EMPLOYMENT TRIBUNALS

JUDGMENT

BETWEEN

CLAIMANT		RESPONDENT
MS R HARLEY	**V**	**UNIVERSITY COLLEGE LONDON**

HELD AT: LONDON CENTRAL ON: 12 – 16 APRIL 2021

EMPLOYMENT JUDGE: MR M EMERY
MEMBERS: MR D SHAW
MR P DE CHAUMONT-RAMBERT

REPRESENTATION:
FOR THE CLAIMANT Mr D Piddington (Counsel)
FOR THE RESPONDENT Ms H Patterson (Counsel)

JUDGMENT

1. The claim of failures to make reasonable adjustments succeeds in part.

2. The claim of disability discrimination for reasons connected to disability succeeds in part.

RESERVED REASONS

The Issues

1. The claimant has bipolar disorder and crohn's disease. The respondent admits the claimant is disabled under the Equality Act 2010 (EqA) provisions, and it admits constructive knowledge of disability from 4 April 2019, and actual knowledge from 17 June 2019.

2. The claimant was employed Executive Assistant at Great Ormond Street Institute of Child Health. She declared she had a disability on the equal opportunities form on her job application and, when successful in getting the role, on her new starter form. She says the respondent failed to apply its own policies and failed to consider the need for reasonable adjustments to her role. She claims she was treated unfavourably because of things arising from her disability. This discrimination, she argues, caused her to go off work with ill health. The respondent denies all allegations.

3. At the outset of the hearing the claimant made an application to amend what had been an agreed List of Issues, drawn up by legal representatives following a Case Management Discussion. The claimant's essential point was that the amendments were a more specific identification of issues already within the list of issues, or were issues which were allegations in the claim; the respondent argued that that they were impermissible late additions and/or new claims to the agreed Issues.

4. By agreement it was decided to determine this issue at the end of evidence: the evidence would remain the same as there was an obvious cross-over with the Issues already within the List. At the end of evidence the parties made written and oral submissions on the claimant's proposed amendments which we carefully considered.

5. In allowing the amendments, we concluded that the amendments related to specific allegations which were clearly set out in the claim; that they were labelled allegations within the Details of Complaint. Adding them to the List of Issues was, we considered, articulating into the List allegations already pleaded.

6. The first amendment was for a further 'reasonable adjustment': 3.7(a): *"Providing pre-employment health checks and/or enquiring about reasonable adjustments for all staff who disclose on the Equal Opportunities Form and/or the Staff Recruitment Form that they are disabled."*

7. The Tribunal noted that this was essentially a mirror of an agreed PCP – *"not implementing health checks…"* - issue 3.1(a). We noted also paragraphs 4 and 6 of her claim – *"HR should have informed the claimant's manager that she had declared a disability…"; … "no such health clearance was undertaken"* alleging that this is a breach of s.13, 15 and s.20 EqA. We concluded that the

amendment sought to the list of issues was already implicit in the PCP and was a claim clearly made within the original ET1.

8. The second amendment to the List of Issues was Allegations 4.1(e) - The letters sent by Ms Hofmans to the Claimant dated 19 June 2019 and 23 July 2019.

9. We again noted what is in the claim form – paragraphs 19-22 and 28 – which refer to both letters and say that both amount to a breach of s.15. The Tribunal saw this amendment to the list of issues as no more than an articulation of what was explicitly in the claim, that these letters amounted to unfavourable treatment. Again, the amendment to the list was allowed as this is an allegation clearly made.

10. The third amendment is Allegation 4.2(a) – the need for the Claimant to attend medical appointment as 'something arising' in consequence of her disability. The Tribunal again noted paragraphs 11-14 of her claim form – the claimant stated it was a medical appointment, she was told her managers would not be happy, the claimant said she would rearrange, causing her stress – pleaded as a s.15 EqA claim. The Tribunal again considered that the proposed amendments to the List was adding to the List of Issues what was a clear allegation made within the Details of Complaint.

11. The final List of Issues (as sent through by the respondent's solicitors on 16 April 2021) is as follows (numbering changed):

Jurisdiction: Time Limits

12. In respect of any alleged acts of discrimination which occurred on or before 13 May 2019 are they out of time and therefore does the Tribunal have jurisdiction to hear those claims?

13. In respect of the allegations of discrimination which relate to the period from 1 March 2019 (date of the Claimant's application for employment with the Respondent) to 23 October 2019 (date the Claimant lodged her claim), do they form part of a continuing act or omission under section 123(3)(a) of the EqA?

14. In respect of any alleged acts of discrimination which are out of time, would it be just and equitable for the Tribunal to extend time?

Disability Discrimination: section 6 EqA

15. It is accepted that at all material times the Claimant was a disabled person with the conditions of Crohn's disease (and associated IBS) and/or bipolar disorder and/or depression as defined in section 6 of the EqA, supplemented by the provisions in Schedule 1.

16. Did the Respondent know or reasonably ought to have known that the Claimant was a disabled person, and if so, at what point in time?

The Respondent accepts constructive knowledge from 4 April 2019 and actual knowledge from 17 June 2019.

Duty to make reasonable adjustments: section 20 EqA

17. Did the Respondent apply the following PCPs:

    a. Not implementing reasonable pre-employment health checks to all employees including the Claimant who informed the Respondent that they considered themselves to be disabled;

       The respondent says checks are carried out for specific roles or when requested

    b. Requiring employees including the Claimant to attend work during normal contracted hours 9 am to 5pm (or requiring that of employees including the Claimant during their probationary period);

       This is agreed by the Respondent.

    c. Requiring employees including the Claimant to carry out her work at the normal place of work;

       This is agreed by the Respondent.

    d. Not having someone else available to take phone messages or amending the voicemail answer to reflect that when the Claimant would be able to reply;

       This is agreed by the Respondent.

    e. Referring employees including the Claimant to an internally employed Occupational Health Nurse, without that person having the necessary expertise to assess the employee's condition in question (in the Claimant's case, her disabilities); and

       The Respondent asserts that this PCP does not correlate with any adjustment as the corresponding adjustment has been withdrawn.

    f. Only paying limited sick pay when employees including the Claimant are on sick leave due to a disability, and where the Respondent has not implemented other reasonable adjustments to facilitate the Claimant's return to work (and or recouping overpayments).

       The Respondent accepts that the Claimant was paid in line with its sick pay policy during her absence. However, it does not agree that it failed to implement reasonable adjustments to facilitate her return to work.

18. Do the above amount to a PCP for the purposes of section 20(3) EqA?

19. Did the PCP at paragraph a to (f) above, put those with crohn's disease (and associated IBS), and/or bipolar disorder and/or depression at a substantial disadvantage. The substantial disadvantage relied upon is the access to and ability to work successfully in the role in which she was employed.

20. If so, did the PCP in question put the Claimant at a substantial disadvantage in comparison with persons who are not disabled?

21. Did the Respondent apply, or would the Respondent have applied, the PCP in question to people who did not have the same disability as the Claimant?

