FW decision

b. PCP4 Contracted hours
- Providing C with the ability to take additional wellbeing breaks

c. PCP5 Attendance support policy
- Not requiring C to attend absence support meetings when trigger alerts were reached in relation to the Claimant's absence
- Reducing the amount of contact with the Claimant

d. PCP 6 Attendance support policy
- Not requiring C to attend OH
- Reducing the number of OH appointments
- Changing the questions asked of OH

Harassment

7 Has the Respondent subject the Claimant to unwanted conduct related to her disability(ies) that has had the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading humiliating or offensive environment for the Claimant? The unwanted conduct relied on by the Claimant is:

a. the conduct of the Attendance Support Meeting conducted by Ms Usherwood on 22 September 2022.

- Testing the Claimant to recall dates
- Being accused of being absent at a time when C was not

b. Dismissing points of the Claimant's grievance

- Not acknowledging that C was not able to drive or attend meetings

c. Contacting the Claimant while she was unwell between 22 September 2022 and 3 March 2023

Remedy

8 If any of the Claimant's claims are successful what remedy should she be awarded by the Tribunal?

9 The Claimant alleges that her resignation on 3 March 2023 amounts in law to a discriminatory constructive dismissal, relying on the allegations of discrimination above as fundamental breach(es) of her employment contract.

a. Has the Claimant established that the termination of her employment was caused by one or more of the acts of discrimination complained of?
b. What is the appropriate award for injury to feelings?
c. What, if any, compensation should be awarded for financial losses?