EMPLOYMENT TRIBUNALS

Claimant: Ms Helene Corlett

Respondent: Halton Borough Council

Heard at: Liverpool **On:** 19, 20, 21 and 22 October 2020, 20 November 2020 and 23 February 2021 (in Chambers)

Before: Employment Judge Benson
Mr I Taylor
Mr J King

REPRESENTATION:

Claimant: Mr P Wilson of Counsel
Respondent: Ms C Hollins - Solicitor

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The compliant of a failure by the respondent in its duty to make reasonable adjustments succeeds in part.

2. The claimant was unfairly dismissed. This claim succeeds.

3. The complaint of discrimination arising from disability fails and is dismissed.

4. The complaints of harassment and direct discrimination are withdrawn and dismissed.

5. The claims of breach of contract and for holiday pay are withdrawn and dismissed.

6. The parties will be notified of a date for a remedy hearing.

REASONS

Claims and Issues

1. By a claim form received by the Tribunal on 22 October 2019 the claimant brought claims of unfair dismissal, disability discrimination (comprising direct discrimination, harassment, discrimination arising from disability and a failure to make reasonable adjustments), holiday pay and breach of contract. An agreed List of Issues was prepared for the final hearing.

2. During the course of the hearing, this List of Issues was revised and the claims of harassment and direct discrimination, holiday pay and breach of contract were all withdrawn. Further, some of the factual allegations upon which the claimant relied in support of her claims were no longer pursued. The final List of Issues which the parties agreed that the Tribunal was to determine was provided to the Tribunal and is referred to below in the conclusions.

Evidence and Submissions

3. We heard evidence from the claimant, Ms Corlett, together with Ms Deana Perchard, the Principal Trading Standards Officer at the respondent, and Ms Sarah Johnson-Griffiths, the Consultant in Public Health at the respondent.

4. We were provided with a joint bundle of documents and at the conclusion of the evidence, Mr Wilson counsel for the claimant provided written submissions and both he and Ms Hollins on behalf of the respondent provided oral submissions.

Findings of Fact

5. We have made findings in respect of those matters which are necessary for us to determine the issues, and do not seek in this Judgment to set out the full facts in respect of which we heard evidence. The sequence of events in this case are mostly agreed, but where the interpretation of events by each party differs, we have made appropriate findings based upon the witness evidence and documents to which we have been referred.

6. The claimant was employment as a Trading Standards Officer by the respondent. Her employed commenced on 1 September 2014 and terminated on 25 May 2019 when she resigned in circumstances which she says amount to constructive dismissal. Ms Perchard was her manager in the Trading Standards department, and Ms Johnson-Griffiths had responsibility for the Environmental Health Department of which Trading Standards was part.

7. The claimant had a history of depression, anxiety and panic attacks dating back 30 years and it was accepted by the respondent that for the purposes of these proceedings she was a disabled person by reason of depression, anxiety and panic attacks at the relevant time.

8. During her employment the claimant had some periods of longer absence, including between October/November 2016 and January 2017; October 2017 and December 2017; October 2018 and January 2019, and January 2019 until the claimant's notice of resignation dated 26 March 2019, which expired on 25 May 2019. During these periods of absence, the claimant did have intermittent periods when she did work, and we accept that at times she tried to return to work as it assisted her mental health, even though she was not 100% fit.

9. The respondent obtained Occupational Health reports at various times during the claimant's employment including December 2018, January, February and March 2019. We were referred to these, and these together with her doctor's fit notes made recommendations as to how she could be assisted in returning to work.

December 2017

10. Following a period of absence between 6 October and 8 December 2017 the claimant had return to work (RTW) meetings with Deana Perchard on 11 December 2017, and then a more detailed meeting on 13 December 2017. At these meetings Ms Perchard discussed with the claimant her proposed return to work and the recommendations made by Occupational Health, including a phased return. That meeting was not successful. The Claimant wrongly considered that Ms Perchard had already decided what hours she was to work during the phased return period, rather than leaving her to see how she felt at the end of each week, and the claimant considered that her duties and hours were already mapped out for her. We do not accept that this was the position at that meeting, and in fact all that Ms Perchard was doing was seeking to agree a phased return which would ultimately result in the claimant returning to work after some four weeks, as she could not leave it for the claimant to decide as and when she wanted or was able to work.

11. The result of that meeting was that the claimant considered that Ms Perchard was angry and irritated and she concluded that she was not empathetic towards her and not supportive of her mental health issues.

12. A meeting was then arranged with the claimant, Ms Johnson-Griffiths and Ms Perchard and the claimant's trade union representative on 15 December which appeared to smooth over these issues, and thereafter the claimant and Ms Perchard were able to continue in their normal friendship and as work colleagues.

13. From January 2018 the claimant was attending therapy sessions after which she needed to take the rest of the day off in order to recover. The respondent, through Ms Perchard, made accommodation for this by permitting the claimant to take annual leave after each of her sessions. We consider that this was never an issue for Ms Perchard either at this time or later in the claimant's employment. She understood the need for such leave and did not seek to prevent it. The claimant however also wished to take time off with her son, and used her entitlement to parental leave to do this. By July 2018 the claimant was concerned about using up her annual leave and asked for a period of pre-booked annual leave to be replaced by parental leave. This request was approved.