22. Did the Respondent fail to comply with a duty to make reasonable adjustments? The Claimant contends for the following adjustments:

    a. Providing pre-employment health checks and/or enquiring about reasonable adjustments for all staff who disclose on the Equal Opportunities Form and/or the Staff Recruitment Form that they are disabled.

    b. Flexibility to allow her to attend regular medical appointments, in respect of Bipolar Disorder and Crohn's disease;

    c. The option to work from home if she was not fit enough to travel to the office (as with her previous employer), in respect of Crohn's disease;

    d. Allowing her to start early to avoid rush hour traffic, in respect of Crohn's;

    e. If she had to attend medical appointments or her hours were flexible, having someone else to take phone messages or amending the voicemail answer to reflect that when she would be able to reply, in respect of Bipolar disorder or Crohn's;

    f. Allowing her to return to work on a phased return or allowing her to work from home for a period, in respect of Bipolar disorder and Crohn's;

    g. Paying full pay during sick leave until all reasonable adjustments have been implemented in respect of Bipolar disorder and Crohn's.

23. Did the Respondent know, or could the Respondent reasonably be expected to have known, that the Claimant was likely to put to a substantial disadvantage compared to persons who are not disabled?

Discrimination arising from disability: section 15 EqA

24. Was the Claimant treated unfavourably by the Respondent because of something arising from her disabilities? The Claimant relies on the following as alleged acts of unfavourable treatment:

    a. Failing to identify and/or implement reasonable adjustments (Crohn's disease and Bipolar Disorder);

    b. Requiring / requesting that the Claimant attend medical appointments outside working hours or only at the beginning or end of the working day (Bipolar Disorder);

c. Contacting the Claimant while she is off sick and/or requiring her to attend meetings while off sick in respect of her Crohn's disease and/or Bipolar Disorder;

d. The text message sent to the Claimant on 25 June 2019 whilst she was on sick leave;

e. The letters sent by Ms Hofmans to the Claimant dated 19 June 2019 and 23 July 2019; and

f. Only paying sick leave when the Claimant was on sick leave because other reasonable adjustments have not been implemented, and or recouping overpayments (Crohn's disease and Bipolar Disorder).

25. The Claimant relies upon the following as the 'something arising from' her disabilities:

a. The need for the Claimant to attend medical appointments (this relates to the unfavourable treatment set out at paragraph 4.1(b) only);

b. The Claimant was off sick from 17 June 2019 as a result of her disabilities.

26. The Respondent relies on the following legitimate aims:

a. to ensure that employee development and performance can be appropriately and properly measured

b. to ensure business continuity during employee leave; and

c. the robust management of employee sickness absence.

d. The need to ensure the office was appropriately resourced (this relates to the unfavourable treatment set out at paragraph 4.1(b)).

e. Managing employee absence for medical appointments in line with business needs paragraph (this relates to the unfavourable treatment set out at paragraph 4.1(b)).

27. The Respondent will say that the legitimate aims were achieved proportionately as:

a. the Respondent made various attempts to engage with the Claimant to ensure that she was settling into her role;

b. detailed job specifications and role expectations were provided to and discussed with the Claimant at length during both the recruitment and interview process, which the Claimant confirmed she understood and accepted;

c. role targets and expectations were clarified with the Claimant following her commencing employment; and

d. following the Claimant commencing sickness absence, the Respondent has made a number of attempts to engage with the Claimant in a bid to try

and establish what medical issues the Claimant has, and what possible arrangements or reasonable adjustments (if applicable) could be put into place in this regard to facilitate the Claimant's return to work, reverting to full pay.

e. The Respondent is flexible and does allow employees to attend medical appointments in working hours but asks them to arrange them early or late in the day.

The Law

28. Equality Act 2010

6 Disability

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

15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—
a. A treats B unfavourably because of something arising in consequence of B's disability, and
b. A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

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) ...

(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.

23 Comparison by reference to circumstances

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

(2) The circumstances relating to a case include a person's abilities if—

a. on a comparison for the purposes of section 13, the protected characteristic is disability;

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

Schedule 8 – Duty to Make reasonable Adjustments; Part 3 Limitations on the Duty - *Lack of knowledge of disability, etc.*

20(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(a) …

(b) than an employee has a disability and is likely to be placed at the disadvantage…

Relevant case law

29. Discrimination arising from disability

a. There are two steps, *"both of which are causal, though the causative relationship is differently expressed in respect of each of them"*:

i. did A treat B unfavourably because of an (identified) something? and
ii. did that something arise in consequence of B's disability?

"The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence." (Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305).

b. If the employer knows (or has constructive knowledge) of disability, it need not to be aware when choosing to subject B to the unfavourable treatment in question that the relevant "something" arose in consequence of B's disability (*City of York Council v Grosset [2018] EWCA Civ 1105*). In this case a lack of judgment by a teacher was contributed to by stress, which was significantly contributed to by cystic fibrosis; the Court of Appeal found that it did not matter that the school was unaware that the lack of judgment had arisen in consequence of his disability when s.15(10(a) is applied. If the employer knows of the disability, it would *"be wise to look into the matter more carefully before taking the unfavourable treatment"*.

c. *Trustees of Swansea University Pension and Assurance Scheme (2) Swansea University v Williams* [2015] IRLR 885. unfavourable treatment is a hurdle, or creating a particularly difficulty or disadvantaging the claimant.

d. There must be some connection between the "something" and the claimant's disability; the test is an objective test, and the connection could arise from a series of links (*iForce Ltd v Wood UKEAT/0167/18)* – but there must be some connection between the "something" and the claimant's disability.

e. The test was refined in *Pnaiser v NHS England [2016] IRLR 170, EAT*:

   i. A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises. The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A, and there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

   ii. Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is irrelevant.

iii. The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. - it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

iv. "It does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to "something" that caused the unfavourable treatment."

f. The fact that an employer has a mistaken belief in misconduct as a motivation for a particular act is not relevant in considering s.15 discrimination, in a case where the employer had a genuine but mistaken belief the claimant had been working elsewhere during sickness absence: it is sufficient for disability to be *'a significant influence … or a cause which is not the main or sole cause, but is nonetheless an effective cause of the* unfavourable treatment'.' *(Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893, EAT)*.

g. Justification: *R (Elias) v Secretary of State for Defence [2006] 1 WLR 3213*: three elements of the test: *"First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?".* When assessing proportionality, an ET's judgment must be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer. *Hensman v Ministry of Defence UKEAT/0067/14/DM*, *[2014]).* The test of justification is an objective one to be applied by the tribunal, while keeping the respondent's 'workplace practices and business considerations' firmly at the centre of its reasoning. The test under s 15(1)(b) EqA is an objective one according to which the tribunal must make its own assessment" (*City of York Council v Grosset UKEAT/0015/16).* Under s 15(1)(b) the question is whether the unfavourable treatment is a proportionate means of achieving a different objective, i.e. the relevant legitimate aim. *Ali v Torrosian (t/a Bedford Hill Family Practice) [2018] UKEAT/0029/18:* this objective balancing exercise requires that to be proportionate the conduct in question has to be both an appropriate and reasonably necessary means of achieving the legitimate aim; and for that purpose it will be relevant for the Tribunal to consider whether or

not any lesser measure might have served that aim. Although there may be evidential difficulties for a Respondent in discharging the burden of showing objective justification when it has failed to expressly carry out this exercise at the time, the ultimate question for the Tribunal is whether it has done so.

30. Reasonable adjustments

a. A failure to make reasonable adjustment involves considering:
   i. the provision, criteria or practice applied by or on behalf of an employer;
   ii. the identity of non-disabled comparators (where appropriate); and
   iii. the nature and extent of the substantial disadvantage suffered by the claimant.

