EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms K Tasker	v	Jameson Carter Limited

Heard at: Reading by CVP **On**: 26, 27 and 28 January 2022

Before: Employment Judge Hawksworth
Mrs S Laurence-Doig
Ms S Morgan

Appearances
For the Claimant: In person
For the Respondent: Ms L Hatch (counsel)

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that:

1. The claimant's complaint of failure to make reasonable adjustments succeeds.

2. The claimant's complaint of direct disability discrimination fails and is dismissed.

3. The claimant's claim for holiday pay fails and is dismissed.

4. The remedy to which the claimant is entitled will be decided at the remedy hearing which has already been listed. Case management orders will be sent separately.

REASONS

Claim, hearings and evidence

1. The claimant was employed by the respondent from 19 September 2018 until her dismissal on 4 October 2019. In a claim form presented on 28 October 2019 after a period of Acas early conciliation from 24 September 2019 to 16 October 2019, the claimant made complaints of direct disability discrimination, failure to make reasonable adjustments and a claim for

holiday pay. The respondent presented its response on 9 December 2019 and defended the claim.

2. There was a preliminary hearing before Employment Judge Vowles on 25 June 2020 at which the issues were identified and case management orders were made for the parties to prepare for the final hearing.

3. The final hearing took place by video hearing (CVP). There was an agreed hearing bundle with 221 pages (paper copy) and 228 pages (electronic copy). The bundle index was hyperlinked which the tribunal found very helpful. References to page numbers in these reasons are to the paper copy bundle. Two pages were added to the bundle on the first day of the hearing (an email dated 16 September 2018 and a screen shot of a text message dated 6 August 2019).

4. After preliminary matters had been dealt with, we took the first morning of the hearing for reading. We began hearing witness evidence at 12.30pm. All the witnesses had exchanged witness statements. We heard witness evidence from the claimant on the first and second day of the hearing. On the second day of the hearing, we heard evidence from the following witnesses for the respondent in this order:

   4.1 Ms Martine Robins, an external HR consultant engaged by the respondent;

   4.2 Mr Raj Bedi, owner and managing director of the respondent.

5. We had the benefit of written closing comments from Ms Hatch which were sent to the claimant and the tribunal on the evening of the second day. These included detailed submissions on the law. On the third day of the hearing Ms Hatch and Ms Tasker made short oral closing comments.

6. Judgment was reserved. We apologise to the parties and representatives for the delay in promulgating this reserved judgment. This reflects the current volume of work in the tribunal.

The Issues

7. The issues for us to decide were set out in the case management summary of the preliminary hearing (bundle page 34.2) as follows:

   7.1 <u>Direct disability discrimination – section 13 Equality Act 2010</u>

      7.1.1 The claimant claims that the less favourable treatment because of disability was the dismissal on 4 October 2019.

      7.1.2 The comparator is hypothetical.

   7.2 <u>Failure to make reasonable adjustments – section 20(4) Equality Act 2010</u>

7.2.1 The claimant claims that a physical feature, namely the stairs to the office, put her at a substantial disadvantage in comparison to persons who are not disabled.

7.2.2 The substantial disadvantage was that due to the claimant's disabilities she was unable, without difficulty, to climb the stairs to access her place of work.

7.2.3 [The claimant said that] the respondent failed to take such steps as was reasonable to have to take to avoid the disadvantage.

7.3 Holiday pay – regulation 30 Working Time Regulations 1998

7.3.1 The claimant claims that she has not been paid her full entitlement of holiday pay on termination of employment.

8. The claimant said at the start of the hearing before us that the claim for holiday pay relates to non-payment of holiday pay accrued during the period for which she was paid in lieu of notice.

9. At the start of the hearing we also clarified that the respondent's position on disability is:

9.1 The respondent accepts that the claimant was disabled at the relevant times by:

9.1.1 Ehlers-Danlos syndrome, also known as hypermobility;

9.1.2 fibromyalgia.

9.2 The respondent does not accept that the claimant was disabled at the relevant times by:

9.2.1 chronic pain syndrome;

9.2.2 chronic fatigue syndrome.

9.3 Another medical condition is accepted by the respondent as a disability but is not relevant to the claim.

10. At the start of the hearing we also clarified the proposed reasonable adjustments as follows:

10.1 the main adjustment proposed by the claimant was working from home with reallocation of some duties;

10.2 the occupational health report suggested the same adjustments as the claimant and in addition:

10.2.1 an office on the ground floor; and

10.2.2 installation of a lift or stair lift .

Findings of fact

11. We make the following findings of fact based on the evidence we heard and read. We decide facts on the balance of probabilities, that means what we think is most likely to have happened.

12. On 19 September 2018 the claimant began working for the respondent as a business support administrator. The respondent is a car dealership which exports premium cars to buyers overseas. Raj Bedi is the owner and managing director. It is a small business; at the time the claimant joined there were about 5 employees.

13. The team worked well together. There was a sales team comprising Mr Bedi and Ms Gamble. Mr Bedi and Ms Gamble worked in the office and remotely as required. Mr Bedi had a part-time personal assistant who supported him. The claimant mainly supported Ms Gamble.