September 2018

14. In September 2018 the claimant made the same request in respect of a period of annual leave booked in October. This time the request was refused. The reason that the request was refused by Ms Perchard was that the department had or was about to lose two of its four staff. As such it was short-staffed and Ms Perchard appreciated that it was going to take some months to recruit replacements. She was concerned that if the claimant replaced her annual leave with parental leave she would still have that additional annual leave which needed to be taken before the end of leave year causing more staffing issues. When this was communicated to the claimant on 25 September, the claimant considered that Ms Perchard was simply being awkward and she appealed to Ms Johnson-Griffiths. Ms Johnson-Griffiths responded by an email of 28 September and in that email, she said:

> "New requests for leave within the team would need to be very carefully considered, and we may not be in a position to grant any leave at this particular time, until the staffing shortages have been remedied."

15. The claimant reacted to this email by becoming anxious, as she read it as meaning it might not be possible that she would be allowed to take time off to recover from her therapy. This was not however what Ms Johnson-Griffiths intended. The claimant considered that Ms Johnson-Griffiths was lacking in empathy for her and her mental health condition.

<u>October 2019 absences</u>

16. The claimant felt anxious, nervous and panicky over the following few days and on 2 October did not feel that she could go into work. She asked for a day's leave for that day. The claimant emailed Ms Johnson-Griffiths with an explanation as to why she needed to use her annual leave to recover after each of her therapy appointments, and that day Ms Johnson-Griffiths telephoned the claimant and reassured her that those days would not be affected. This was later reaffirmed in in an email. The claimant was absent on 3 October and on 4 October worked from a remote office. On 5 October she was not well enough to work and left the office early. She emailed the respondent (page 257).

17. On 6 October the claimant emailed the respondent again suggesting ways that the respondent could assist in managing her anxiety (pages 263-265). These included communicating with her about recruitment, about how the department's work would be managed in the interim and providing empathetic responses to the claimant that demonstrated that she was being actively listened to and permit some flexibility around therapy times and dates.

18. On 8 October Ms Johnson-Griffiths emailed the claimant and suggested mediation.

19. The claimant's anxiety levels since she had been told that she could not convert her annual leave into parental leave had increased, and she had feelings of hopelessness and suicide. The claimant saw her GP on 10 October, who signed her off work for three months but confirmed that she was fit to return if the employer could accommodate a return on a phased return basis, and her hours of work and duties altered. These were specified as having the rest of day off work following her

psychotherapy sessions (page 640). The claimant remained absent through ill health and then from 19 October to 29 October 2018 was on annual leave.

Sickness absence or annual leave?

20. During the period from 2 October 2018 the claimant punctuated sickness absence with pre-booked annual leave and time in work on odd days. Although she had a fit note with recommendations from 10 October, she was in work on 12 October, and then was absent through sickness from 15 to 18 October. In an email of 17 October, she said she advised the respondent that she was on annual leave from 19 October. She did not consider this was sickness absence. As such the claimant's period of absence from 19 – 26 October 2019 was a period of annual leave not sickness. The point Ms Perchard makes in email of 22 January 2019 (p379) is therefore valid

Return to Work Meetings – Autumn 2017

21. Upon returning to work, the claimant did not want to have a RTW meeting with her manager, Ms Perchard. As a result of the previous RTW interview in December 2017, she considered that Ms Perchard was not empathetic towards her and although she was happy to speak with Ms Perchard on work-related matters, she did not wish to speak to her about her health.

22. We do not accept that Ms Perchard deliberately ignored the claimant upon her return to work as the claimant alleges on 29 October. We accept Ms Perchard's evidence that she was engrossed in work at the time the claimant returned, and did not initially see the claimant.

23. Both Ms Perchard and Ms Johnson-Griffiths were of the view that the RTW meeting should be with Ms Perchard and that its purpose was to discuss both the claimant's health and work-related issues which followed from that. We accepted Ms Johnson-Griffiths' evidence that she had no real understanding of the work of that department, and the ongoing issues relating to workload duties, etc., which would need to be discussed on a RTW interview.

24. On this occasion, however, Ms Johnson-Griffiths went ahead with a meeting on 29 October and sought to conduct it in the best way she could. As the claimant had only been absent for a short period, she did not consider a phased return could be granted as she had discussed this with HR who had advised that a phased RTW was not in accordance with its Return to Work Guidance which only applied when an individual had been absent for a prolonged period. The doctor's note of 10 October had signed the claimant off for three months but confirmed that the claimant was: 'fit for work taking account of the following advice' which included a '…phased return to work…'. At that time the claimant had been absent for a week but had also had a period of holiday and intermittent absences before that. Ms Johnson- Griffiths also reaffirmed that any RTW meeting had to take place with DP.

25. During the meeting, Ms Johnson-Griffiths discussed the altered hours and duties mentioned by the GP. She confirmed that the claimant's therapy appointments would be like any medical appointment, and as such if the claimant needed to take the rest of the day off, that could be either by annual leave or sick leave. The

claimant confirmed that she would like to take unpaid leave in that situation. Ms Johnson- Griffiths also discussed with the claimant whether she wished to apply for part-time hours and provided her with details of the respondent's flexible working policy. She pointed out that in doing so, it would be helpful if to say whether this was on a permanent basis as this would assist the service in considering how the additional time could be covered. She explained this would need to be discussed with Ms Perchard and the needs of the service would be considered in deciding whether this could be accommodated. She also suggested mediation between Ms Perchard and the claimant.