   Environment Agency v Rowan [2008] IRLR 20, *[2008] ICR 218*

   "the nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustment necessarily run together. An employer cannot … make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and extent of the substantial disadvantage imposed upon the employee by the PCP'. *Newham Sixth Form College v Sanders [2014] EWCA Civ 734*.

b. *Provision, criterion or practice:* It is a concept which is not to be approached in too restrictive a manner; as HHJ Eady QC stated in *Carrera v United First Partners Research UKEAT/0266/15 (7 April 2016, unreported)*, 'the protective nature of the legislation meant a liberal, rather than an overly technical approach should be adopted'. In this case the ET were found to have correctly identified the PCP as 'a requirement for a consistent attendance at work'.

c. Pool of comparators: has there been a substantial disadvantage to the disabled person in comparison to a non-disabled comparator? *Archibald v Fife Council [2004] UKHL 32*, *[2004] IRLR 651*, *[2004] ICR 954*: the proper comparators were the other employees of the council who were not disabled, were able to carry out the essential functions of their jobs and were, therefore, not liable to be dismissed.

d. While it is not a breach of the duty to make reasonable adjustments to fail to undertake a consultation or assessment with the employee (Tarbuck v Sainsburys Supermarkets Ltd), it is best practice so to do. The provision of managerial support or an enhanced level of supervision may, in accordance with the Code of Practice, amount to reasonable adjustments (*Watkins v HSBC Bank Plc [2018] IRLR 1015)*

e. The adjustment contended for need not remove entirely the disadvantage; the DDA says that the adjustment should 'prevent' the

PCP having the effect of placing the disabled person at a substantial disadvantage. *Leeds Teaching Hospital NHS Trust v Foster UK EAT /0552/10*, *[2011] EqLR 1075:* when considering whether an adjustment is reasonable it is sufficient for a tribunal to find that there would be 'a prospect' of the adjustment removing the disadvantage—there does not have to be a 'good' or 'real' prospect of that occurring. *Cumbria Probation Board v Collingwood [2008] All ER (D) 04 (Sep)* - 'it is not a requirement in a reasonable adjustment case that the claimant prove that the suggestion made *will* remove the substantial disadvantage'.

f. The test of 'reasonableness', imports an objective standard and it is not necessarily met by an employer showing that he personally believed that the making of the adjustment would be too disruptive or costly. It is for the tribunal to decide what is reasonable. *Lincolnshire Police v Weaver [2008] All ER (D) 291 (Mar)*: it is proper to examine the question not only from the perspective of a claimant, but that a tribunal must also take into account 'wider implications' including 'operational objectives' of the employer.

g. *RBS v Ashton* [2011] ICR 632: The tribunal must have consideration of the potential effect of the adjustment – it does not matter what the employer may or may not have thought, the question is what effect the adjustment may have had, if it had been made

h. *Latif v Project Management Institute* [2007] IRLR 579: establishing that a provision, criterion or practice placed the disabled person at a substantial disadvantage was not sufficient to shift the burden of proof. To draw such an inference there must be evidence of an adjustment which appears reasonable, and which would mitigate or eliminate the disadvantage.

i. *Employer's knowledge: Gallop v Newport City Council [2013] EWCA Civ 1583*, *[2014] IRLR 211* – a reasonable employer must consider whether an employee is disabled, and form their own judgment. The question of whether an employer could reasonably be expected to know of a person's disability is a question of fact for the tribunal (*Jennings v Barts and The London NHS Trust UKEAT/0056/12*, *[2013] EqLR 326*,) Also, 'if a wrong label is attached to a mental impairment a later re-labelling of that condition is not diagnosing a mental impairment for the first time using the benefit of hindsight, it is giving the same mental impairment a different name'. *Donelien v Liberata UK Ltd UKEAT/0297/14:* when considering whether a respondent to a claim 'could reasonably be expected to know' of a disability, it is best practice to use the statutory words rather than a shorthand such as 'constructive knowledge' as this might imply an erroneous test. The burden – given the way the statute is expressed – is on the employer to show it was unreasonable to have the required knowledge.

j. Employment Code of Practice paragraph 6.28: the kind of factors which a tribunal might take into account in deciding whether it is reasonable

for a person to have to take a particular step in order to comply with the duty to make reasonable adjustments. These include:

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

b. the practicability of the step;

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

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

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

f. the type and size of the employer.

Witnesses

31. The Tribunal heard evidence from the claimant. For the respondent we heard from Ms T Jones, Institute Manager who was on both of the claimant's interview panels and who the claimant would in part be working for; Ms N Hofmans, Executive Officer, who was on the first panel and who the claimant would also be working for; Ms H Brown, Head of HR Systems and Business Process who gave evidence on the HR computerised system.

32. At the outset of the hearing, the fact of it being a 'CVP' hearing, fairness, and the need for reasonable adjustments to the process were discussed. It was agreed that the Tribunal would break at least every hour for 15 minutes – or more if required at any time. The Tribunal carefully monitored the process. The hearing did proceed slower than anticipated in the original timetable, this was consistent with the requirement to ensure that all parties started the hearing and remained throughout the hearing on an equal footing.

33. No issues were raised during the hearing and we were satisfied that it was conducted fairly, with no prejudice to either party or to any witness.

34. The Tribunal spent the first half-day of the hearing reading all the witness statements including the claimant's disability impact statement, and the documents referred to in the statements. At this stage the list of issues (and the issues still in dispute) was still being refined by the parties, this was produced at 2.00pm and submissions made as above.

35. This judgment does not recite all of the evidence we heard, instead it confines its findings to the evidence relevant to the issues in this case, all of which was known to the parties during the investigation and disciplinary process.

36. This judgment incorporates quotes from the Judge's notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions.

The relevant facts

37. The claimant applied for the role of Executive Assistant to the Director and to the Institute Manager of the UCL School of Life and Medical Sciences. The hours of work were specified to be 36.5 days per week, a 9 month probation period. The role holder was responsible for the "administrative and secretarial requirements" of the Director and the Institute Manager.

38. This included the following duties: provide comprehensive secretarial and administrative support, including managing all correspondence, extensive diary management, arranging appointments; responsible for smooth running of the Director's office anticipating needs, taking notes at meetings. This is just some of the duties of the role. The full Job Description and personal is at pages 487-491.

39. The claimant accepted in her evidence that this was a busy and demanding role, a reactive and fast-paced role. She accepted that at least some elements of her role needed to be undertaken in the office including meeting visitors, answering the phone, dealing with paper post, copying documents, attending meetings, taking notes.

40. The application form did not contain any section to outline any health or disabilities; she ticked *"yes"* to question on disability on the equal opportunities form; we accepted her evidence that she stated she had mental health and a chronic long-term physical illness on this form. The equal opportunity monitoring form was separated from the application form and was not seen by managers, it was only used for monitoring purposes.

41. Issues of health were not raised at the claimant's two interviews for the role. The claimant says she referred to the importance of flexible working in an answer, saying that flexible working was very important to her. She said her answer referenced *"you could grow within role as could have experiences outside of the workplace".* One interviewer records an answer that the claimant is *"flexible with ways of working"* also that she was prepared to stay late at work (517).