14. The claimant did not have a written job description. Her role and Mr Bedi's PA's role were not exactly the same but they had some similarities, in particular both did sourcing vehicles and preparing quotations for customers and potential customers, and the administration of cash sales transactions (sales not requiring letters of credit). The claimant and Mr Bedi's PA covered parts of each other's work when one was on annual leave. We accept the evidence of Mr Bedi that around 10% to 15% of Mr Bedi's PA's role was the same as the claimant's role. The claimant was also responsible for stationery supplies, this required her to ask the team what they needed and order it online. She did a stationery order once or twice in 10 months.

15. Another person dealt with marketing and the website; when she first joined she worked in the office but her employment arrangements changed and she moved to permanent home working. There was also a part-time accountant.

16. At the time the claimant joined, the respondent was based in a serviced office called Quatro House. There were two lifts in the building. There were also disabled parking spaces by the entrance doors.

17. The claimant used the lifts and the disabled parking spaces. She has an inherited condition called Ehlers-Danlos Syndrome Type 3 (also called hypermobility, severe hypermobility, or hypermobile Ehlers-Danlos Syndrome, hEDS,). She also has fibromyalgia. Both conditions cause the claimant mobility difficulties, pain and fatigue. She has had symptoms for 15 years and they have been gradually worsening over this time. For seven years she has taken prescribed painkillers on a daily basis and she has prescribed medication to deal with the side effects of the painkillers.

<u>Probation review meeting</u>

18. On 27 June 2019 the claimant had a probation review meeting with Mr Bedi (page 62). It was a positive meeting. Mr Bedi was happy with the claimant's work. He confirmed that she had completed her probation and she was given a pay rise.

19. At the review meeting Mr Bedi and the claimant discussed the fact that there was to be a move to a new office, but the new location had not yet been

identified. They were to move from the serviced office (where tea, coffee and cleaning was provided) to a non-serviced office. Mr Bedi and the claimant agreed that after the move the claimant would take on a new role of office general manager, in addition to her business support role. The office manager role would be to ensure adequate office supplies such as tea and coffee, and to deal with any cleaner related activity.

20. The claimant asked Mr Bedi whether he had found or viewed any possible offices for the move. He said he was considering one which he had viewed and was planning to view another. The claimant asked if there were lifts at the office he had viewed, as she would struggle with stairs. He said that there were no lifts but there was only one flight of stairs. The claimant said that, with rest breaks, she could manage one flight of stairs if needed, but could not manage any more than that. She asked about disabled parking and explained that she has a blue badge. Mr Bedi said he did not think there was any disabled parking.

21. Mr Bedi and the claimant also discussed some improvements which were going on to the operational aspects of the business. The business was moving away from paper files to electronic files for security and ease of access. A lot of work was being done on streamlining the respondent's order system to become more electronic, in addition to having standardised paper copies order folders. The intention was to streamline everything using cloud technology and networking files.

22. Mr Bedi and the claimant discussed steps the claimant could take to ensure that the existing electronic customer order folders on the network were better organised to allow easy, efficient access. After the meeting, the claimant began to organise the electronic customer folders as discussed with Mr Bedi.

<u>Office move</u>

23. On 29 July 2019 the respondent moved to its new offices at Priory Court. Staff all worked from home while the office furniture and IT equipment was moved to the office.

24. On 30 July 2019, a Tuesday, the respondent's staff began working from Priory Court. When the claimant arrived at the office, she found that there were no disabled parking spaces, and the allocated parking spaces were on the opposite side of the car park to the entrance. The new office was in a townhouse style building with no lifts. On going into the building, the claimant found that the new office space was on the second floor. To reach the office there were 37 steps divided into six flights with landings. The landings were small square landings, some of which had doors off them. The kitchen was on the first floor of the building.

25. For the remaining four days of the working week, the claimant attempted to manage the stairs, stopping on her way up and down. She experienced considerable additional pain and fatigue. By the weekend she was in agony and unable to move, despite using all her usual coping mechanisms, pain relief methods and medication.

<u>Discussions about reasonable adjustments</u>

26. On Monday 5 August 2019 the claimant texted Mr Bedi. She said she was unable to get into work because of the number of stairs. Mr Bedi asked the claimant to meet him on 6 August 2019.

27. On 6 August 2019 the claimant emailed Mr Bedi a letter headed 'Reasonable adjustment request' (page 66). She said that as a result of the move:

> *"I am now left in the position of being well enough, capable and able to perform my duties but unable to access the office, due to the large number of steep stairs I am required to climb, to do so. This has caused me additional pain, fatigue and muscle weakness, and has hugely exacerbated the symptoms of my hEDS, Fibromyalgia and side effects of my medications. Despite my best efforts to continue last week I have been left struggling to attempt one flight of stairs let alone six, in significant extra pain and struggling to move around, even with supports and mobility aids."*

28. The claimant said that she would like Mr Bedi to consider reasonable adjustments. She said that she thought there was no possibility of a lift or other mechanism being installed, as the office was rented, and a move was unlikely to be an option, as there was likely to be a minimum rental term. She went on to say:

> *"This leaves me with very few options for resolution of this issue that I am aware of, but I am open to any suitable suggestions made by yourself or the rest of the team. The only possible resolution that I can see that would work for both myself and the company, without causing excessive costs, is for me to work remotely from home. I have a laptop that I am happy to use, we use Office 365 on a cloud based service so all electronic files are accessible remotely, once I had met with you to collect the work mobile phone along with my special mouse and wrist supports for use at home, I would have access to email, WhatsApp, Cliq, Zoho, Taskworld and of course the telephone as I would do in the office. I would be able to come for meetings in Costa coffee above Next, which has an accessible lift and disabled parking, as required."*

29. Mr Bedi was shocked that a formal letter had been written and sent to him before the meeting. We find that it was helpful for the claimant to set out clearly in writing the difficulties she was having since the move and her suggestions for addressing them.