26. Following that meeting, Ms Johnson-Griffiths spoke with Ms Perchard who was very upset and aggrieved as she felt she had been put in an intolerable position with regard to her management of the claimant and had been undermined. She was unwilling to engage in mediation as she saw this as an accusation of wrongdoing by the claimant against her and that the respondent considered that she had done something wrong. She did not feel she could manage the claimant if she would not recognise her as her manager and if she could not have a RTW interview with her. She felt that she was receiving conflicting advice from HR.

27. The claimant remained off sick from 1 November to 11 January 2019. She attended an Occupational Health appointment on 5 November 2018. Recommendations were made as a result. These confirmed that the claimant was not fit for work and recommended that initially she met with Ms Johnson-Griffiths rather than Ms Perchard and that mediation might assist.

28. On 12 November the claimant advised HR that she was unable to work full-time and was therefore unable to return to work at that time. Her fit note expired on 9 January.

Request for Part-time hours

29. On 3 December, the claimant wrote to Ms Johnson-Griffiths (page 388) enquiring about mediation and making a request for flexible working of part-time hours of two days per week, Monday and Tuesday and expressing her concerns about having a RTW meeting with Ms Perchard. She also requested that she return on a phased basis.

30. Ms Johnson-Griffiths acknowledged the request for reduced hours on 14 December 2018. In that email she provided her preliminary thoughts upon the request as under the policy a meeting needed to take place with the claimant and she was aware that she was still unwell and not in work. She explained that they would be considering the request in terms of service capacity and ability to reallocate roles. She confirmed that at that time there were no criminal officers (which was part of the claimant's role) and they had 2 vacancies. She indicated they were not in a position to make a decision at that time and under the flexible working policy, they had 3 months to do so. She confirmed that the vacant roles had been advertised and they had set out that they would consider part-time working which may give flexibility to recruit more than 2 WTE officers. She confirmed that if they were to recruit these officers they would be in a position to approve the request for the claimant to reduce her hours to two days as duties could be reallocated. She indicated that it would not

be until February that they could consider the application fully and provide the claimant with a final answer.

31. On 7 December the claimant had a further meeting with Occupational Health. The report (pages 643-645) included the recommendation that the claimant work part time hours, if operationally feasible and have a phased return to work. The report also stated that if mediation and part time hours could be arranged, the Occupational Health practitioner considered the claimant would be fit to return to work when her fit note expired in early January.

32. Ms Johnson-Griffiths and Ms Perchard saw the OH report and its recommendations on or around 2/3 January 2029.

33. We do not accept the claimant's suggestion that the email dated 4 January 2019 (page 346) suggests that Ms Perchard blames the claimant for the delay in the report.

Meetings with Ms Perchard

34. A conversation with Ms Johnson-Griffiths took place on 10 January 2019 before the claimant returned to work and they agreed a phased return arrangement. She also explained to the claimant that although she had agreed the claimant's phased return hours, it would be Ms Perchard who would be discussing the rest of her return to work arrangements with her.

35. On 11 January 2019 the claimant wrote to Ms Johnson-Griffiths and referred to the OH report recommendations including that she would not have a return to work meeting with Ms Perchard. She sought a temporary part-time working arrangement whilst the application to reduce her hours on a permanent basis was considered. Ms Johnson-Griffiths did not see the email until the afternoon of 15 January.

36. The claimant returned to work on 14 January 2019. She had been sent a meeting request by Ms Perchard for a meeting the following day. Concerned that the claimant might not yet have seen it as she was not due in work until shortly before the meeting, on 15 January 2019, Ms Perchard came to the claimant's desk and reminded her about the meeting. At this stage, Ms Perchard was aware of the OH recommendations but it had been agreed between Ms Johnson-Griffiths, Ms Perchard and HR that as the claimant's line manager and as Ms Johnson-Griffiths knew little about her work, the meeting would need to be with Ms Perchard.

37. The claimant refused to meet with her. We accept that this refusal by the claimant, in front of others was upsetting and embarrassing to Ms Perchard, and that she considered it undermined her position. Later than day the claimant sent invitations to meet with Ms Perchard to discuss workload and Ms Perchard replied that she was not in a position to have a workload meeting with her at that time. The claimant differentiated between having workload meetings with Ms Perchard which she was prepared to have, and a return to work meetings when her health would be discussed, which she was not prepared to attend with Ms Perchard. This was difficult for Ms Perchard to understand and as her manager it she felt the claimant was picking and choosing when she was prepared to be managed.

38. It was clear in the evidence which was given to us by Ms Perchard that she has also been badly affected by the breakdown in the relationship with the claimant, and the claimant's continuing refusal to meet with her. She understood this stemmed from the initial return to work meeting in December 2017. Ms Perchard considered that the claimant had made unfounded complaints about her which upset her and which she did not understand. She also had a period of sick leave as a result.

39. In refusing to attend mediation, we accept that Ms Perchard wished to understand what she had done wrong in order that she could defend her reputation before engaging with the claimant, and that she did not consider that it was an appropriate forum to do that by way of a mediation. She was protective of her own mental wellbeing.

Return to Work – January 2019

40. Following further correspondence, on 17 January 2019 Ms Johnson-Griffiths undertook the RTW meeting. The phased return was discussed, together with the mediation request which Ms Johnson-Griffiths confirmed that Ms Perchard was not prepared to agree to. The claimant requested that her part-time working be considered as a reasonable adjustment under the Equality Act 2010 rather than under the flexible working policy. They discussed the recruitment of the two additional members of staff to the department, and that part-time working was not possible until further officers had been recruited, however she confirmed that if they were recruited, the part time hours would be approved at that stage. Ms Johnson-Griffiths explained that the advertisements had been drafted to encourage part-time applicants, and that they hoped this would result in additional applicants applying. It was agreed that in the short-term, meetings would be held with Ms Johnson-Griffiths.