42. In her evidence the claimant said that she believed the core hours were 10 – 4, not 9-5, also that she was aware that the respondent had flexible working policies applicable to disabled employees that UCL *"championed"* flexible working, work-life balance and support for disabled employees on its website.

43. On accepting the offer of employment the claimant was asked to fill in an online pre-employment UCL staff registration form, on which she said *"yes"* to the question *"Are you disabled or do you have a condition which may require adjustments to your work…?"* (503).

44. The claimant's evidence was that when she filled in the equal opportunity form and then the staff registration form she assumed that it would generate some

kind of contact from Occupational Health, that it had done so in previous roles. *"So I did not think this information would be locked away and no one would see it."*

45. The respondent's case at Tribunal was that it only undertakes automatic pre-employment health checks for certain roles (for example clinical or lab roles). It says that its policy is to carry out health checks for all disabled employees when they raise any underlying health issues with their line manager.

46. Ms Brown's evidence was that the staff registration form and the question about requirements for reasonable adjustments would be pulled through to the HR system, that the information on the system as printed in the bundle, including the 'yes' to disability on the staff registration form appeared to come from the HR data system.

47. In her evidence, Ms Hofmans was taken to documents produced after the claimant's resignation a q&a with the Business Process Advisor in HR who confirmed that when the employee ticked 'yes' to disability *"they would be made aware that they will be contacted [by OH] to assess their requirements and to advise the manager of any reasonable adjustments that are needed"* (824). She confirmed that she understood this was the process which should have been followed.

48. Ms Hofmans also confirmed that the aim was to ensure that adjustments were in place before a start date to avoid any disadvantage to a disabled employee. She confirmed that had this occurred in practice, there would have been a referral to OH to consider reasonable adjustments for the claimant.

49. Ms Tansey accepted that the induction/probation policy (416-8) states that its aim is to ensure any reasonable adjustments can be made before start date – that there is an *"expectation"* that prior to starting there would be an express consideration of reasonable adjustments, which would then be picked up by managers after the employee has started.

50. The claimant's employment commenced on 7 May 2019. She did not raise issues of flexible working / adjustments with her managers when she started in role. She said, and the Tribunal accepted her evidence, that she was expecting at this time an OH referral and that the issue of adjustments would be brought up then.

51. On her first day of work she had an induction and the claimant was told there was no flexibility in the role, it was 9-5 at her desk. The claimant's evidence was that *"I thought I needed flexibility, what am I going to do and I panicked, this was my first day."* She did not raise this as an issue with her manager.

52. The claimant's evidence which we accepted was that she wanted information on adjustments to be made to her managers by OH, to avoid any unintentional but potentially damaging reaction to the request if it came from her.

53. Ms Hofmans accepted in her evidence that she did not specifically refer to 'reasonable adjustments' with the claimant; she thought she would have asked if any support was needed as part of her induction. She accepted that employees may be reticent to raise issues of reasonable adjustments.

54. The claimant did email the HR Manager Ms Capelan on two occasions asking for HR inductions, 21 May and 3 June 2019 (690-91). She did not say at any stage that she wanted to discuss issues of health and adjustments. We accepted that at this point the local HR team did not know that the claimant had a disability. The claimant's induction checklist information had not been sent to local HR or to the claimant's manager.

55. The claimant was off work 5 – 12 June 2019 giving symptoms of temperature, headaches, achy muscles and shaky. The claimant accepted that her managers were supportive and it was reasonable for them to make enquires about her likely return to work.

56. In the claimant's return to work interview she and her manager agreed that she did not need a referral to OH (567); in her evidence the claimant said she did not believe this was necessary for the flu. Other health issues were not mentioned.

57. On 14 June 2019 the claimant emailed Ms Hofmans saying she had an appointment on 24 June and wanted the afternoon off. The claimant was told that this may be an issue, and was asked whether she could change the appointment to the of the day. Ms Hofmans confirmed in her evidence that appointments would normally be expected to be taken at the beginning or end of the day, that she believed this to be a routine GP appointment. She said that if she had understood this to be a specialist appointment the claimant would not have been asked to change this, that a disability-related appointment would be accommodated. We accepted this evidence.

58. On 17 June 2019 the claimant took sickness absence; her mother emailed Ms Hofmans saying that the claimant *"is having a bipolar relapse. She is awaiting an appointment with her GP …. Due to her current state and symptoms she is not contactable, and having to attempt communicating people could cause her to deteriorate please send any communication to this email…"* *569).

59. In response Ms Hofmans sent two emails – the first was to ask to pass on to the claimant *"our best wishes"* and to pass on when the claimant could be contacted. The second said that on advice they would have to write to the claimant *"as we are under obligation to liaise with her direct…"* (570).

60. The claimants Fit note dated 17 June 2019 refers to her being not fit for work because of Bipolar disorder to 1 July 2019 (571). The claimant emailed this to HR (the central HR team) on 19 June saying that she had bipolar and crohn's disease complications, that she was only able to communicate effectively intermittently, and to give her consent to her mother being emailed. She said her medication was being increased and an additional medication prescribed, and was waiting to hear back from the Crisis team. She referred receiving physiotherapy twice a week (581).

61. Ms Hofmans was unaware of the receipt of the sick note of the claimant's email. She emailed a letter to the claimant on 19 June 2019, saying that she was to be referred to OH, also referring to the first probation review meeting, saying that once the OH report has been released *"we will need to schedule a meeting to*

discuss the OHW recommendations and workplace support which may be available, as well as the following probationary review requirements". It listed 4 bullet points of probation checklist, including feedback on performance to date; progress against induction checklist and objectives/targets; further training or development needs. It said that she could have a colleague or TU rep at the meeting (573-5).

62. This emailed letter panicked the claimant – this did not seem like a standard probation meeting. As she said in her evidence *"I was absolutely terrified when I read this letter. Because it was a bipolar relapse, you focus …. It may not be in the intention but the tone of the letter caused that reaction. … this is a disciplinary type not a standard probation meeting. … it's uncomfortable to read now … it is not appropriate – there should be separate meeting for adjustments and then a probation meeting. All at once would have been intense and quite overwhelming."* The Tribunal accepted that this was the claimant's response, and that she felt overwhelmed and terrified on reading this letter.

63. Ms Hofmans evidence was that she received advice from HR to send this letter that she took this advice at face value in sending the letter. She was not aware that her mother had said at this time letters should be sent to a different email address, she had been told there was a duty of care to stay in touch. We accepted this evidence.

64. On the same day Ms Hofmans referred the claimant to OH and asked OH to get in contact with her asap, given the concern she had (576).

65. On 21 June 2019 OH admin emailed the claimant saying that she had indicated she was disabled. *"We hope you have felt able to discuss any specific needs you have with your manager. If you would like any further support or advice …"* (587).

66. The first available OH appointment was 9 June and details were emailed to the claimant's email.

67. On 28 June her mother emailed OH saying that despite receiving an acknowledgement from HR of her sicknote, her absence was being treated as unauthorised *"this contact has caused quite a deterioration in Rachael's physical and mental state".* She asked OH to ensure that her manager had the sicknotes she attached to this email (586). The sicknotes (but not the covering email) were forwarded by OH to Ms Hofmans the same day (589-90). Ms Hofmans sought advice from HR.

68. Ms Hofmans evidence was that local HR was not aware a sick note had been sent in – as this had been sent to a central HR email address. She had been advised to say that this was an unauthorised absence. We accepted this evidence.