30. Mr Bedi and the claimant met at the accessible Costa on 6 August 2019. Mr Bedi offered to set up a kettle, fridge and water facilities on the second floor so that the claimant did not have to go to the first floor to use the kitchen. The claimant said she appreciated this suggestion, but it did not address the issue of her being able to get to the second floor.

31. Mr Bedi said that it was not possible for the claimant to work remotely, as it was an office based role and had been advertised as such. The claimant

offered to work from home temporarily until the situation was resolved but Mr Bedi refused.

32. In terms of next steps, Mr Bedi and the claimant agreed that the claimant would contact Access to Work for help and guidance, but they agreed that making a claim would be likely to take too long to be of assistance, and so they put this on hold. They also agreed that the claimant would look into options to aid mobility up flights of stairs. Mr Bedi emailed the claimant after the meeting to say they should communicate by the end of the following day, as they needed *'to come up with a suitable solution to your problem with accessing the office upstairs'*.

33. The claimant emailed Mr Bedi with an update on 7 August 2019 (page 71). She said Access to Work did not provide any helpline facility other than for claims. She said that she had checked charity, government and equipment suppliers' websites to consider the options to aid mobility. She said they either involved lifts/stair lifts which they had agreed were not suitable, or were stability aids which would still mean the claimant climbing the stairs using her arms to assist and stabilise. She said this was not suitable for her because of the risk of shoulder dislocation and neck issues.

34. She went on to explain that she felt that remote working, while not the ideal solution, could work for both the company and her. She said that at the meeting, Mr Bedi:

> *"Rul[ed] out my request for remote working, saying it only works short term and the job wasn't advertised as a remote working position as it's a support role."*

35. She addressed the concerns Mr Bedi had raised about remote working. She said that working remotely she could do the following:

    35.1 access the electronic folders, files and documents on the cloud;

    35.2 use email, WhatsApp, and electronic systems Zoho, Taskworld, and Cliq;

    35.3 use the telephone;

    35.4 check invoices, sales orders and payment amounts and confirm agreements (these documents being scanned in for records purposes anyway);

    35.5 pdf/quote/proforma requests could be sent by email or Cliq (an online payment system), and would just need the latest order number to be included in the request;

    35.6 freight requests could be sent to her by email or Cliq, and she could complete a shipping request form and send required documentation to the freight provider;

    35.7 she would be able to log in to the Calibre portal as normal;

35.8 she would be happy to attend meetings with Mr Bedi and the team as required, at an accessible location.

36. The claimant said that she would be unable to access the paper customer files in the office. That meant that someone in the office would have to put a tick in the checklist on the paper customer file to keep it up to date.

<u>Meeting on 12 August 2019</u>

37. On 9 August 2019 Mr Bedi sent the claimant a copy of the company sickness policy and suggested that they meet again on 12 August 2019 to go through the options (page 80). The claimant replied to say she could attend the meeting. She said that she was not off sick, she was perfectly well and able to carry out her role but not able to do so due to the change of office location. She said she had offered to work remotely while solutions were investigated, but Mr Bedi had not allowed her to do so (page 80).

38. Mr Bedi and the claimant met on 12 August 2019. In the meeting Mr Bedi set out the reasons why he thought remote working was not possible for the claimant's role. These were:

    - *Who will answer land line calls that come into the office?*
    - *Who will handle outgoing UPS packages that need to be sent out/Management of Calibre bookpacks?*
    - *Discuss specific payment terms on PIs [proforma invoices] with team members*
    - *Handling specific freight related issues e. g. SONCAP inspections, Nepal, BVQI (Sri Lanka)*
    - *Creating new paper order files*
    - *Amending yellow checklist sheet on order files*
    - *Model [specification] configurations — issues will arise that need discussing urgently in house*
    - *Accounts related queries that need checking up with files in house*

39. At the meeting the claimant and Mr Bedi also discussed possible mobility aids to enable the claimant to climb the stairs. Mr Bedi suggested an emergency evacuation chair. The claimant said that was not suitable as it would require someone else to haul her up the stairs on the chair, and it would be humiliating to use on an everyday basis (page 86).

40. Mr Bedi said that the claimant's absence was impacting on workload. The claimant offered to work from home while other solutions were being investigated but Mr Bedi said that was not possible.

41. Mr Bedi and the claimant agreed that the claimant should be referred to an independent occupational health doctor for advice on reasonable adjustments.

42. Mr Bedi prepared notes of the meeting and amended them to include points added by the claimant (page 87).

43. We pause here in the chronology to return to the reasons Mr Bedi gave to explain why he thought the claimant could not work from home. In the

hearing before us, Mr Bedi gave more detail about some of the points he outlined at the meeting on 12 August 2019:

43.1 Land line calls could be diverted to a remote location but Mr Bedi did not think this made sense when the majority of staff were in the office.