41. The claimant continued working until 30 January 2019, when she was signed off by her GP and her mental health deteriorated. She had further Occupational Health reports over the next couple of months. (Pages 643/644 and 323, 343, 354, 355.)

42. On 1 March 2019 Ms Johnson-Griffiths wrote to the claimant to advise that her request to work part time could not be granted as the service had only been able to recruit 1 of the 2.6 officers required to bring the service up to the necessary staffing levels. Again, reference was made to the flexible working policy.

43. On 12 March 2019 the respondent sent an email to Ms Claimant enquiring about a particular case (page 406). It was a sensitively worded email in a situation where Ms Johnson-Griffiths needed some information.

Claimant's resignation

44. On 26 March 2019 the claimant emailed the respondent, resigning with notice. The reasons for her leaving were stated to be:

(1) Since September/October instances at work had exacerbated her mental health condition causing her to be unable to work;

(2) Being informed that no leave would be able to be taken until there was a full complement of staff, causing her further anxiety and depression

and meaning that she would be unable to take her leave for therapy, and receiving no assurances in that regard;

(3) Being informed that she would not be allowed to take any leave until there was a full complement of staff, which would be some three months such that other than therapy days she would not be able to take any leave for three months;

(4) A lack of communication or information about the loss of 50% of the enforcement staff and how it would affect her workload. Further, how this would impact upon her own busy workload;

(5) A refusal of mediation and insistence that a return to work meeting had to be held with Ms Perchard contrary to advice from Occupational Health;

(6) A failure to agree a reduction in hours of work and the use of the flexible working policy rather than a reasonable adjustment request being considered;

(7) That the respondent was looking at the request upon the impact on service rather than the claimant's health and wellbeing;

(8) A refusal to have workload meetings upon the claimant's return to work.

45. On 28 March 2019 the claimant received an email from Ms Johnson-Griffiths requesting a meeting to see if she could be supported in returning to work and reconsidering her resignation. The claimant asked for her husband to accompany her, but this was refused and she was told the respondent's policy was that she could only be accompanied by a colleague or trade union representative.

46. At the meeting which took place on 8 April the respondent said that they had considered the request for reduced hours as a request for a reasonable adjustment and a one-day reduction in hours was discussed. The claimant reaffirmed that she was resigning.

47. The claimant's employment terminated on 25 May 2019.

The Law

Constructive dismissal

48. To succeed in a claim of unfair dismissal, the claimant must establish that she was dismissed by her employer. In a case of constructive dismissal, a claimant has to show that she terminated the contract by resigning, whether with or without notice, but in circumstances in which she was entitled to do so by reason of the employer's conduct.

49. The relevant section of the Employment Rights Act 1996 is section 95(1)(c). The leading case is Western Excavating (ECC) Limited v Sharp [1978] ICR 221. In

that case the Court of Appeal ruled that for an employer's conduct to give rise to a constructive dismissal, the employee must establish there was a fundamental breach of contract on the part of the employer, that the employer's breach caused the employee to resign and that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

50. In order to identify a fundamental breach of contract on the part of the employer, it is first necessary to establish what the terms of the contract are. Individual actions by an employer that do not in themselves constitute fundamental breaches of any contractual term may have the cumulative effect of, for example, undermining the trust and confidence inherent in every contract of employment. A course of conduct can therefore cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a 'last straw' incident.

51. The 'last straw' does not by itself need amount to a breach of contract. Lewis v Motorworld Garages Ltd 1986 ICR 157, CA

52. The existence of the implied term of mutual trust and confidence was approved by the House of Lords in Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606, HL. There, their Lordships confirmed that the duty is that neither party will, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

53. If the claimant establishes that she has been dismissed, the provisions of Section 98 Employment Rights Act 1996 come into play.

54. Section 98 reads as follows:

> "(1) **In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal and**
>
> **(b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this sub-section if it:**
>
> **(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,**
>
> **(b) relates to the conduct of the employee,**
>
> **(c) is that the employee was redundant, or**
>
> **(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.**
>
> **(3) …**

> **(4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case".**

Disability Discrimination

55. Burden of proof

56. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides as follows:

> **"(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."**

57. Consequently, it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention.

Duty to make reasonable adjustments

58. By section 20 of EQA 2010 the duty to make adjustments comprises three requirements.

59. The first requirement, by section 20(3), incorporating the relevant provisions of Schedule 8, is a requirement, where a provision, criterion or practice of the employer's puts a disabled person at a substantial disadvantage in relation to the employer's employment in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

60. A disadvantage is substantial if it is more than minor or trivial: section 212(1) EQA 2010.

61. Paragraph 6.28 of the EHRC Code lists some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

> **(1) Whether taking any particular steps would be effective in preventing the substantial disadvantage;**
>
> **(2) The practicability of the step;**

> **(3) The financial and other costs of making the adjustment and the extent of any disruption caused;**
>
> **(4) The extent of the employer's financial and other resources;**
>
> **(5) The availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and**
>
> **(6) The type and size of employer.**

62. Claimants bringing complaints of failure to make adjustments must prove sufficient facts from which the tribunal could infer not just that there was a duty to make adjustments, but also that the duty has been breached. By the time the case is heard before a tribunal, there must be some indication as to what adjustments it is alleged should have been made.

