EMPLOYMENT TRIBUNALS

Claimant: Miss L Whyman

Respondent: Gristwood and Toms Limited

Heard at: Watford (remotely by video) **On:** 15-17 August 2022

Before: Employment Judge S Shore
NLM – Mrs J Hancock
NLM – Ms S Hamill

Appearances

For the claimant: Mr A Donnelly, Solicitor
For the respondent: Ms J Williams, Solicitor

JUDGMENT AND REASONS ON LIABILITY

The unanimous decision of the Tribunal is that:

1. The claimant's claim of constructive unfair dismissal contrary to sections 94, 95 and 98 of the Employment Rights Act 1996 succeeds. No deduction in compensation will apply because of any contributory conduct by the clamant or the principle in the case of **Polkey v A E Dayton Services Ltd** [1987] UKHL 8.

2. The claimant's claim of automatic unfair dismissal for the reason or principal reason that in circumstances of danger which she reasonably believed to be serious or imminent and which she could not reasonably be expected to avert, she refused to return to her place of work contrary to section 100(1)(d) of the Employment Rights Act 1996 fails.

3. The claimant's claim of discrimination arising from disability (contrary to section 15 of the Equality Act 2010) by:

    3.1. Requiring her to work on one or two days per week in the office from the week commencing 3 August 2020; and or

3.2. Failing to allow her to continue to work from home

succeeds.

4. The claimant's claim of indirect discrimination (contrary to section 19 of the Equality Act 2010) because of the protected characteristic of disability by applying the PCP of requiring administrative assistants to attend the respondent's head office on one or two days per week from the week commencing 3 August 2020 succeeds.

5. The claimant's claim of failure to make reasonable adjustments (contrary to sections 20 and 21 of the Equality Act 2010) by applying the PCP of requiring administrative assistants to attend the respondent's head office on one or two days per week from the week commencing 3 August 2020 succeeds.

6. A case management order and notice of hearing for remedy will be sent to the parties under separate cover. The remedy hearing is listed for 24 October 2022 by video.

REASONS

Introduction and History of Proceedings

1. The claimant was employed by the respondent as an Administrator from 6 June 2013 to 4 September 2020, following her resignation on notice dated 5 August 2020. Her ET1 was presented to the Tribunal on 18 September 2020.

2. The claimant presented claims of:

    2.1. Constructive unfair dismissal contrary to sections 94, 95 and 98 of the Employment Rights Act 1996.

    2.2. Automatic unfair dismissal for the reason or principal reason that in circumstances of danger which she reasonably believed to be serious or imminent and which she could not reasonably be expected to avert, she refused to return to her place of work contrary to section 100(1)(d) of the Employment Rights Act 1996.

    2.3. Discrimination arising from disability contrary to section 15 of the Equality Act 2010 by:

        2.3.1. Requiring her to work on one or two days per week in the office from the week commencing 3 August 2020; and or

        2.3.2. Failing to allow her to continue to work from home.

    2.4. Indirect discrimination because of the protected characteristic of disability contrary to section 19 of the Equality Act 2010 by applying

the PCP of requiring administrative assistants to attend the respondent's head office on one or two days per week from the week commencing 3 August 2020.

2.5. Failure to make reasonable adjustments (contrary to sections 20 and 21 of the Equality Act 2010) by applying the PCP of requiring administrative assistants to attend the respondent's head office on one or two days per week from the week commencing 3 August 2020 succeeds.

3. The claims were case managed on 28 July 2021 by Employment Judge McNeill QC, who agreed with the parties what claims that the claimant was making and the issues in the case in a case management order dated 28 July 2021 [24-30].

Issues

4. The list of issues agreed by the parties and EJ McNeill is as follows:

Constructive unfair dismissal

1. *The Claimant is a clinically vulnerable person who was advised to shield during the Covid-19 pandemic. In that context, in requiring the Claimant to work from the Respondent's office one or two days a week from 3 August 2020, did the Respondent act in breach of the term of mutual trust and confidence in the Claimant's contract of employment?*

2. *If so, did the Claimant resign in response to such a breach so that her resignation constituted a dismissal within the meaning of section 95(1)(c) of the Employment Rights Act 1996 (ERA)?*

3. *If so, what was the reason or principal reason for dismissal and was the dismissal fair or unfair within the meaning of section 98(4) of the ERA?*

Automatic unfair dismissal: section 100(1)(d) of the ERA

4. *Was the reason or principal reason for the Claimant's dismissal that she refused to return to her place of work in circumstances of danger which she reasonably believed to be serious and imminent and which she could not reasonably have been expected to avert? The Claimant relies on the danger posed by Covid-19 to her as a clinically vulnerable person.*