43.2 Outgoing UPS packages were car owner manuals, these were often delivered to customers separately from the car itself. Although the booking of UPS deliveries could be done online, packaging and labelling of the physical package could not. The number of packages which needed to be sent out varied, depending on the number of sales and the type of sale. In an average month, there would be between 3 and 7 car sales.

43.3 Proforma invoices which required discussion with team members were in both physical and electronic format.

43.4 The need to handle specific freight issues was the biggest issue as far as Mr Bedi was concerned. Import processes for cars are complex and require detailed paperwork. Phone or email communication with people providing the documents is required. If anything goes wrong with the paperwork, the respondent's team needs to discuss this together. The claimant was not involved with collating, copying or sending on hard copy import documents.

43.5 Management of customer orders was done on both paper and electronic files. The business was moving towards electronic customer files as discussed by the claimant and Mr Bedi on 27 June 2019. A yellow checklist was kept on the paper order files, this was a paper document which showed what steps had been taken and where the order had got to. Mr Bedi has now implemented an electronic version of the checklist as a back-up. Updates are recorded on both the paper copy and the electronic copy.

43.6 Model specification configuration issues arise when manufacturers' prices change. The claimant would need to deal with these by checking manufacturers' websites, downloading brochures, and speaking to suppliers. The team would have to discuss any changes urgently.

<u>Flexible working and doctor's note</u>

44. Returning to the chronology, on 14 August 2019, on advice from the Federation of Small Businesses, Mr Bedi wrote to the claimant suggesting that, further to their discussion on 'the issue of flexible working,' they review the situation one more time (page 93). He asked her to send a written request under the statutory right to make a flexible working request. The claimant replied to say that she was happy to revisit her request for remote working but she was not requesting flexible working, she was requesting reasonable adjustments (page 97).

45. On 15 August 2019 Mr Bedi wrote to the claimant to say that as she had asked to work from home, it was necessary for her to make a flexible

working application as he had said (page 99). He also asked the claimant to provide a doctor's note while they were waiting for the occupational health process to take place.

The claimant's grievance

46. On 16 August 2019 the claimant made a formal written grievance (page 100). She said that she was unable to manage the stairs in the new office and that Mr Bedi had refused to allow her the reasonable adjustment of working remotely from home, even temporarily. She was unhappy about being told that the company sickness policy applied and about being asked for a doctor's note.

47. Mr Bedi replied on 19 August 2019 to say that the grievance process would be started after receipt of the occupational health report (page 106). He said that any consideration of remote working would be subject to the flexible working arrangement application process he had outlined previously.

48. On 20 August 2019, with the date for running the payroll approaching, Mr Bedi wrote to the claimant to say that he would require a doctor's note to address the period of sickness absence since Monday 5 August and that if she did not believe that she was sick, she would be deemed to be on unpaid leave, with the option of using any untaken holiday (page 109). He said he had not received any medical evidence to demonstrate the claimant's inability to climb the stairs.

49. The claimant replied on 20 August 2019 and said that she was not sick and so she could not provide a doctor's sicknote (page 110). She said she was being prevented from working by the refusal to allow her to work from home, and she expected to be paid in full. She said medical evidence had not been requested, but would be provided at the occupational health appointment. Mr Bedi decided to pay the claimant full pay as a gesture of goodwill.

50. Mr Bedi replied to the claimant on 21 August 2019 (page 112). He said that home working was not possible due to the nature of the claimant's office based job. He said that there was a great deal of work sitting in the office which required urgent administration. He reiterated that a flexible working application had to be made, for the claimant '*to put forward a genuine case for remote working*'. He said again that the claimant had not provided medical evidence.

Occupational health assessment

51. The claimant saw the occupational health consultant on 22 August 2019.

52. The respondent received the occupational health report on 28 August 2019 (page 173). The doctor recorded that he had seen the claimant's clinical records and advised that:

    52.1 The claimant has severe hypermobility resulting in regular dislocation or partial dislocation of her joints, the most significant being her right shoulder which typically dislocates about once or twice a month,

following which she is left with pain and spasm. Other joints partially dislocate which also results in pain and spasm;

52.2 she also has Fibromyalgia from which she experiences widespread pain, and associated fatigue;

52.3 she has attended pain clinics and is heavily medicated;

52.4 there is no additional treatment on offer, and the possibility of spontaneous improvement from fibromyalgia was not anticipated.

53. The doctor said:

"Given the severity of her symptoms, and discussion of the other limitations in her day to day life I support the view that she is unable to climb to even a first-floor office other than very occasionally, with varying degrees of pain and fatigue

…[her] health status prevents her climbing stairs to the second floor without severe pain and risk of dislocation."

54. The doctor said that the claimant was fit to undertake her role and 'the issue is purely access'. He suggested that adjustments which might assist were:

54.1 An office on the ground floor either close by or remotely;

54.2 Installation of a lift or stairlift;

54.3 If a ground floor office either close by or remote was a possible adjustment, then *"it may help if those aspects of the role which require her presence in the current office could be reassigned to others, and some of their duties, which could be managed remotely, assigned to her."*

55. Mr Bedi invited the claimant to a meeting on 4 September to discuss the report (page 117). The respondent engaged Martine Robins, an external HR consultant, and she was also present at the meeting. The invitation letter said that if a return to work in some capacity was not possible, one option that would be considered was the termination of the claimant's employment on the grounds of long-term incapacity for work.