Discrimination Arising from Disability

63. Section 15 of the EQA provides that

> **(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.**
>
> **(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.**

Conclusions

64. Although the issues which the Tribunal needs to decide were discussed and agreed at the outset of this hearing, the claimant's representative's written submissions in respect of both the discrimination and unfair dismissal claims focussed upon the decision not to allow the claimant to work reduced hours when requested and the deferring of that decision. We have however dealt with all of the issues which were identified.

Disability

65. It is admitted by the respondent that the claimant is disabled within the meaning of section 6 of the Equality Act 2010. The conditions relied on by the claimant are depression, anxiety and panic attacks.

Disability Discrimination – Discrimination arising from disability

66. It was agreed that the first issue we must consider is: Did the respondent discriminate against the claimant by subjecting her to unfavourable treatment, namely the matters set out below, because of her communication style, sickness absence and requirement for reasonable adjustments?

67. We accept and indeed it was not disputed that the claimant's sickness absence and requirement for reasonable adjustments arose as a consequence of

her disability. There was little evidence put forward by the claimant concerning her communication style and how that arose as a consequence of her disabilities.

Deana Perchard classifying the claimant's holiday during periods of sickness absence as holiday and not sickness absence on 22 January 2016.

a. In view of our findings that the respondent correctly classified the claimant's absence as annual leave as opposed to sickness, we do not consider that the claimant has discharged the burden of demonstrating that Ms Perchard's actions on 22 January amounted to unfavourable treatment. The claimant did not advise the respondent that she was sick during the period of annual leave. Although the claimant did have an overarching fit note for that period, it confirmed that the claimant could continue to work with adjustments. The claimant had attended work during the period of the fit note. As there was no unfavourable treatment, this claim fails.

Sarah Johnson-Griffiths stating that the claimant's individual needs could not be balanced against the requirements of the service or the rest of the team on 14 December 2018.

b. In rejecting the claimant's request to work reduced hours in her email of 14 December 2018 until they knew the outcome of the recruitment process, the claimant has shown she was treated unfavourably. Ms Johnson-Griffiths' explanation and denial of her request at that time arose as a consequence of her right to seek reasonable adjustments. We have considered whether the respondent has shown it had a legitimate aim for that decision and was that aim achieved by proportionate means. The respondent relies upon the aim of maintaining regular attendance at work and ensuring appropriate staffing levels. These were legitimate aims. They were two members of staff down and they needed the claimant to continue with the criminal prosecutions as she was the only member of the team who could deal with them. At the time of this statement by Ms Johnson-Griffiths, the claimant had asked to work reduced hours but the respondent had no medical confirmation supporting this. Although the GP's fit note of 10 October refers to altered hours, our view is that is referring to a phased return and time off after the claimant's therapy appointments. As such in the absence at this time of a report or specific recommendations, it was proportionate to advise the claimant that her request would be reviewed in February after the recruitment process had been undertaken and additional staff had been recruited. This claim therefore fails.

Deana Perchard refusing to meet the claimant regarding her workload on 22 January 2019.

c. We find that the claimant has on the evidence discharged the initial burden of showing that the reason Ms Perchard did not want to meet

with the claimant on 22 January arose as a consequence of the claimant's absence. It was shortly after she had returned from work and was linked with the RTW process. However, on our findings, we accept that the respondent has shown that Ms Perchard's reason was because she was upset and frustrated at lack of support of her managers and HR, particularly Ms Johnson-Griffiths and what she saw as them undermining her authority. On that day it was Ms Perchard's own emotional state which was the reason she did not meet with the claimant as opposed to anything which arose as a consequence of the claimant's absence or communication style. This claim therefore fails.

Disability Discrimination – failure to make reasonable adjustments

68. Turning to the complaint of a failure to make reasonable adjustments. The claimant relies upon the following provisions, criteria or practices:

(a) the requirement to maintain full-time attendance at work;

(b) the requirement for employees returning from work after sick leave to have a return to work meeting with their line manager; and

(c) the practice of permitting employees to be accompanied to meetings only by work colleagues or trade union representatives.

69. The claimant says that these PCPs put her at a substantial disadvantage compared with non-disabled persons. The substantial disadvantages she relies on are:

(a) Her mental health, in particular anxiety and depression, was exacerbated;

(b) The failure to make adjustments necessitated periods of sick leave;

(c) Delayed her return to work from sick leave;

(d) It necessitated a flexible working application and a permanent contractual change rather than a reasonable adjustment which could have been further adjusted as necessary;

(e) She resigned in accordance with section 39(2)(c) and 7(b) EqA 2010.

70. The claimant hasn't specified which of the substantial disadvantages she says relates to which PCP and indeed the claimant's submissions focussed heavily upon just one PCP, being that of maintaining full time attendance at work. It seems to us that in respect of PCP (c) the substantial disadvantage can only be the exacerbation of her anxiety and depression, and in respect of PCP (b) it is that plus the delay of her return to work and her resignation. The substantial disadvantage which the claimant says she suffered in respect of PCP (a) the requirement to maintain full time attendance are all of those listed.

71. We are reminded that the claimant must prove sufficient facts from which the Tribunal could infer not just that there was a duty to make adjustments, but also that the duty has been breached. We have considered the Guidance to the Tribunal contained within the EHRC Statutory Code of Practice for the Equality Act 2010 above.