5. *The Respondent disputes that section 100(1)(d) can apply in circumstances of constructive dismissal. It contends that the section is only apt to apply where the employer has dismissed the employee. The Claimant disputes this and contends that section 100(1)(d) can apply in circumstances of constructive dismissal.*

Disability

6. *The Respondent accepts that the Claimant is and was at all relevant times a disabled person within the meaning of section 6 of the EqA because of her condition of rheumatoid arthritis.*

7. *The Respondent accepts that it had knowledge of the Claimant's disability at all relevant times.*

   EqA, section 15: discrimination arising from disability

8. *At the relevant time (which appears to be the time at which the Claimant was required to return to the office, although this was not clearly stated by the parties), did the Claimant's disability (rheumatoid arthritis) cause, have the consequence of, or result in "something"? The Claimant claims that the "something" was:*

   8.1. *Placement in the Covid-19 extremely vulnerable category;*

   8.2. *A requirement to shield at home;*

   8.3. *A requirement to work from home unless it was "impossible" to do so;*

   8.4. *An inability to return to work at the Respondent's head office for one or 2 days a week from w/c 3 August 2020; and/or*

   8.5. *Stress and anxiety brought about by her disability/the prospect of returning to work at the Respondent's head office.*

9. *Did the Respondent's requirement that the Claimant should work one or two days in the office and its failure to allow her to work from home amount to unfavourable treatment because of all or any of those "somethings"?*

10. *If so, was that treatment a proportionate means of achieving a legitimate aim? The legitimate aim relied on by the Respondent is the need to support other workers in carrying out their work.*

    EqA, section 19: indirect disability discrimination

11. *Did the Respondent apply a provision, criterion or practice (PCP) to the Claimant, namely requiring all administrative assistants to work from the Respondent's head office one or two days a week from the week commencing 3 August 2020?*

12. *Did that PCP put disabled individuals at a particular disadvantage when compared with non-disabled individuals? The Claimant contends that disabled individuals, in particular those who were clinically vulnerable and advised to shield, were at a higher risk of injury to their health by reason of Covid-19 if they were required to attend the office.*

13. *Did the PCP put the Claimant at that disadvantage?*

14. *If so, can the Respondent show the PCP to be a proportionate means of achieving a legitimate aim? The Respondent relies on the same legitimate aim as is relied on in relation to the Claimant's claim under section 15 of the EqA.*

Reasonable adjustments: EqA, sections 20 & 21

15. *Did the Respondent apply the PCP of requiring administrative assistants to attend the Respondent's head office one or two days a week from the week commencing 3 August 2020?*

16. *If so (and it does not appear to be disputed), did that PCP put individuals with the Claimant's disability at a particular disadvantage when compared with individuals who did not have that disability?*

17. *Did that PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability?*

18. *Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at such a disadvantage?*

19. *Did the Respondent take such steps as were reasonable to avoid any disadvantage? The Claimant contends that she should have been able to work all her hours from home and should not have been required to come into the office.*

Remedy

20. *If the Claimant succeeds in her unfair dismissal claim, she will seek a basic award and a compensatory award.*

    20.1. *What is she entitled to by way of a basic award?*

    20.2. *What is she entitled to by way of a compensatory award for her financial losses?*

21. *The Respondent confirmed that it did not contend for any **Polkey** deduction or any deduction for contributory fault.*

22. *In addition to the above losses, if the Claimant succeeds in all or any of her disability discrimination claims, she will seek in addition to the above compensation, an award for injury to feelings.*

5. As we reserved our Judgment and Reasons on liability, we have not considered remedy. That will be dealt with at a subsequent hearing.

Law

6. For the purposes of the unfair dismissal claims, the relevant sections of the Employment Rights Act 1996 are sections 98 and 100(1)(d).

"Section 98 Employment Rights Act 1996

(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 subsection (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 subsection 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) In subsection (2)(a)—

(a)"capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b)"qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal was 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."

7. Section 100(1)(d) states:

"(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that...

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or..."

8. The statutory law relating to the claimant's claims of discrimination is contained in the Equality Act 2010 (EqA). The relevant sections of the EqA were sections 13 (direct discrimination); section 15 (discrimination arising from disability) and 136 (burden of proof). The relevant provisions are set out here:

Discrimination Definitions

6. Disability

A person (P) has a disability if—

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

There are six types of disability discrimination. The relevant parts of the Equality Act 2010 (sections 13, 15, 19, 20, 26 and 27) are:

15. Discrimination arising from disability
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.
The section 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.

19. Indirect discrimination
A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
A provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
(a) A applies, or would apply, it to persons with whom B does not share the characteristic,
(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c) it puts, or would put, B at that disadvantage, and
(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

20. Adjustments for disabled persons

Duty to make adjustments

(1)Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2)The duty comprises the following three requirements.

