Case No: 2302030/18

EMPLOYMENT TRIBUNALS

Claimant: **Mrs S Hill**

Respondent: **Lloyds Bank Plc**

Heard at: **London South** **On: 28 & 29 January 2019**

Before: **Employment Judge Martin**
Mr N Shanks
Ms A Sadler

Representation
Claimant: **Mr Barnett - Counsel**
Respondent: **Mr Ahmed - Counsel**

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The Claimant's claim that the Respondent failed to make reasonable adjustments is successful

2. The Respondent shall pay compensation for injury to feelings to the Claimant in the sum of £7,500

3. The Tribunal makes the following recommendation:

   The Respondent undertakes to ensure that the Claimant does not work or interact in any capacity with Mr Stuart Bailey or Ms Eileen McEwen and that in the event that this not possible that the Respondent and the Claimant explore suitable alternative employment with the Respondent and if this fails that the Respondent uses its best endeavours to ensure that the Claimant can leave the Respondent with a severance package equivalent to its redundancy payment scheme applicable at the time of her departure.

RESERVED REASONS

1. By a claim form presented to the Tribunal on 31 May 2018 the Claimant brought a claim of disability discrimination that the Respondent had failed to make reasonable adjustments. The Respondent defended the claim.

The issues

2. The issues for the Tribunal to determine were agreed between the parties. The issues are replicated in the conclusions below.

Background

3. The Tribunal has set out the background facts to put the case into context. Further facts are set out in the conclusions section which deals with each point in the list of issues in turn.

4. By way of background, the Claimant is employed by the Respondent as an Analyst and Business Architect. She has been employed for over thirty years. The Claimant had a period of sick leave from 4 July 2016 to 9 October 2017 for stress. She says the stress was caused by the bullying and harassment she received at work. The Claimant brought a grievance against her immediate line manager who for the purposes of this judgment (given that it will be published online) shall be referred to as Ms M. This grievance and the subsequent appeal were not upheld. The Claimant also has issues with Mrs M's line manager, Mr B (who for the same reasons will not be identified in this judgment) but did not raise any formal grievance against him. For the avoidance of doubt the Claimant's claim does not relate specifically to the allegations of bullying and harassment but are limited to a reasonable adjustment she says the Respondent should have made on her return to work.

5. It was agreed by both parties that the Claimant did not want to work for Ms M or Mr B, and that they did not want to work with her. When she returned to work, she returned to work in the Bristol office. Ms M worked from the Glasgow office and Mr B worked from London. The Claimant is happy working in Bristol and has no problems with her work, line management or anything else connected to her role there. She is, however, anxious that in the future she may have to work with Mr B or Ms M and her uncontested evidence was that this caused her many issues. She says the prospect of working again with Mr B fills her with *absolute dread and fear*' such that she feels physically sick. She says that the prospect of working with Ms M leaves her in a constant state of fear which leaves her exhausted. In her statement she says she must make herself get out of bed each day and she can not relax.

6. The Claimant's trade union representative wrote to the Respondent on 30 July 2018 requesting that the Respondent committed to assuring the Claimant that she would not be placed "*under the control of people with whom she cannot work"*. In response, and with the agreement of the Claimant, the Respondent set up a meeting with an Issue Resolution Manager who was an experienced mediator. This meeting took place on 24 April 2018. Sadly, the Issue

Resolution Manager passed away the next day and the Respondent does not know what happened at this meeting.

7. This led to the Claimant's union representative writing to the Respondent on 27 April 2018 requesting an undertaking that at no point in the future would the Claimant be required to work with or under the management of either Ms M or Mr B.

8. For some reason this communication did not reach the Respondent until June 2018 and in the meantime the Claimant had presented her claim to the Tribunal. The Respondent replied on 9 July 2018 as follows: …. The Group does not want to put Suzanne, or any colleague, in a position which might be detrimental to her personal health and wellbeing, however, whilst we can make some efforts to make sure that Suzanne does not have to work with [Ms M] or [Mr B] in future it is not possible to provide an absolute guarantee of this for a number of reasons…..I can confirm that the Group would not offer redundancy or severance as an alternative as Suzanne's role would not be redundant. There was no response.

9. The Claimant has continued working for the Respondent without any problems at work. Ms M was selected for redundancy in a recent reorganisation and will be leaving the Respondent in early March 2019. The Claimant was not selected for redundancy in the last reorganisation. Mr B continues to work in London.

The hearing

10. The Tribunal heard evidence from the Claimant and for the Respondent, the Tribunal heard evidence from Ms Jackie Carey-Smith (Resolution Team Manager). There two lever arch files of documents numbered to 518.