72. We have considered whether each of the particular PCPs were applied to the claimant and put her at the substantial disadvantages she alleges:

PCP of the requirement to maintain full-time attendance at work

73. It was not disputed by the respondent that this PCP was applied to the claimant. We take in turn the substantial disadvantage which the claimant says she suffered and the step she says would have alleviated that disadvantage as set out in the agreed issues:

Adjustment sought:

(a) Permit the claimant to book annual leave for therapy appointments on 25 September and 28 September to 1 October 2018 (by allowing the claimant's request to take parental leave on those dates and by giving reassurance that she could have leave for therapy at future dates when she needed it).

(b) In notifying the claimant on the dates above, that she could not convert her period of booked annual leave between 19 to 29 October to parental leave, the claimant says she was put at a substantial disadvantage. She says that she needed to use a proportion of her annual leave to recover from her therapy sessions by taking the rest of that day off. That she needed time to recover is confirmed by her GP and the OH practitioner. Although the claimant was at a disadvantage compared with non-disabled people, we do not however find that this put her at a substantial disadvantage. Any misunderstanding she may have had about her ability to take annual leave to recover from her therapy was rectified on 2 October by Ms Johnson-Griffiths. She reassured the claimant that she did not need to use annual leave, she had other options. Her therapy sessions were classed as medical appointments and she could have taken the recovery time as sick leave (as suggested by Ms Johnson-Griffiths). Our findings of fact are such that we are satisfied that there was never any opposition or resistance to the claimant taking annual leave for any therapy appointments, either from Ms Perchard or Ms Johnson-Griffiths, who were sympathetic to the claimant's needs. This had been accommodated since the claimant started the therapy sessions. We do not therefore consider that the claimant has satisfied the initial burden of proof placed upon her by section 136 Equality Act 2010.

(c) In any event, the adjustment which the claimant sought, being that the claimant be permitted to change her week of annual leave to parental leave, was not a reasonable one. The service was short staffed and had the claimant converted that week, she would have had an additional

week of annual leave to take in the remainder of the leave year at a time when the respondent was extremely short staffed. Further in view of our findings that it was never intended that the claimant be prevented from using annual leave to recover from her therapy sessions nor was she ever prevented, there is no factual basis for the adjustment put forward by the claimant. This claim fails.

Adjustment sought:

(d) Permit the claimant to have altered hours so that she was given the rest of the day off following her psychotherapy session as advised by her GP on 2 October (when Sarah Johnson-Griffiths gave the claimant no reassurance that she could continue to take leave for therapy sessions);

(e) In view of our findings that Ms Perchard and Ms Johnson-Griffiths did permit the claimant to take the rest of the day off after her therapy sessions, as advised by her GP and that the claimant was given that reassurance on 2 October 2018, there is no factual basis for this claim as there was no substantial disadvantage to the claimant. The claimant has not discharged the burden of proof. This claim fails.

Adjustment sought

(f) *Permit part-time hours as a reasonable adjustment from 29 October 2018 onwards (requested in meeting with Sarah Johnson-Griffiths on that date and subsequently on 3 December (pages 322-323), following receipt of the Occupational Health report dated 7 December 2018, following request made in return to work meeting with Sarah Johnson-Griffiths on 17 January 2019 (pages 374-5), and following the request made on 20 January (page 376) and not require a flexible work application*;

(g) We accept that the claimant has shown she was put to a substantial disadvantage in the requirement to maintain full time hours compared with a non-disabled person for the reasons put forward by her at (a)(b) and (e). The claimant had regular episodes of absence related to her disability over her period of employment. She was able to return to work between such episodes but during the period of absence from November 2018 it became clear to the claimant that she was unable to continue to work full time hours. Someone with the claimant's mental health issues could not sustain full time hours and doing so exacerbated her depression and in January 2019 caused her to have a further period of sick leave. The OH report of 7 December 2018 detailed in our factual findings supported this. The respondent did not agree to her requests at the time and put off any decision to a later date. The claimant has therefore discharged the initial burden of showing that the duty arose and that the duty had been breached. We do not accept that in itself the particular method used for the claimant to ask for reduced hours was a substantial disadvantage caused by the requirement to work full time hours.

(h) We turn then to whether permitting the claimant to work reduced hours was a reasonable step which the respondent could have taken which would have alleviated the disadvantage such that she could have returned to work. We find that it was, but only from receipt of the Occupational Health report on 2 or 3 January 2019. As such at the meeting on 17 January with Ms Johnson Griffiths, it would have been a reasonable step for the respondent to have taken.

(i) The respondent did have a staffing issue and there was a clear concern as to how they were going to cope with the workload in the department particularly with the criminal prosecutions when the claimant was the only officer who could deal with these. Ms Johnson-Griffiths relied upon the recruitment exercise bringing forward additional staff who could work the hours which the claimant was seeking to drop. However, the claimant had been seeking such hours for some time, and from the OH report of 7 December 2018 and later at the claimant's RTW interview on 17 January and the various emails around that time, it was clear that the claimant needed reduced hours to assist in her recovery and allow her to successfully return and remain in work.