69. The OH report said that the claimant was unable to return to work at this time, that she would require a stress risk assessment on her return; that another adjustment could be to consider where the acceptable level of absence lies; and

to have regular meetings with her to enquire of her wellbeing and provide support. It said that she was likely to be considered disabled under the Equality Act 2010 (596-99).

70. For the claimant, this OH report was *"shambolic".* She was not asked questions about reasonable adjustments, she was left to discuss these with her manager. Her bipolar was bad at this time. The Tribunal accepted the claimant's perception. We also accepted that at this time she was unable because of ill health to discuss adjustments with her manager. We accepted that the claimant believed it would have been better for OH to make these suggestions.

71. However, we did not agree that it was necessarily a bad thing for the claimant, when she was able, to discuss her suggestions with her manager. At some point she would have had to engage with her manager about the detail of how these could work. The claimant knew what adjustments had worked in past roles – as she said in her evidence, *"I had adjustments in previous jobs and they had worked."*

72. The claimant gave evidence as to why she had not engaged with the request to consider adjustments *"I had told them about disability - I was met with accusations that I had had not told them, this made me fell attacked, I was being called a liar. And saying 'having a rep' did not make me feel supported and encouraged. . I said I had informed UCL and I was being told I had not informed anyone about disability.... I struggled to trust employer…"*

73. The Tribunal felt that while the claimant wanted to rely on OH to suggest adjustments, in practice all OH would have been doing was relaying the claimant's suggestions. At some point the claimant would need to make these work with her manager and we did not accept that the claimant could not, when fit to do so, discuss with her manager the adjustments she believed would work. We considered that the reference in the OH report to a risk assessment would have been an ideal opportunity for the claimant to discuss adjustments with her employer.

74. The claimant initially refused for the OH report to be released; her mother emailing saying there had been no discussion about adjustments, the referral letter had not been seen by the claimant, also there had been a subsequent request for a meeting to manage her absence. Her mother referenced the respondent's Induction Policy*: "Before start date: ensure any reasonable adjustments can be made for individuals before their start date".* The email stated that because this had not taken place, *"my daughter's health deteriorated significantly".* She said that the claimant would not be attending the meeting as she had a medical appointment that day (612-3).

75. Ms Hofmans responded to the claimant's mother on 5 August 2019 forwarding the OH referral form and apologising for not sending it earlier. She said that the OH report was for the claimant to address with OH confidentially. She referred to the Induction Policy, saying that as she had not been aware of underlying health conditions the issue of ensuring reasonable adjustments before start date *"…were not carried out. … .these activities will [now] be progressed."*

76. The letter said that Ms Hofmans wanted to meet with the claimant when fit to return *"the purpose of the meeting"* was to discuss the OH report, undertake a risk assessment and *"…explore the options for reasonable adjustments"* to support her; also to agree the date of a probation review meeting *"… at which we will review actions agreed to support her return to work."* (615-6).

77. For the claimant, the issue was that she needed to discuss reasonable adjustments with OH, that she was too ill and could not sit and discuss reasonable adjustments with the manager. She said in her evidence that her experience was that OH would made suggestions and it would be for managers to decide if suitable. We considered, as above, that OH had at this stage made some suggestions, that when well enough it was for the claimant to discuss these, and other potential adjustments, with her managers.

78. On 8 August 2019 the claimant's solicitors wrote a detailed letter to Ms Capelan by email making allegations of s.13 and s15 EqA discrimination, detailing failures to make adjustments, and saying that her sickness absence was *"a direct consequence of the treatment to which she has been subjected".* The letter sets out adjustments – including flexibility to attend medical appointments; the option to work from home; to start work early; having someone else take phone messages when she was not in the office; a phased return and referring her to OH; paying full sick pay until adjustments have been implemented. The letter seeks payment for all loss of earnings suffered as a consequence (617-620).

79. The claimant accepted that her solicitor had made these suggestions of 8 adjustments from what she had been given in her previous employment – she had got these *"from looking at old OH referrals".*

80. The respondent's lawyers responded on 3 September 2019, saying first that it wished to address the issue of reasonable adjustments required, that the claimant had not initially informed her manager of her medical conditions; but that the respondent now wished to get medical assistance to understand *"the implications this has for her role and an opportunity to consider what adjustments could be made…"*; that this may also include a possibility of another role *"where adjustments could be more readily accommodated…".* It them dealt with and denied the allegations made by the claimant before reiterating the request for the claimant to agree to a medical report (634-7).

81. On 20 September 2019 the claimant raised a grievance: it commented on the respondent's solicitor's letter stating that her lawyer had suggested adjustments, the respondent had failed to follow its own policies; that the offer was only to *"go through the motions"* before dismissing her (644-653).

82. The claimant attended an OH appointment on 4 October 2019. The OH report the same date states that the claimant's crohn's disease was very unpredictable and severe and not currently responding well to treatment and with significant symptoms. *"Her condition is adversely affected by stress and she is currently experiencing a high level of stress".* It referred to the Bipolar disorder. It stated

it was *"difficult to predict"* when she would return to work. Adjustments to be considered include flexible working; homeworking from time to time; allowing attendance to medical appointments and therapy by working around the appointments; that communication needed to take place with management, but she struggles with phone and is no fit to meet in person *"I am unable to give an timescale for when this could change".* Apart from a meeting via representatives, or email communication only *"It is difficult for me to see how this situation can be resolved"* (665-6).

83. The claim was issued on 23 October 2019.

84. The grievance hearing took place without her – she submitted 18 documents as evidence and saying she would answer q&a. questions were sent to her and she responded. As a consequence the grievance panel asked on 29 November 2019 for further questions to be considered – regarding the claimant's disclosure of disability and the respondent's *"obligations at that time".* It asked for a swift investigation on this issue (749).

85. The grievance dated 14 February 2020 partially upheld her complaint. It accepted that the respondent should have made further enquiries about the claimant's disability, but failed to do so. The outcome states that the OH no longer routinely contact new members of staff who disclose disability: that the disclosure should be to a manager by the employee following which an OH referral can be made. Also, the claimant did not disclose to her managers, so they were not aware of the need for adjustments. Clearer guidance around disclosures at staff registration stage needed to be made. No other allegations were upheld; for example sick pay was paid in accordance with the respondent's policy; the respondent's communication with the claimant was "fair and dutiful" there was no lack of flexibility as no one was aware of the claimant's disability when discussing hours of work; adjustments were no carried out as no one was aware they were needed.

86. The claimant says that she needed adjustments as set out in the list of issues 3.1 – but that she would not need all of these adjustments all of the time. Her medical appointments would likely be once a week; that the crohn's flare up can be unpredictable and she may have to work from home sometimes, or she may have to travel in a little later. She says in her last role she had to work from home 3 times in a year. We accepted this evidence.

87. Ms Hofmans gave evidence on the need for 9-5 in the office. Her evidence was that when the claimant started work there was only her and the claimant in the office. She said that there was recruitment in July 2019 for a Deputy to the Assistant Manager, that this was known when the claimant was appointed. Her view was that *"we could provide cover with 3 people"* at this time.

Submissions

88. We considered the oral and written submissions of the parties. The arguments made are incorporated into our 'conclusions, below.