56. Mr Bedi made enquiries with the landlord about the use of a ground floor office in Priory Court but it is a small building and the ground floor was fully occupied, so there was nothing available.

<u>Meeting on 4 September 2019</u>

57. The claimant sent another grievance letter on 23 August 2019 (page 113).

58. Mr Bedi asked Ms Robins to chair the hearing of the claimant's grievance. The grievance meeting took place on 4 September 2019 (page 119).

59. The grievance meeting was attended by Ms Robins, Mr Bedi and the claimant (page 122 and page 128). At the meeting the claimant explained that most of her work could be done remotely: software, specifications, online activity involving looking at the portal or doing shipping requests via the cloud. She suggested that those of her duties which could not be done remotely (packaging of book packs and updating of paper files) could be reassigned to Mr Bedi's PA. The claimant suggested that in return some of Mr Bedi's PA's duties which could be done remotely could be reassigned to the claimant, such as quotes, pro-forma invoices and cash sales. The claimant thought this would balance out their roles and enable the claimant's role to be fully home based.

60. Mr Bedi explained why he thought the claimant's job could not be done from home. He referred to:

    - Answering landline calls
    - Payment terms need to be discussed between team members face to face
    - Model specifications - always issues to discuss internally as these are never straightforward
    - Account information - sensitive information needs to remain in the office
    - Using personal laptop - GDPR issues
    - Freight issues - could use email or portal system but freight is not restricted to simple requests for collection as there are numerous other issues which require internal discussion with team members face to face
    - Landline calls to the office could be diverted to a work mobile for her to cover
    - UPS packages - outgoing including packaging and labelling not possible remotely
    - Creating new paper order files and checklists — all customer orders are maintained on a paper-based folder system which has sensitive information within. These are paramount to the business functioning on a day to day basis and [the claimant's] role is to manage these within the office environment.

61. In relation to GDPR and security issues, the claimant suggested that she could install on her personal laptop or computer the same security or encryption software used by Mr Bedi, Ms Gamble and the marketing executive when they worked from home. She suggested that alternatively the respondent could purchase a specific encrypted laptop for her to use.

62. Although the respondent had suggested that a separate meeting should take place after the grievance meeting, to discuss the occupational health report, there was no separate meeting about this on 4 September.

<u>The percentage of the claimant's work that could not be done/could be done remotely</u>

63. At the hearing before us, one of the tribunal members, Ms Morgan, asked Mr Bedi, *"How much, in percentage terms, of Ms Tasker's role would have*

to be given up to [Mr Bedi's PA] if Ms Tasker worked remotely?" Mr Bedi took a moment to think and then said, *'About 10%'*, adding that this was not scientifically done.

64. The respondent's counsel Ms Hatch summarised this evidence in paragraph 68 of her written closing comments, saying, *'Mr Bedi estimated that about 10% of C's work had to be done in the office although he indicated it was hard to say'.*

65. After the hearing, on 28 January 2022, Ms Hatch wrote to the tribunal to say that Mr Bedi had not read her written closing comments before they were sent to the tribunal. He had now done so and wanted to say that his recollection of this exchange was markedly different. Ms Hatch's note recorded the question he was asked as *'How much of C's job would she have had to give up if working remotely? How much done in office'* Mr Bedi said he thought the question was, *'How much of C's job would she have had if working remotely?*' and his answer of 10% was in response to that question. In other words, Mr Bedi said on 28 January 2022 that on 27 January 2022 he meant to say that the claimant would only be able to do 10% of her role remotely.

66. We have carefully considered our notes of this question, and in particular Ms Morgan's note, as she wrote her question down before she asked it, and read it from her note. Her note records the question as set out in paragraph 63 above. From the way the question was expressed as recorded by Ms Morgan and Ms Hatch, and in particular from the words 'given up to [Mr Bedi's PA] and 'done in the office', we find that it is unlikely that Mr Bedi misunderstood the question as being about the percentage of the role the claimant would retain if working remotely, rather than (as it was) a question about the percentage of the role she would lose.

67. In any event, we find based on all the evidence we heard and read, that the proportion of the claimant's job which she would not have been able to do if she had been working remotely was around 10%, not 90%. Most of the points in the lists of office based activities Mr Bedi gave the claimant on 12 August and 4 September could, on closer investigation, have been done from home. We discussed them in detail with Mr Bedi at the hearing. They were either things that could have been done online or by telephone (such as communicating with people providing import documents or dealing with model specification configuration issues), or they were things which needed discussion with team members. Even though Mr Bedi said that discussions should be face to face, there was no reason why they could not have been conducted by telephone. Landline calls to the office could, as Mr Bedi accepted, have been diverted to the claimant's work mobile.

68. There were very few tasks which had to be done in the office. We find that the only parts of the claimant's business support role which could not have been done from home were administration and checking of paper customer order files (including the paper checklist) and packaging and labelling of the UPS parcels (of which there were on average 3-7 per month, or 1-2 a week). The main element of the role which could not be done from home was the administration of paper files.