(j) Unfortunately, the respondent became bound up in processes and policies as opposed to looking at the claimant as an individual and assessing her particular needs. It appears to have overlooked its duty, in light of the claimant's disability, to consider adjustments to allow the claimant to return or remain in work. It became focussed on the flexible working policy, which was not the appropriate policy to invoke in this situation. Ms Johnson-Griffiths had assurances from HR that business need prevailed and although it was entirely clear that the service was understaffed, the respondent failed in its duty to carry out a proper consideration of the claimant's needs. Temporary arrangement could have been considered but were not discussed. There was sufficient indication in the OH report of 7 December and from communications with the claimant which should have made the respondent realise that if she was not permitted to work reduced hours, at least on a temporary basis, she would not be able to cope in work and would be off ill again. From a business perspective, the respondent seemed to have lost sight of the fact that having the claimant in work for part of the week would have been preferable to having no one to deal with the criminal prosecutions and other work which was part of her role. Unfortunately, the respondent didn't appear to give this consideration. We accept that the claimant wanted to be in work and wanted to get back to work. She found that this assisted her in her recovery and had she been able to work reduced hours, there would have been a good prospect of her remaining in work. We therefore find that the respondent failed in its duty in this respect from 2 or 3 January 2019. Prior to that date, the medical evidence available to the respondent was not in our view sufficiently clear to demonstrate that the respondent failed in its duty. This claim succeeds.

<u>Adjustment sought</u>

(k) *Permit a phased return to work on 29 October 2018 (meeting with Sarah Johnson-Griffiths) and on or about 12 November 2018 (page 301);*

(l) As an individual who had long and intermittent periods of absence due to her disability, we consider that the claimant has shown that the PCP put her to a substantial disadvantage in respect of those listed at (a) (b) (c) and (e).

(m) The respondent's decision upon the claimant's return to work on 29 October and 12 November not to consider a phased return, although in accordance with the strict wording of its guidance, did not look at the claimant's individual needs and circumstances. There was medical advice in the GP note of 10 October that the claimant was fit for work subject to the recommendations including a phased return. Although there were a number of other recommendations, the claimant felt that being in work assisted her recovery and had the phased return been agreed, we consider that the claimant would have been able to return and have had a better chance of remaining in work from 29 October. The claimant has satisfied the initial burden of proof. The respondent has not been able to show to our satisfaction, why this was not a reasonable adjustment to make. Its explanation was that it was not in line with its policy. There was no evidence put forward as to how allowing such a return would have caused any disruption to the respondent. It had worked after previous absences and indeed, any steps that could have assisted the claimant in successfully retuning to work would have helped the respondent in its depleted staffing situation. We find that the respondent has failed in its duty to make a reasonable adjustment in this respect. This claim succeeds.

Adjustment sought

(n) *Allowed flexibility around her therapy session times and dates (see a) and b) above for specific dates);*

(o) In view of our findings of fact that the respondent was sympathetic to the claimant's needs concerning her therapy sessions and offered suggestions to the claimant concerning time off afterwards, there is no factual basis to support this claim as there has been no substantial disadvantage. The claimant has not discharged the initial burden of proof and this claim fails.

Adjustment sought

(p) *Provide empathetic responses that demonstrated active listening and acknowledged the sensitive information disclosed in relation to the claimant's mental health (throughout and specifically requested as an adjustment from 6 October 2018 (pages 263-265);*

(q) Although there is evidence that Ms Perchard was frustrated at times, we consider that this was primarily with the respondent and what she saw as them undermining her position by agreeing to Ms Claimant's

requirements. We consider that both Ms Perchard and Ms Johnson-Griffiths were empathetic towards the claimant. We appreciate that the claimant did not have that view, but viewed objectively, we do not find any factual basis to support this claim as there is no substantial disadvantage. The claimant has not satisfied the initial burden of proof and this claim fails.

Adjustment sought

(r) *Provide mediation between the claimant and management, in particular DP (from approximately 8 October 2018 onwards when mediation is first raised (page 261)).*

(s) We accept that the claimant has shown she has been put to a substantial disadvantage as a result of the PCP to maintain full time attendance at work, compared with a non-disabled person, in that the claimant suffered an exacerbation of her anxiety and depression. We do not consider that it was a reasonable adjustment for the respondent to have made. Although the claimant wanted to mediate, the criticism which the claimant had raised about Ms Perchard, including her lack of empathy and resistance to being managed by her, caused Ms Perchard considerable concern. Mediation would have required the participation of both parties and Ms Perchard had in our mind, sufficient concerns about the behaviour of the claimant to not wish to engage with her at that time. There was little the respondent could do about that. There was no failure by the respondent in its duty to make a reasonable adjustment and this claim fails.

PCP of the requirement for employees returning from work after sick leave to have a return to work meeting with their line manager:

Adjustment sought

(t) Having someone other than DP conduct return to work meetings on 5 October 2018 (see page 256), on 1 November 2018 (see page 280) and on 15 January 2019;

(u) The substantial disadvantage which the claimant suffered as a result of this PCP is the exacerbation of her anxiety and depression, the delay of her return to work and ultimately, her resignation. We accept that the claimant has shown that in the respondent not adapting their normal practice as to who should conduct return to work meetings, this did cause the claimant these disadvantages which were substantial in view of her mental health issues at that time. As such the duty arises.

(v) The issue we go on to consider is whether the adjustment would have alleviated that disadvantage and whether such adjustment was a reasonable one to make. The claimant as at the dates of each of the return to work meetings was of the view that Ms Perchard was not empathetic to her mental health conditions. She therefore did not want to discuss her health with her. Her view stemmed from her incorrect view of

Ms Perchard's responses and attitude at a meeting in December 2017 and the fact that she considered Ms Perchard was being awkward in her not agreeing to the claimant changing a period of annual leave to parental leave. We accept that the claimant's view of Ms Perchard would have made it likely that if those meetings had been with someone else, that would have assisted the claimant in that she would have been more comfortable. The only other person who could have conducted these was Ms Johnson Griffiths. As at 5 October and 1 November, the claimant also had the view that Ms Johnson Griffiths was not empathetic towards her and therefore we do not consider that the disadvantage would have been alleviated at that stage. By 15 January she was more comfortable with Ms Johnson Griffiths.