Conclusions on the evidence and the law

Disability – knowledge

89. The respondent accepts constructive knowledge of disability – as it received a confirmation from the claimant she was disabled prior to her employment starting. It argues that it is a large organisation with changing systems and effectively there are gaps as to what happened with this information.

90. But Ms Jones and Ms Hofmans did not have actual knowledge of disability, argues the respondent. We accepted this. The claimant did not tell her managers, and was waiting to discuss with HR at a private meeting and then to discuss adjustments with OH. The respondent accepts that this was not an unreasonable position for the claimant to adopt; but it does mean that the claimant's managers were not aware of her disability prior to 17 June 2019.

91. We noted the test in *DWP v Alan* - ought the employer or have known both that the employee was disabled and that his disability was liable to affect him in the manner set out in [the EqA]? There is no duty on the employer unless it knew, actually or constructively, of the claimant's disability and that the claimant was likely to be placed at a substantial disadvantage.

92. We concluded that that by its own systems and policies, the respondent had knowledge of disability – that by its own systems it was meant to arrange an appointment to discuss potential reasonable adjustments before the start of employment. It failed to do so. The Tribunal concluded that had it done so it would have been aware of the claimant's disabilities prior to the start of employment and it would have been aware that the claimant was at a substantial disadvantage in at least some aspects of the role and how it was to be undertaken.

93. We concluded that the respondent should reasonably have been aware that the claimant had crohn's disease and bi-polar disorder prior to the start of her employment.

Reasonable adjustments - PCPs

94. Not implementing reasonable pre-employment health checks to all employees including C who informed R that they considered themselves to be disabled:

    a. The respondent's position is that it only carries out automatic pre-employment health checks for certain roles; that it is for the employee to raise any underlying health issues with their manager.

    b. The tribunal noted the evidence that the actual policy was for the respondent's HR team to pick up on a ticked disability box and engage with the starter prior to their start date, to enable adjustments to be discussed prior to joining. This was accepted by Ms Jones and Ms Hofmans in their evidence.

c. The tribunal concluded that there was a policy of having pre-employment health checks where the disability box is ticked, but that the actual practice in place was not to have pre-employment health checks. We noted the evidence at 824, the employee will be made aware that they will be contacted by OH.

95. Requiring employees including C to attend work during normal contracted hours 9 am to 5pm (or requiring that of employees including C during their probationary period). This is an agreed PCP.

96. Requiring employees including C to carry out her work at the normal place of work. This PCP is agreed.

97. Not having someone else available to take phone messages or amending the voicemail answer to reflect that when C would be able to reply. This PCP is agreed.

98. Only paying limited sick pay when employees including C are on sick leave due to a disability, and where R has not implemented other reasonable adjustments to facilitate C's return to work (and or recouping overpayments). It is accepted that employees on sick leave are paid in accordance with R's Sickness Absence Policy. It is disputed that R failed to make reasonable adjustments for C.

Substantial disadvantage

99. We next considered whether the PCPs placed the claimant at a substantial disadvantage. The substantial disadvantage relied upon is the access to and ability to work successfully in the role. In noting that the test is an objective one, and that a substantial disadvantage is one that is more than minor or trivial we concluded as follows:

100. We accepted the claimant's contention that disabled employees with bi-polar and/or crohn's disease are likely to require reasonable adjustments, and that failing to implement pre-employment health-checks meant that no adjustments were put in place prior to the start of her employment. This means that the claimant was starting her role without any consideration of reasonable adjustments.

101. We concluded that this practice put the claimant at a substantial disadvantage in comparison with non-disabled new starters, who would not need a pre-employment health check. This practice - of no health checks - was applied to all employees of the respondent.

102. We accepted that requiring a fixed work shift of 9-5 could have an adverse impact on employees suffering from crohn's and from bi-polar disorder and that it did so with the claimant. This shift means that the claimant was travelling into central London at peak rush-hour. We accepted that this caused the claimant an increase in crohn's symptoms. We did not accept the respondent's contention that arriving at work at 8.00 would mean tubes into central London would be no less busy. We accepted the claimant's evidence that at least part

of her route into work would be less busy at 7.30 than 8.30am. We concluded that this practice put the claimant at a substantial disadvantage in comparison with non-disabled new starters, who would not have difficulty travelling at rush hour. While the respondent operated flexible hours, the Tribunal accepted that the 9-5 hours applied to employees in similar roles, i.e. EAs working for senior managers.

103. We also accepted that the requirement to work in the office would cause a substantial disadvantage to the claimant, as a result of the symptoms of bi-polar and/or crohn's. We accepted that this would mean that the claimant and others with these conditions would be able to work but may have significant difficulty travelling to work when symptoms are increased. We also noted that the claimant had some difficulties while at work, including focussing at work on occasion. We concluded that this practice put the claimant at a substantial disadvantage in comparison with non-disabled new starters, who would not need to work from home for disability-related reasons. This PCP of working full time in the office would have been applied to all employees in the same or similar role.

104. One of the reasons why the claimant was required to attend the office was to take telephone messages. We accepted that a requirement to attend work instead of working from home would amount to a substantial disadvantage. It meant that an employee would be required to attend work to take messages on days when they were too unwell to travel and when at least some of their role could otherwise be undertaken from home. This practice put the claimant at a substantial disadvantage in comparison with non-disabled new starters, who would not to work from home; this PCP applied to all employees in similar roles.

105. The failure to pay sick pay: the claimant’s argument was that this absence arose from the failure to make reasonable adjustments; and non-payment of salary resulted in a loss of salary as well as increased stress. We accepted that this amounted to a substantial disadvantage. We concluded that this practice put the claimant at a substantial disadvantage in comparison with non-disabled new starters, who would be less likely to fall sick early on in their employment. This PCP of no sick pay was applied to all employees of the respondent at this stage of their employment.

Knowledge of Substantial Disadvantage

106. The respondent failed to undertake a pre-employment health check or any other way of determining whether adjustments were required. We accepted that had it done so it would have known of the claimant’s medical conditions and the disadvantage she was placed under by the PCPs. We concluded that the respondent ought reasonably to have known of the substantial disadvantage before the claimant commenced employment. We concluded that the respondent had constructive knowledge of the claimant’s conditions of bipolar disorder and Crohn’s disease.

107. We noted also that Ms Hofmans and Ms Tansey accepted that once aware of her disabilities, they would have known that the claimant was placed at a substantial disadvantage by way of the PCPs.

108. We accepted that had the respondent referred the claimant to OH prior to her employment starting, that the respondent would have had knowledge of disability. There would have been the opportunity to consider adjustments at this time.

Reasonable adjustments

109. Providing pre-employment health checks for all staff who disclose on the Equal Opportunities Form and/or the Staff Recruitment Form that they are disabled. The tribunal concluded that this was a reasonable adjustment that the respondent could have made. It was its policy to undertake health checks and enquire about reasonable adjustments, but it had adopted a practice of not doing so. We concluded that there was a real prospect that had this adjustment been put in place, the disadvantage the claimant suffered – starting work without adjustments in place – would have been alleviated. A health check would have enabled the claimant to discuss the adjustments she believed could be necessary, and for her employer to assess whether these adjustments could reasonably be made.

110. We considered separately the issue of "enquiring about reasonable adjustments for all staff". We did not consider this to be a reasonable adjustment – per *Tarbuck* it is not a failure to make an adjustment to fail to consult with an employee about adjustments, although it is wise to do so.