(3)The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(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.

(5)The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.

(6)Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7)A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8)A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9)In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—

(a)removing the physical feature in question,

(b)altering it, or

(c)providing a reasonable means of avoiding it.

(10)A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—

(a)a feature arising from the design or construction of a building,

(b)a feature of an approach to, exit from or access to a building,

(c)a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d)any other physical element or quality.

(11)A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12)A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13)The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

21. Failure to comply with duty

(1)A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2)A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3)A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

Housekeeping

9. The parties produced a joint bundle of 162 pages. If we refer to pages in the bundle, the page number(s) will be in square brackets (e.g. [43]). If we refer to a particular paragraph in a document, we will use the silcrow symbol (§) with any paragraph number. If we refer to more than one paragraphs, we will use two silcrows (§§).

10. The claimant produced two additional documents on the first morning of the hearing:

    10.1. A message dated 25 April 2020 that the claimant posted on a work WhatsApp group to which a copy of her Shielding Letter from NHS England dated 22 April 2020 [44-48] was attached. We gave the document page number 163; and

    10.2. Page 11 of the respondent's Coronavirus Risk Assessment Version 6 dated 26 June 2022 that described measures in place for office-based activities. We gave the document page number 164.

11. EJ McNeill's case management order [24] had set aside time to enable the Tribunal to read the papers. We started the hearing at 10:00am, dealt with the confirmation of the claims, list of issues, and other housekeeping matters before adjourning for an hour to complete our reading. We indicated that we would deal with liability as the first matter and would then deal with remedy if required.

12. The claimant gave evidence in person and produced a witness statement dated 29 July 2022 that ran to 78 paragraphs.

13. Evidence was given in person on behalf of the respondent by:

    13.1. Andy Toms, a director of the respondent. His witness statement dated 29 July 2022 consisted of 45 paragraphs.

    13.2. Joan Young, Human Resources Manager for the respondent. Her witness statement dated 15 August 2022 consisted of 40 paragraphs.

14. The claimant was cross-examined by Ms Williams in some detail. Mr Toms and Ms Young were cross-examined by Mr Donnelly. The Tribunal asked some questions of the witnesses.

15. We heard oral submissions from Ms Williams and Mr Donnelly at the end of the second day and reconvened on the third day to continue our deliberations. The attendance of the parties was excused until 2:00pm. It became apparent that we would be unable to complete our deliberations, prepare a judgment and reasons and deliver it to the parties by a reasonable time on the third day, so we decided to reserve our decision. We notified the parties of this at about 12:00pm on the third day.

16. In these reasons, we have anonymised some of the peripheral figures in the case, as the evidence disclosed medical matters that need not be made public. The parties know who the individuals are.

Findings of Fact

Preliminary Comments

17. All findings of fact were made on the balance of probabilities. If a matter was in dispute, we will set out the reasons why we decided to prefer one party's case over the other. If there was no dispute over a matter, we will either record that with the finding or make no comment as to the reason that a particular finding was made. We have not dealt with every single matter that was raised in evidence or the documents. We have only dealt with matters that we found relevant to the issues we have had to determine. No application was made by either side to adjourn this hearing in order to complete disclosure or obtain more documents, so we have dealt with the case on the basis of the documents and evidence produced to us and the claim as set out in the list of issues.

18. We would also mention at this point that we have only made findings on matters that assisted us to answer the questions posed by the list of issues. For example, we read and heard a lot of evidence about matters that predated August 2020. However, the list of issues on the claims of unfair dismissal were based on facts that spanned the early days of August 2020 and the claims of disability discrimination were also largely concerned with facts from the same period.

19. We make the following findings.

Undisputed Facts

20. We should record as a preliminary finding that a large number of relevant facts were not disputed, not challenged or actually agreed by the parties. These were:

    20.1. The respondent provides arboricultural consultancy services, including tree surgery, pest and disease control in trees and tree planting, to local authorities and other large organisations across the south and midlands of England. It has a variable workforce numbering between 120 and 150. The respondent was established more than 40 years ago.

    20.2. The claimant was employed as an Administrator by the respondent from 6 June 2013 to 4 September 2020. She resigned by email on 5 August 2020. The parties entered into a contract of employment dated 30 September 2013 [31-27], which did not feature in our deliberations. The respondent appears to have valued the claimant as a hard-working employee. It was agreed that the respondent was supportive of the claimant in a number of ways, which included paying her at her full rate of pay, rather than at SSP rates, when she was absent because of ill health.

    20.3. The claimant usually worked in an office building at the respondent's premises. We saw photographs of the office where the claimant usually worked.