(w) Was it therefore a reasonable adjustment for the respondent to make? In looking at this, it is necessary to understand the respondent's position. It had to consider both employees. Ms Perchard needed to be able to manage her staff and it was causing her distress and frustrations that she was not permitted to do so. The claimant's position was inconsistent in that she had a period of months when she was happy to be managed by Ms Perchard, and then she changed her view after Ms Perchard refused her request to convert her annual leave. She also initially did not consider that Ms Johnson-Griffiths was empathetic but later took a different view.

(x) We find that it would have been difficult for Ms Johnson-Griffiths to conduct a return to work meeting as the claimant's health and ability to reintegrate into the workplace was inextricably linked with her workload and how her work was to be carried out upon her return. On each occasion upon the return to work Ms Johnson-Griffiths had a meeting with the claimant when she refused to meet with Ms Perchard, but these were not satisfactory and left issues outstanding. On balance therefore, we consider that the respondent has shown that it was not a reasonable adjustment for the claimant to insist that she not have her RTW meetings with Ms Perchard on those occasions.

<u>With regard to the PCP of the practice of permitting employees to be accompanied to meetings only by work colleagues or trade union representatives</u>:

<u>Adjustment sought</u>

(y) *permitting the claimant's husband to attend the meeting to discuss her resignation on 4 April 2019.*

(z) This was a meeting after the claimant had resigned and was to see if the situation could be recovered. It was convened at the respondent's request. With her disability, the claimant has shown that she was placed at the substantial disadvantage in that her mental health issues were further exacerbated. She had been absent from work since January and for long periods prior to that. Her contact with work colleagues was limited. She needed someone familiar with her for support and she requested that her husband accompany her. This was turned down by

the respondent. The claimant has discharged the initial burden. We consider that this was a reasonable adjustment to make, there would have been little inconvenience to the respondent and it would have assisted. The respondent has not put forward any reason other than it was not in line with their policies. It seems that the respondent again followed their procedures without giving consideration to the individual's particular needs. We consider that allowing the claimant's husband to attend would have alleviated the disadvantage suffered by the claimant. This claim therefore succeeds.

Unfair Dismissal

74. The claimant resigned in circumstances which she says amounted to a dismissal within section 95(c) of the Employment Rights Act 1996. It is for her to show that she was dismissed. She relies upon the implied term of trust and confidence and says that the conduct of the respondent during the period from December 2019 onwards caused her to resign.

75. The conduct which she relies upon is essentially the same issues which she raises as allegations of discrimination, including the failure by the respondent in its duty to make reasonable adjustments. These are set out in her letter of resignation and are detailed at paragraph 44 above.

76. We must therefore consider whether the respondent without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

77. Of the conduct about which the claimant complains, our findings of fact in many respects do not support the claimant's view of the respondent's actions. Many of the incidents, we consider were not as she describes or were not intended or likely to destroy or seriously damage their relationship. Unfortunately, possibly as a result of her disability, the claimant was overly sensitive to the respondent's motives. This led her to see Ms Perchard and Ms Johnson-Griffiths acting in an unreasonable manner towards her and her requests, when there was often proper cause for the decisions which they took.

78. There were however acts of unlawful discrimination, which for the reasons set out above we find were without reasonable cause, and which were likely to seriously damage the relationship with the claimant. These were the decision from January 2019 to not permit the claimant to work reduced hours, or explore with her how that might work; and the refusal to allow the claimant to return on a phased basis on 29 October and 12 November 2018. The reduced hours and the phased return issue (which was one of the matters which she says exacerbated her mental health condition) were both referred to in the claimant's resignation letter.

79. Having received the occupational health report recommending reduced hours and noting the claimant's clear wish to return to work after her period of absence, their decision not to allow reduced hours at that stage and defer it to after the recruitment process had no reasonable basis. Neither did the refusal to allow the claimant to return on a phased basis on 29 October and then again on 12 November because it was not in line with the respondent's policies. Both decisions were likely

to seriously damage the trust and confidence between the claimant and the respondent for the reasons set out above. As such the test in Malik is met. The failure to make the adjustments of reduced hours was ongoing until the claimant resigned and it was the respondent's discriminatory conduct which formed part of her reasons for resigning.

80. The respondent sought to argue in the hearing that there was a delay, such that the claimant affirmed the contract, as she resigned on notice. We do not accept this as a principle. In any event, the claimant gave notice on 26 March 2019. On 8 April she met with the respondent and reaffirmed her decision to leave. For the remainder of the period of her notice the claimant was on sickness absence. We find that there was no delay.

81. We find that the claimant was dismissed.

82. The respondent has pleaded that the reason for the dismissal was some other substantial reason. It did not elaborate upon this in the hearing or in the submissions. In failing to detail this, we consider that the respondent has been unable to show a fair reason for the claimant's dismissal.

83. As such the dismissal was unfair.

84. The Tribunal apologies to the parties for the delay in producing this reserved judgment, which was in part because of difficulties in accommodating a further day of deliberations.

Employment Judge Benson
Date 23 March 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
30 March 2021

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.