111. Flexibility to allow her to attend regular medical appointments, in respect of Bipolar Disorder and Crohn's disease: the respondent's position was that these were twice weekly for two years, that this would be two afternoons a week at least. The role was one which required the claimant to be physically present, and during these appointments she would not have been doing any work. this was not a practicable adjustment.

112. We noted Ms Hofman's evidence – that while it would have been difficult to arrange cover for regular appointments, this would change in July 2019 when a Deputy to Assistant Manager would be recruited, making it three employees based in the same area who could pick up calls etc. She also said that appointments for disability-related absences could be accommodated. We noted also that the claimant's evidence was that it would not be two appointments every week, that while there was a regular physiotherapy session this was not twice a week. We concluded based on this evidence that this was an adjustment which could be accommodated for a weekly appointment with the claimant leaving work mid-afternoon once a week. We also concluded that this adjustment would have a benefit – it would enable the claimant to receive treatment which would assist her medical conditions. There was a real prospect that this would be an effective adjustment for the claimant.

113. The option to work from home if she was not fit enough to travel to the office (as with her previous employer), in respect of Crohn's disease: the respondent accepted that “infrequent” working from home would be the same as covering the absence of a sick employee; that this could be accommodated. We accepted also Ms Hofmans evidence that much of the role cannot be done from home, but that irregular/infrequent absences from the office working from home could be accommodated. We agreed that this would be a reasonable adjustment which could be made; this was on Ms Hofmans and Ms Jones evidence. We again considered that there was a real prospect that being able to work from home on a very occasional basis (the claimant’s evidence was 3 times in 11 months in her last role) would be of benefit in minimising her symptoms.

114. Allowing her to start early to avoid rush hour traffic, in respect of Crohn's: we noted that Ms Jones accepted that cover could have been provided from 4-5pm. Ms Hofmans evidence was that with three people in the office the 3rd person covers. We noted also that until we heard from Ms Hofmans on this issue, we were not made aware that a 3rd person would shortly be employed in the same office as her and the claimant. We considered as a consequence that the adjustment was more likely than not to succeed and that it would be of benefit to the claimant. This is despite the medical evidence saying that different travel times would not necessarily assist the claimant. We accepted the claimant’s evidence based on her knowledge of her conditions that an earlier start time was less stressful and would be of benefit to her medical conditions.

115. If she had to attend medical appointments or her hours were flexible, having someone else to take phone messages or amending the voicemail answer to reflect that when she would be able to reply, in respect of Bipolar disorder or Crohn's: we noted again Ms Hofmans evidence, that this would have been a practicable solution when a 3rd employee was recruited. We did not accept the respondent’s argument that this would have been for 11 hours a week – we did not accept that there would be two appointments per week, we also accepted that there would be a degree of cover for calls, particularly when the third member of the team was recruited. For example if the claimant was taking notes in a meeting, she could not take a call, and we accepted that this would be a rolling duty when a member of staff was not at their desk. We considered that when medical appointments during working hours were required, it was a reasonable adjustment for someone else to take messages. There was a real prospect that this adjustment would assist in alleviating disadvantage as it would enable her to receive treatment to benefit her medical condition.

116. Allowing the claimant to return to work on a phased return or allowing her to work from home for a period, in respect of Bipolar disorder and Crohn's: the respondent accepts that this would have been reasonable adjustment it wold have made.

117. Paying full pay during sick leave until all reasonable adjustments have been implemented in respect of Bipolar disorder and crohn’s: the claimant’s position is that it would be reasonable as the only reason for the absence was because there was a failure to make reasonable adjustments. The respondent’s view

was that only in exceptional circumstances should full pay be payable; it is established law that paying full pay is not a reasonable adjustment as it does not assist the employee to undertake their role.

118. We concluded that on the evidence we had heard, we could not consider the failure to pay full pay amounted to a failure to make a reasonable adjustment. At no stage was the respondent given evidence to show that its actions had caused the claimant's injuries. At tribunal we saw no evidence to show that the respondent's actions caused the claimant to go off work and stay off work. We accept that this is the claimant's case, but we also considered that it is possible that the claimant may have taken sick leave at some point in any event at this time or shortly thereafter absent the acts of discrimination. We therefore considered that this was not a reasonable adjustment which the employer should have made. We did accept that this is an issue of causation for loss at a compensation hearing.

119. Accordingly the following claims of a failure to make a reasonable adjustment succeed:

    a. Providing pre-employment health checks for all staff who disclose on the Equal Opportunities Form and/or the Staff Recruitment Form that they are disabled.

    b. Flexibility to allow her to attend regular medical appointments, in respect of Bipolar Disorder and Crohn's disease;

    c. The option to work from home if she was not fit enough to travel to the office (as with her previous employer), in respect of Crohn's disease;

    d. Allowing her to start early to avoid rush hour traffic, in respect of Crohn's;

    e. If she had to attend medical appointments or her hours were flexible, having someone else to take phone messages or amending the voicemail answer to reflect that when she would be able to reply, in respect of Bipolar disorder or Crohn's;

    f. Allowing her to return to work on a phased return or allowing her to work from home for a period, in respect of Bipolar disorder and Crohn's;

<u>Discrimination arising from disability</u>

120. Was the Claimant treated unfavourably by the Respondent because of something arising from her disabilities?

<u>Alleged unfavourable treatment</u>

121. Failing to identify and/or implement reasonable adjustments (Crohn's disease and Bipolar Disorder): the essence to this claim is the failure to have a pre-employment health check or any OH check thereafter which could identify the adjustments needed. The respondent accepts constructive knowledge of both medical conditions.

122. We concluded that this was unfavourable treatment. The respondent accepts in its submissions that it could amount to unfavourable treatment. The claimant

was expecting a OH check to take place, she wanted it to occur. We concluded that if it had occurred it is possible that adjustments could have been put in place prior to her starting work. Instead she started work without adjustments, and felt on the back foot because of the settled view she had been given that the hours of the role were fixed and would not be changed.

123. Requiring / requesting that the Claimant attend medical appointments outside working hours or only at the beginning or end of the working day (Bipolar Disorder): again, we concluded this was unfavourable treatment – the claimant was potentially going to lose the benefit of treatment she had been waiting for some months.

124. Contacting the Claimant while she is off sick and/or requiring her to attend meetings while off sick in respect of her Crohn's disease and/or Bipolar Disorder: we again accepted that this was unfavourable treatment. It was not as characterised by the respondent in its submissions a standard progress report/route map and consideration of the condition. The context here was the implication for her probation – and the suggestion she could have a colleague or TU pre present. We concluded that the letter was unfavourable as it was sent to the claimant when she was very unwell, and we found that this letter did exacerbate her medical symptoms. In saying this we would emphasise that this letter contained issues which were entirely legitimate issues for the employer to discuss – the OH report and issues about probation and progress. The unfavourable treatment was to send the information about the probation hearing/right to be accompanied at this time.

125. The text message sent to the Claimant on 25 June 2019 whilst she was on sick leave: this text is where the claimant was told her leave was unauthorised. This was incorrect; also the claimant had said she was not in a position to receive messages, and had authorised her mother to do so that receiving such mail exacerbated her disability. We considered this amounted to unfavourable treatment.