The law

11. The law as relevant to the issues and considered by the Tribunal is as follows:

12. An employer is required to make reasonable adjustments under ss.20 and 21 Equality Act 2010 where a provision, criterion, or practice (PCP) applied, placed a disabled person at a substantial disadvantage in comparison with non-disabled persons. Failure to do so amounts to unlawful disability discrimination. Tribunals determining whether it would be reasonable for the employer to have to make a particular adjustment in order to comply with the duty must take into account the extent to which taking that step would prevent the disadvantage caused by the PCP (Equality and Human Rights Commission's Code of Practice on Employment).

13. The case of ***Environment Agency v Rowan [2008] ICR 218*** set out guidance on how to approach reasonable adjustment cases. It held that the Claimant must show:

14. There was a PCP

15. The PCP put the Claimant at a substantial disadvantage in comparison to persons who did not share his disability

16. The adjustment would avoid that disadvantage

17. The adjustment was reasonable in all the circumstances

18. The failure to make the adjustment caused the losses alleged.

Submissions

19. Both parties gave oral submissions. These are not replicated here but were considered in full. As necessary their submissions appear in the conclusions below.

The Tribunal's conclusions

20. Having found the factual matrix as set out above the Tribunal has come to the following conclusions on the balance of probabilities.

21. The Respondent conceded that the Claimant was a disabled person as defined by s6 Equality Act 2010 and that it had knowledge of her disability at the relevant time.

22. **Did the Respondent apply the following provision, criteria or practice (PCP) (or was such a PCP applied on behalf to the Respondent)?**

    ***Not offering members of staff any undertaking or comfort that it will ensure employees are not placed to work with people who have previously bulled them and/or have been alleged to have bullied them and/or have a real potential to cause (further) injury to the employees' mental health*.**

23. The Respondent's evidence was that they would not and had not in the past given a contractual undertaking to an employee that they would not be placed to work with a person they previously had difficulties with. They do however regularly say that they will use their 'best endeavours'.

24. The Claimant submitted that EHRC code construes a PCP widely and that it can include formal or informal policies, including one off decisions and actions. Although this is not binding it was endorsed in the case of Lamb v ***The Business Academy Bexley UKEAT/0226/15***, which at paragraph 26 repeats this section. It was submitted that never offering such an undertaking is a practice.

25. The Respondent submitted that the PCP is not made out as there is no written policy and that the Claimant has not made this issue out.

26. The Tribunal finds that it is the practice of the Respondent not to give binding undertakings but to give words of comfort to use best endeavours or best effort. The wording of the pleaded PCP is couched in absolute terms. Whilst the word 'comfort' is used, it is used in the context of an absolute commitment rather

than 'best endeavours'. The Respondent's evidence is that it does not do this, and the Tribunal finds this to be a practice applied to all employees. The Claimant has therefore shown that there was a PCP.

27. **Did the PCP in question put the Claimant at a substantial disadvantage in comparison with person who are not disabled?**

The Claimant assets that the substantial disadvantage was placing the Claimant in a state of constant fear, worry and stress that she may be required to work under Ms M and Mr B, who she alleges had previously bullied her. This exacerbated the Claimant's physical symptoms of inflammation, pain, hypervigilance, inability to concentrate, exhaustion, panic attacks and hair loss, as well as her mental symptoms of shattered self-confidence, low self-worth, low self-esteem, hopelessness, anger, hypersensitivity, isolation and withdrawal.

28. The Respondent's submission was that the Claimant says she is happy at work and has no problems under her current line manager and that essentially, she has no difficulties working on a day-to-day level. Insofar as the potential of working with them arises, the Claimant does not want to work with Mr B or Ms M and they similarly do not want to work with her. It was submitted that they are in different business units and different locations and that she is not involved with them and has never been asked to work with them since she returned to work or to engage in any project with them. The Respondent's position is that the Claimant wants an adjustment now for disadvantage in the future and consequently no substantial disadvantage shown.

29. The Claimant submitted that the substantial disadvantage is working in fear that she may in the future be required to work with Ms M or Mr B and that she states in her witness statement that all she wants to do is to feel safe when working. It was submitted that most people do not work in that state of anxiety or fear and this is a substantial disadvantage over non-disabled people.

30. The Respondent did not challenge the Claimant's evidence about how she felt at work [check notes] and therefore the Tribunal accepts her unchallenged evidence even though there is no medical evidence to back it up.