69. The office manager elements of the claimant's role could almost all have been managed remotely as well. The claimant could have messaged or emailed the team to check when office supplies such as tea and coffee were required, and could then have made the order online. This was the same approach she took to stationery orders when she was working in the Quatro House office. She would have been able to set up cleaning services remotely and could have dealt with the provider remotely. She would not have been able to check that the cleaning was being carried out properly, and would have had to ask the team about this.

Grievance outcome

70. The outcome of the grievance was sent to the claimant on 18 September 2019 (page 131). Mr Bedi and Ms Robins made the decision in consultation. They decided that the claimant's grievance was not upheld. They decided that Mr Bedi was not aware of the claimant's disability at the time of the probationary review with the claimant, that Mr Bedi had to understand the claimant's situation fully before deciding what action to take in response to the claimant's request for reasonable adjustments, that he had assumed the flexible working process was appropriate and that the claimant had been paid full pay for August 2019. Mr Bedi's understanding was that the main reason for the grievance being rejected was because the claimant had not provided formal medical evidence of her disability before the office move.

71. The outcome letter said the claimant could appeal the decision to Mr Bedi. The claimant decided not to appeal. She had concerns about the fairness of the process given that her complaints were about Mr Bedi and he was the decision maker. She did not feel that she would have sufficient time to appeal and then notify Acas for early conciliation within the required time limits.

Dismissal

72. On 27 September 2019 Mr Bedi wrote to the claimant to invite her to a meeting to consider her long-term absence from work (page 136). The letter said that if a return to work in some capacity was not possible, one option that would be considered was the termination of the claimant's employment on the grounds of long-term incapacity for work.

73. The meeting took place on 30 September 2019 (page 140). Mr Bedi proposed putting a stool or chair on each stair level (landing) 'to minimise any discomfort caused in climbing the stairs'. The claimant said this was not suitable due to her medical condition as explained in the Occupational health report.

74. Mr Bedi wrote to the claimant on 1 October 2019 to say that the respondent was considering terminating her employment on the grounds of long-term incapacity for work (page 141). He invited her to attend a further meeting on 4 October 2019.

75. At the meeting on 4 October 2019 Mr Bedi confirmed that the respondent could not agree to remote working (page 143). The claimant was dismissed

with effect from 4 October 2019. She was paid one month's pay in lieu of notice, and for accrued but untaken holiday leave.

76. The respondent did not replace the claimant after she was dismissed.

Holiday pay

77. The claimant said that she was entitled to pay for holiday which accrued during the period for which she was paid in lieu of notice.

78. The claimant's contract of employment said that she was entitled to 28 days holiday in each holiday year (from 1 January to 31 December), including public holidays.

79. The contract said at paragraph 4.3:

> *"The Company … may, in its absolute discretion, pay your salary entitlement in lieu of all or any part of the unexpired period of notice (subject to deduction at source of income tax and applicable national insurance contributions). Any such payment will consist solely of basic salary as at the date of termination and, for the avoidance of doubt, the payment in lieu of notice shall not include any element relating to any bonus or commission payments that might otherwise have been due, any payment in respect of benefits which you would have been entitled to receive or any payment in respect of any annual leave entitlement that would have accrued during the period for which the payment in lieu is made…"*

The Law

Direct disability discrimination

80. Disability is a protected characteristic under sections 4 and 6 of the Equality Act 2010.

81. Section 13(1) of the Equality Act provides:

> *"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

82. Section 23 provides:

> *"(1) On a comparison of cases for the purposes of section 13, 14 or 19 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."*

83. As was explained in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11 [2003] IRLR 285:

> "*the comparator …must be a comparator in the same position in all material respects … save that he or she is not a member of the protected class.*"

84. The claimant relies on a hypothetical comparator.

Failure to make reasonable adjustments

85. The Equality Act imposes a duty on employers to make reasonable adjustments. The duty comprises three requirements, in this case, the second requirement is relevant. This is set out in sub-section 20(4):

> *"(4) The second requirement is a requirement, where a physical feature 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."*

86. In relation to the second requirement, s 20(9) of the Equality Act provides that reference to avoiding a substantial disadvantage includes reference to:

> *"(a) removing the physical feature in question,*
> *(b) altering it, or*
> *(c) providing a reasonable means of avoiding it."*

87. Paragraph 20 of schedule 8 of the Equality Act says that an employer, A, is not subject to a duty to make reasonable adjustments:

> *"if A does not know, and could not reasonably be expected to know –*
>
> *…*
>
> *(b) … that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."*

88. The EHRC Code of Practice describes the duty to make reasonable adjustments as:

> *'a cornerstone of the Act which requires employers to take positive steps to ensure that disabled people can access and progress in employment. This goes beyond simply avoiding treating disabled workers, job applicants and potential job applicants unfavourably and means taking additional steps to which non-disabled workers and applicants are not entitled'*.

89. In *Redcar and Cleveland Primary Care Trust v Lonsdale* UKEAT/0090/12, [2013] EqLR 791, HHJ Peter Clark explained that the duty to make reasonable adjustments can involve *'treating disabled people more favourably than those who are not disabled'.*

90. In *Environment Agency v Rowan* [2008] IRLR 20, [2008] ICR 218 the EAT said that in order to make a finding of failure to make reasonable adjustments there must be identification of:

    "(a) the provision, criteria or practice applied by or on behalf of an employer; or
    (b) the physical feature of premises occupied by the employer;
    (c) the identity of non-disabled comparators (where appropriate); and
    (d) the nature and extent of the substantial disadvantage suffered by the claimant."