126. The letters sent by Ms Hofmans to the Claimant dated 19 June 2019 and 23 July 2019: as above.

127. Only paying sick leave when the Claimant was on sick leave because other reasonable adjustments have not been implemented, and or recouping overpayments (Crohn's disease and Bipolar Disorder): again, we accepted that a failure to receive full pay amounts to unfavourable treatment.

<u>Something arising from disability:</u>

128. The Claimant relies upon the following as the 'something arising from' her disabilities: The need for the Claimant to attend medical appointments and the claimant’s sick leave from 17 June 2019. It was clear to us that both amounted to something arising in consequence of disability – the medical appointments and the sick leave were both directly connected to her disabilities.

<u>Was as the unfavourable treatment because of something arising from her disability?</u>

129. The respondent argues that if there was any failure to identify adjustments, it was not because of the claimant's absence from work or requirement for medical appointments. It was when the claimant was off work that she was referred to OH and adjustments were identified. One suggested adjustment – a risk assessment - could have led to adjustments being discussed and implemented. Further adjustments were identified on 4 October and via solicitor's letter. Thereafter the respondent stated it wished a further medical opinion, which had a condition suggesting that the claimant's role may be changed which, we found, led to a legal impasse while proceedings were issued.

130. We concluded that the claimant's absence from work or her medical appointment requirements was not a cause or factor in the failure to identify adjustments; that this unfavourable treatment was not because of her absence from work of because of her requirement for medical appointments. It was the failure to undertake a preemployment health check which was the cause of the failure to identify adjustments. We accepted that after the claimant had gone of sick, some adjustments were suggested by OH. As stated above, when the claimant was well enough these could have started the basis of a discussion about adjustments. Accordingly, the claim that the failure to identify adjustments arose from the claimant's sick leave or requirement for medical appointments fails.

131. The unfavourable treatment of requiring the Claimant attend medical appointments outside working hours or only at the beginning or end of the working day (Bipolar Disorder): the requirement for medical appointments arose from the claimants' disability and the respondent's policy of denying the request for leave was because this was a medical appointment in working time. A significant factor for this unfavourable treatment was the fact it was in the respondent's view a GP appointment. We concluded that a significant cause of this treatment was the medical appointments which arose from disability.

132. Contacting the Claimant while she is off sick and/or requiring her to attend meetings while off sick in respect of her Crohn's disease and/or Bipolar Disorder: did this treatment occur because of something arising from her disability? The answer is yes – as it arose from her sickness absence which was because of her disability. We concluded the same with the texts and letters as above.

133. The failure to pay full sick pay during the claimant's sickness absence was clearly something which arose from her disability, the reason why she as on sick leave was because of her disabilities and the respondent was aware from the date of this absence she had bipolar disorder.

134. We next considered the respondent's legitimate aims: The Respondent relies on the following legitimate aims:

    a. to ensure that employee development and performance can be appropriately and properly measured

    b. to ensure business continuity during employee leave; and

c. the robust management of employee sickness absence.

d. The need to ensure the office was appropriately resourced

e. Managing employee absence for medical appointments in line with business needs.

135. We concluded that all were clearly legitimate aims for any employer.

136. Were these aims achieved proportionately? We noted that the respondent relies on its job specifications, job tasks, and expectations in the role which were known to the claimant at interview and beyond. It also relies on the attempts to engage with the claimant after her sickness absence started. We noted also that the respondent is flexible and allows employees to take medical appointments, but for them to be arranged early or later in the day if possible.

137. We noted the concessions of the respondent's witnesses: that the claimant could and would have been given time off work for medical appointments during the working day if these could not be changed; that when the third employee in the office was recruited the sharing/allocation of duties would have been much easier. We concluded that it was not a proportionate means of achieving the legitimate aim of resourcing office/managing employee's absences to refuse to allow an employee to take time off in the working day, given the concession of the witnesses on this point.

138. Contacting the Claimant while she is off sick and/or requiring her to attend meetings while off sick in respect of her Crohn's disease and/or Bipolar Disorder: we concluded that it was proportionate means of achieving the legitimate aim of robustly managing sickness absence for the respondent to contact the claimant while off sick, in order to manage sickness absence. Employers need to keep in touch with their employees during sickness absence. This included the letters and texts sent to the claimant, even if there was a mistake in one text as the claimant had submitted a medical certificate.

139. However, we did not conclude that it was a proportionate means of managing sickness absence or, for example, ensuring development and performance can be maintained, to add into a letter about sickness absence a reference to a probation review and issues to be addressed at this meeting and the right to a colleague/TU member. This is clearly a work-related issue. The claimant knew that she was on probation, and would have been aware of the need for a review meeting at some point. This letter strongly implies that the respondent has issues with the claimant's performance. We concluded that it is not a proportionate means of achieving this aim to inform an employee who is clearly very ill of a formal probation meeting with colleague/TU present. Accordingly, this part of the allegation succeeds.

140. We concluded that it the respondent acted proportionately and in accordance with its legitimate aim in not paying the claimant full pay during her sickness absence. It would rarely be proportionate for an employer to do so it was, we considered both appropriate and reasonably necessary to manage employee sickness absence to pay a contractual entitlement only; in this case SSP. We

did not consider that a lesser measure – i.e. to pay a proportion of pay or full pay, would have met this legitimate aim.

141. We noted the concessions of the respondent's witnesses: that the claimant could and would have been given time off work for medical appointments during the working day if these could not be changed; that when the third employee in the office was recruited the sharing/allocation of duties would have been much easier. We concluded that it was not a proportionate means of achieving the legitimate aim of resourcing office/managing employee's absences to refuse to allow an employee to take time off in the working day, given the concession of the witnesses on this point.

142. Contacting the Claimant while she is off sick and/or requiring her to attend meetings while off sick in respect of her Crohn's disease and/or Bipolar Disorder: we concluded that it was proportionate means of achieving the legitimate aim of robustly managing sickness absence for the respondent to contact the claimant while off sick, in order to manage sickness absence. Employers need to keep in touch with their employees during sickness absence. This included the letters and texts sent to the claimant, even if there was a mistake in one text as the claimant had submitted a medical certificate.

143. However, we did not conclude that it was a proportionate means of managing sickness absence or, for example, ensuring development and performance can be maintained, to add into a letter about sickness absence a reference to a probation review and issues to be addressed at this meeting and the right to a colleague/TU member. This is clearly a work-related issue. The claimant knew that she was on probation, and would have been aware of the need for a review meeting at some point. This letter strongly implies that the respondent has issues with the claimant's performance. We concluded that it is not a proportionate means of achieving this aim to inform an employee who is clearly very ill of a formal probation meeting with colleague/TU present. Accordingly, this part of the allegation succeeds.

144. We concluded that the following claims of discrimination arising from disability succeed:

    a. Requiring / requesting that the Claimant attend medical appointments outside working hours or only at the beginning or end of the working day.

    b. Contacting the Claimant while she is off sick requiring her to work-related attend meetings

Remedy

145. A remedy hearing was provisionally listed for 11 October 2021. Given the delay in promulgating this judgment, this hearing is converted into a 1 hour Case management discussion by CVP at 10.00am at which directions for a Remedy hearing will be given.

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EMPLOYMENT JUDGE M EMERY

Dated: DATE 20 September 2021

Judgment sent to the parties
On: 21/09/2021

For the staff of the Tribunal office

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