31. The threshold for a substantial disadvantage is not high, being no more than minor or trivial, and on this basis the Tribunal finds that the Claimant was placed at a substantial disadvantage.

32. **The Claimant asserts that the following adjustment(s) would have alleviated the alleged substantial disadvantage:**

The Respondent providing an undertaking to the Claimant in writing that:-

(a) It will not rearrange duties or roles so that the Claimant has to work with or report to Eileen McEwan or Stuart Bailey; and,

(b) in the event that business demands leave it with no practical alternative, it will offer the Claimant a redundancy/severance payment

under the full terms applying to employees of the Claimants contractual status at the time of the offer of dismissal.

Were these steps reasonable?

33. Ms Cowley-Smith gave evidence that the requested undertaking was not reasonable on the basis that the Respondent would have been put in a position where it may be in breach of that undertaking due to business reasons. She described high level restructuring meetings which involved those concerned signing non-disclosure agreements (NDA) and those people may not know of the restriction on the Clamant working with Mr B or Ms M. She gave evidence that a lot of the work was project based and the Claimant may be assigned to a project where either Mr B or Ms M was involved. She said that undertakings were never given but words of comfort such as best effort or best endeavour were.

34. Ms Cowley Smith acknowledged that adjustments to company sick pay can be made where someone has a disability and that severance packages were concluded in some circumstances including disability related issues. She also accepted when asked that the purpose of the Respondent's redundancy scheme is to compensate employees for past service where they have to leave the organisation through no fault of their own and she accepted in cross examination that the Claimant's situation in this case was the same in that she would be leaving for a reason that was no fault of her own.

35. Ms Cowley Smith also gave evidence that had the Claimant's grievance against Ms M been upheld then disciplinary action would have been initiated against Ms M which may have resulted in her dismissal. If Ms M had not been dismissed, then she said that arrangements would be made that the Claimant would not work with Ms M. It was put to her that if she could do this in these circumstances it was no different in terms of the undertaking that the Claimant sought. [cite evidence]/

36. The Respondent submitted that the Claimant had changed the terms of the undertaking she wanted over time and that the terms of the undertaking sought were not clear. However, there is no communication to this effect that we were taken to. The submission was that the Claimant clearly failed to conceptualise and set out properly the adjustment she required and as such the adjustment was unreasonable.

37. The Respondent further submitted that it was unreasonable as it was unlimited in extent or duration and pointed out that Mr B and Ms M had allegations made against them, with Ms M having two tiers of investigation with many people interviewed and the grievance was not upheld. There was no grievance against Mr Bailey.

38. It was put that the undertaking relates to two individuals with unproven allegations the effect of which would restrict them to apply promotion for example with the Claimant in her witness statement envisaging an undertaking whereby they would not be allowed to work even in the department she works in. She says even though no findings they indirectly punished, puts R in a bind. It was suggested that if they allowed Mr B or Ms M to enter the department, she

worked in they would be breach of contract or if they did not allow them to, this could give rise to a claim of constructive unfair dismissal.

39. Ms Cowley Smith said there was no effective way to mark the HR files which are confidential. It was submitted that project work is allocated by local collaboration and those people would not know of the undertaking. It was submitted that all that was needed was the Respondent's assurance of best effort or best endeavour as the Claimant could say if she was in a situation where she may be placed in proximity to Mr B or Ms M. She said she knew in broad terms how much a redundancy payment would be for the Claimant but not the exact amount. The Claimant said that under the current redundancy scheme it was about £130,000.

40. In relation to the payment part of the proposed undertaking, the Respondent submitted that she would be asking for redundancy even if there was not a redundancy situation which was untenable.

41. It was submitted that the Respondent's conduct was not on trial and in those circumstances an enhanced redundancy payment would be for discussion as required but not an automatic payment arising under the scheme.

42. The Claimant submitted that the Respondent's main objection that an undertaking is not practical was that they cannot predict what would happen in the future. However, it was submitted that this is what limb 2 of the undertaking is there for as it gives the Respondent a get out if it is not possible to keep the Claimant separate from Mr B or Ms M. It was submitted that the undertaking was a reasonable adjustment to the Respondent's company redundancy scheme with the trigger definition for a payment to fall within scope of reasonable adjustments and this was the same as adjusting sick pay as a reasonable adjustment.