91. In *Newham Sixth Form College v Saunders* [2014] EWCA Civ 734 Laws LJ said:

    "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."

<u>Burden of proof in complaints under the Equality Act 2010</u>

92. Sections 136(2) and (3) provide for a shifting burden of proof:

    "(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) This does not apply if A shows that A did not contravene the provision."

93. This means that if there are facts from which the tribunal could properly and fairly conclude that there has been unlawful discrimination, the burden of proof shifts to the respondent.

94. In a complaint of failure to make reasonable adjustments, for the burden to shift, the claimant must demonstrate that there is a PCP causing a substantial disadvantage and evidence of some apparently reasonable adjustment that could have been made (*Project Management Institute v Latif* 2007 IRLR 579, EAT).

95. If the burden shifts to the respondent, the respondent must then provide an "adequate" explanation, which proves on the balance of probabilities that the respondent did not fail to make reasonable adjustments.

96. The respondent would normally be expected to produce "cogent evidence" to discharge the burden of proof. If there is a prima facie case and the explanation for that treatment is unsatisfactory or inadequate, then it is mandatory for the tribunal to make a finding of discrimination.

<u>Holiday pay on termination</u>

97. Regulation 14(1) and (2) of the Working Time Regulations 1998 say that:

"(1) Paragraphs (1) to (4) of this regulation apply where -

(a) a worker's employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3)."

Conclusions

98. We have applied the legal principles to our findings of fact to reach our conclusions in respect of the issues we had to decide. We have addressed the issues in a different order, starting by considering the complaints of failure to make reasonable adjustments, then direct disability discrimination and the holiday pay claim.

<u>Disability and the respondent's knowledge of disability</u>

99. The respondent accepts that the claimant was a disabled person at the material time within the meaning of section 6 and schedule 1 of the Equality Act, because of Ehlers-Danlos syndrome and fibromyalgia.

100. We have found, based on the occupational health report, that the claimant experiences widespread pain and associated fatigue as a result of her fibromyalgia. It is not necessary for us to decide whether the claimant has separate conditions of chronic pain syndrome and chronic fatigue syndrome and whether those are disabilities within the meaning of the Equality Act. The claimant experiences widespread pain and associated fatigue as symptoms of her fibromyalgia which is accepted to be a disability.

101. The respondent knew that the claimant was disabled by Ehlers-Danlos syndrome and fibromyalgia from 28 August 2019 when Mr Bedi received the occupational health report. The report set out the claimant's health conditions and explained the impact of those conditions on her.

102. We heard a lot of evidence about whether the respondent knew about the claimant's disabilities before receiving the occupational health report. We do not think this issue is relevant to the issues we have to decide. However, for completeness, we record that we have concluded that from 27 June 2019 the respondent could reasonably have been expected to know that the claimant was disabled. This is because on that day the claimant told Mr Bedi that she would struggle with stairs and she could not manage more than one flight, she asked about disabled parking and she said that she was a blue badge holder. The respondent could reasonably have been expected to know from this that the claimant was disabled.

Failure to make reasonable adjustments

103. This is not a case where the claimant complains about a provision, criteria or practice applied by the employer. Instead, the claimant relies on the second requirement which relates to the physical features of the premises occupied by the employer.

104. The physical feature of the premises occupied by the employer which the claimant complains about is the 37 stairs which had to be climbed to access the office (as the office was based on the second floor of a building without a lift).

105. The claimant says that the stairs put her at a substantial disadvantage in comparison with persons who are not disabled. The non-disabled comparators are people who do not have Ehlers-Danlos syndrome and/or fibromyalgia. The nature and extent of the substantial disadvantage is that the claimant is unable to climb to even a first floor office other than very occasionally with varying degrees of pain and fatigue, and is prevented from climbing stairs to the second floor without severe pain and risk of dislocation. She was unable to get to work. It was, as the occupational health doctor said, purely a matter of access.

106. The respondent knew that the claimant was likely to be placed at that disadvantage, because the occupational health report clearly explained the disadvantage she was under. It said that she was unable to climb the stairs to the second floor.

107. The adjustments which were proposed by the claimant and the occupational health doctor as steps which could be taken to avoid the disadvantage were:

    107.1 working from home with reallocation of some duties;
    107.2 an office on the ground floor; and
    107.3 installation of a lift or stair lift.

108. The respondent had investigated the possibility of an office on the ground floor, and there was none available. The parties agreed that the installation of a lift or stair lift was not viable because of the nature of the premises and the fact that they were rented. The only remaining suggested adjustment was to allow the claimant to work from home.

109. The claimant suggested that she could be allowed to work from home, with reallocation of some duties between her and Mr Bedi’s PA. This adjustment would have been a means of avoiding the disadvantage the claimant was under, because it would have meant that she did not have to climb the stairs to get to the respondent’s office.