43. The Claimant referred the Tribunal to G4S case Para 43 which held that an employer may need to treat disabled person more favourably. It was submitted that Ms Cowley Smith accepted that the purpose of the Respondent's redundancy scheme is where employees leave through no fault of their own, following a business reorganisation they are entitled to payment for past service and accepted the Claimant's situation was similar. She was asked several times why it would be an unreasonable adjustment to extend their policy and her response was that redundancy payments were only given in specific circumstances where a redundancy situation existed and she accepted and agreed that it was not unreasonable to give her a redundancy payment in the circumstances of the undertaking.

44. The Claimant rejected Ms Cowley Smiths evidence that if there was a restructure situation without consultation when the Claimant's issues with working with Mr B or Ms C were put to management was fanciful as there would always be consultation, and the opportunity for the Claimant to alert HR that there was a proposal to place her with Mr B or Ms M. It was put that it would be practicable to find another role for the Claimant if the situation arose in another area of the business.

45. The Claimant referred to the Respondent's evidence tht if the Claimant's grievance against Ms M had been upheld and Ms M was disciplined, then the Claimant would never have had to work with her again showing that the Respondent would arrange things so they would not have to work together. The Respondent's evidence was that it was agreed that the issue is not that they could not arrange for people to work together but more that they did not want to put it into a contact thus acknowledging that the Respondent can do what is says now it can't do. The Claimant's position is that the Respondent is a large organisation so there is no practical problem in keeping them apart, so no practical problem to give adjustment sought.

46. The Tribunal has found that the Claimant was put at a substantial disadvantage in comparison with those that were not disabled. The Tribunal has considered carefully the evidence and submission put by both parties. The Tribunal finds that the Respondent has failed to make a reasonable adjustment by not giving an undertaking to the Claimant. It seems to the Tribunal that the Respondent is fixated on the word 'redundancy' in the second limb of the proposed undertaking. It says that as there would technically not be a redundancy situation then it could not make a redundancy payment. The Tribunal interprets this part of the undertaking differently in that the Claimant is seeking assurance that if for business reasons she must work with Mr B or Ms M and could not be relocated, then she would leave with a severance package equivalent to whatever redundancy payment is applicable at the time she left. Presumably if the Respondent could not afford its generous redundancy scheme in the future (as suggested by Ms Cowley Smith) it would amend the policy to make it affordable.

47. The Respondent's argument that they may for business reasons be forced into breaching the undertaking is not tenable because the undertaking envisages this situation possibly arising and gives the Respondent an alternative route of making a severance payment. Even if there was a reorganisation that resulted in on paper the Claimant working with Mr B or Ms M, once this was known, alternative arrangements could be made. If the Claimant was physically disabled for example, and the reorganisation made her commute to work impossible or very difficult, the Tribunal has no doubt that alternative positions would be considered and offered where possible.

48. The Respondent refused to make an undertaking on any basis. It did not ask the Claimant if other wording would alleviate her concerns. It simply offered words of comfort ie 'best efforts', 'best endeavours.' In the Claimant's particular circumstances, the Tribunal finds that giving an undertaking in the terms that the Claimant suggested was reasonable and that consequently the Respondent failed to make reasonable adjustments.

49. This would not create a precedent as the Respondent suggested. This is an adjustment to their normal practice because of the Claimant's disability.

50. Remedy

51. The Claimant submitted that this falls within the middle Vento band and given it has continued for a period of time is in the upper reaches of that band. The Claimant asks for £25,000.

52. The Respondent considers that this falls within the lower Vento band and suggests £ 5 – 7.5k as an appropriate amount given that the Claimant's evidence is of her working happily apart from this issue.
53. Whilst the Tribunal has accepted that the Claimant suffered a substantial disadvantage this was largely on her evidence contained in her witness statement not being challenged and the threshold being low. There is no medical evidence to indicate that the Claimant's mental health was affected because of the refusal to give an undertaking on the part of the Respondent. Without such evidence the Tribunal are unable to place the Claimant in the middle Vento band and place her in the lower band. The Tribunal finds it just and equitable to award £7,500 compensation for injury to feelings.

54. In relation to a recommendation, the Tribunal has considered what would be an appropriate recommendation at this time bearing in mind that Ms M will be leaving the organisation in March 2019.

55. The Tribunal makes the following recommendation:

    The Respondent undertakes to ensure that the Claimant does not work or interact in any capacity with Mr Stuart Bailey or Ms Eileen McEwen and that in the event that this not possible that the Respondent and the Claimant explore suitable alternative employment with the Respondent and if this fails that the Respondent uses its best endeavours to ensure that the Claimant can leave the Respondent with a severance package equivalent to its redundancy payment scheme applicable at the time of her departure.

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Employment Judge Anne Martin

Date: 30 January 2019