110. We have concluded that allowing the claimant to work from home with some reallocated duties would have been a reasonable step for the respondent to take because:

110.1 The claimant was a valued employee and the respondent was happy with her performance. The team worked well together;

110.2 Some of the respondent's staff worked remotely as required, the marketing executive worked permanently from home, and all staff worked from home on the day of the move;

110.3 We have found that the claimant could have done around 90% of her job from home;

110.4 The 10% of the claimant's role which she could not do from home (administration of paper files, paper file checks, packaging and labelling of UPS parcels and checking cleaning services) could have been reassigned to Mr Bedi's PA;

110.5 The reassignment of these tasks to Mr Bedi's PA could have been balanced out by the respondent reassigning around 10% of Mr Bedi's PA's role to the claimant. Around 10% to 15% of Ms Bedi's PA's role was tasks which the claimant could do and which could be done from home (sourcing vehicles, preparing quotations, and cash sales transactions);

110.6 The reassignment of tasks between the claimant and Mr Bedi's PA would have resulted in the claimant having a role which could be done fully from home without requiring Mr Bedi's PA to have an increased volume of work;

110.7 The main element of the claimant's role which she could not do from home (the administration of paper files) would have been a temporary issue, as the respondent was moving to electronic files;

110.8 The respondent has since introduced electronic file checklists as a back-up, which suggests this could have been done for the claimant;

110.9 The respondent's concerns about GDPR compliance could have been met by providing the claimant with security/encryption software or hardware (as the claimant understood was provided to the respondent's other staff who worked from home either permanently or from time to time);

110.10 The respondent did not replace the claimant after she was dismissed, and so other staff must have picked up the tasks the claimant was doing, including the tasks which could not be done remotely;

110.11 There was no alternative to allowing the claimant to work from home, because all of the other adjustments the parties had considered did not avoid the disadvantage or were not possible.

This meant that refusing to allow the claimant to work from home would inevitably result in the dismissal of the claimant. The respondent knew this and should therefore have given much more careful consideration to the possibility of allowing her to work from home.

111. The respondent is a small business and Mr Bedi had no experience of a request for reasonable adjustments. Some of the suggestions he made such as the emergency evacuation chair and putting chairs on the landings were clearly inappropriate. We agree that the evacuation chair was for emergency use only and would not have been suitable for daily use. We also agree that, given the small size of the landings, it would not have been safe to leave chairs on them, and in any event this would not have removed the disadvantage for the claimant. Mr Bedi's suggestion to set up a small kitchen on the second floor also did not remove the disadvantage of not being able to reach the office, although the suggestion was appreciated by the claimant.

112. We accept that Mr Bedi was keen to retain the claimant in employment and was open to considering some ways in which this could be done. However, Mr Bedi did appear to have set his mind against remote working. His focus was very much on what could be done to enable the claimant to get up the stairs, and he saw that as the claimant's 'problem'. He decided very early on that working from home was not possible, ruling it out from his first meeting with the claimant. He refused the claimant's requests to work from home temporarily while adjustments were being considered, even though her absence left a heavy workload. He continued to refuse to allow working from home even when it meant that dismissal was the only alternative.

113. The respondent failed to take the step of allowing the claimant to work from home with reallocated duties. This was a reasonable step for the respondent to take and so the respondent failed to make reasonable adjustments for the claimant. The failure to make reasonable adjustments was conduct extending over the period from 6 August to 4 October 2019. The claimant's claim was brought within three months of that period (in fact within three months of the start of that period), and was therefore brought in time.

<u>Direct disability discrimination</u>

114. The dismissal of the claimant was a detriment. To consider whether it amounted to less favourable treatment, we need to consider whether the claimant's hypothetical comparator would have been treated better than the claimant.

115. Section 23(2) requires us to consider a hypothetical comparator with the same abilities as the claimant, in other words someone who was also unable to climb the stairs to the office. We have concluded that the respondent would have treated another employee who was unable to climb the stairs in the same way as the claimant was treated. The reason for the claimant's dismissal was not her disability, it was her inability to climb the

stairs. We conclude that she was not dismissed because of her disability and the claim of direct disability discrimination fails.

116. The claimant did not bring any complaint of discrimination arising from disability.

<u>Holiday pay</u>

117. The claimant explained that her holiday pay complaint was about her entitlement to pay in lieu of the holiday she would have accrued during her notice period, for which she received pay in lieu.

118. The claimant was entitled to statutory and contractual annual leave. Pay for untaken but accrued statutory annual leave on termination of employment is calculated to the date of termination (regulation 14(1)(b) of the Working Time Regulations). There is therefore no entitlement under the Working Time Regulations for annual leave to accrue during a period in respect of which a payment in lieu has been made. There is no entitlement to any annual leave for the period after the employment has ended.

119. Similarly, the claimant was not entitled to accrue contractual annual leave during the period for which she received pay in lieu. Paragraph 4.3 of the contract of employment expressly said that where a payment in lieu was made, it did not include any entitlement to annual leave.

120. The claimant was not entitled to any pay for holiday which would have accrued during the period for which she was paid in lieu of notice.

Summary

121. In summary:

    121.1 the complaint of failure to make reasonable adjustments succeeds;
    121.2 the complaint of direct disability discrimination fails and is dismissed;
    121.3 the claim for holiday pay fails and is dismissed.

Remedy

122. At the end of the liability hearing a date was set for a remedy hearing, in line with the tribunal's usual practice. Case management orders for that hearing will be sent separately.

Employment Judge Hawksworth

Date: 18 March 2022

Judgment and Reasons sent to the parties
On: 23 March 2022

For the Tribunal Office

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