    20.4. It was properly conceded by the respondent that at all times covered by this claim, the claimant met the definition of 'disabled person' because she had the physical impairment of rheumatoid arthritis that had a significant adverse long-term effect on her ability to carry out day-to-day activities. Part of the claimant's treatment for rheumatoid arthritis are regular injections that have the effect of suppressing her auto-immune system.

    20.5. The respondent acknowledged that it had knowledge that the claimant was a disabled person at all times covered by this case.

    20.6. The claimant did not suggest that she had any other mental or physical impairment that brought her within the definition of 'disabled person'.

    20.7. The claimant dislocated her shoulder in March 2019. She had an operation on the shoulder on 12 March 2020 and was certified unfit to work by her doctor as a result for a period of six weeks.

    20.8. On 26 March 2020, the first lockdown was introduced to counteract the effects of the Covid-19 pandemic. It was agreed that the work the respondent carried out meant that it was regarded as an essential service provider.

    20.9. The claimant began working from home shortly after the first lockdown began and whilst she was still covered by the fit note issued by her GP. We make no adverse findings against either party from this fact.

    20.10. The claimant and a number of her colleagues (including Joan Young) were members of a WhatsApp group which was used for letting one another know when they would be late, or absent, and for exchanging social chat and messages.

20.11. On 22 April 2020, the claimant received a letter from the NHS [44-48] that contained advice about keeping safe, as she was considered to be a person at severe risk of severe illness if they contracted Covid-19. The claimant was advised to shield for 12 weeks: i.e. to 15 July 2020.

20.12. There was some discussion in the hearing about whether or not Joan Young saw the letter when the claimant posted it on the work WhatsApp group on 25 April 2020 [163]. We find that the question was largely immaterial to our consideration, as other evidence made it clear that the respondent was well aware of the claimant's shielding status from 22 May 2020 when the claimant sent her an email [53].

20.13. Ms Young sent the administrative staff at the respondent an email on 22 May 2022 [54] setting out a rota that was due to start the following week for them to attend at the office, as Mr Toms wanted more cover in the office to cover one of the mangers, JN, who was "struggling" when the administrative staff were not in the office.

20.14. The email acknowledged that the claimant's ability to attend the office was dependent on her sourcing childcare, but did not mention her shielding status. The claimant pointed out to Ms Young that she was shielding by email.

20.15. Ms Young accepted that the claimant was shielding and advised her that they would see each other after 30 June.

20.16. On 1 June 2020, the respondent sent all administration staff a copy of version 5 of a Covid 19 Risk Assessment document prepared by its Health and Safety Manager [56-57]. There was an exchange of emails between Ms Young and the claimant about the cleaning measures in place at the respondent's offices. We find no fault in the way that the respondent dealt with those enquiries or the measures it put in place regarding the cleanliness of the offices.

20.17. On 18 June 2020, Ms Young sent the claimant an email asking her to return to the office for one day a week starting the following week. It was not disputed by the respondent that Ms Young knew that the claimant was still shielding. We take judicial knowledge that at this time, it seemed that the pandemic was abating in the United Kingdom, but we find that Ms Young's letter was thoughtless at best and crass at worst. However, it is not a discrete claim of disability discrimination of itself. It does, however, give the Tribunal an indication that the claimant's shielding requirements were not high on the respondent's list of priorities.

20.18. It was accepted by both parties that the claimant reminded Ms Young she was shielding by an email timed at 13:40pm on 18 June [69]. Ms Young responded by email on 19 June, saying that the claimant's shielding letter said she was due to return on 15 June (sic) 2022 [69], which was quickly amended to 15 July by a further email [70], when the claimant pointed out the mistake.

20.19. It was not disputed that the claimant pushed to return to the office at times, for example in her email of 26 June 20220 [88]. The documents

do not show that the claimant was unhappy with the work that she was required to do at home. We find that the claimant's hindsight view of her working arrangements from March 2020 are more negative than the contemporaneous documents suggest.

20.20. The claimant received a further letter from the NHS dated 22 June 2020 [72-75], which we find came with a document titled "Guidance for preparing a safe return to the workplace after shielding" [76-87]. The letter indicated that shielding would end on 1 August 2020. It was not disputed that the claimant sent the letter to Ms Young on 26 June [88].

20.21. Ms Young replied by email dated 26 June 2020 [88]. We note that parts of the email were clumsily worded: particularly the statement that Ms Young had "…spoken to [the Health and Safety Manager] and ***we are happy*** (our emphasis) for you to remain at home until the end of this new shielding letter…" The claimant did not need the respondent's permission to continue to shield.

20.22. It was not disputed by the claimant that she never indicated that she would refuse to return to work on the date planned until the date itself; 5 August 2020. We do not find the claimant's evidence that she failed to raise this with her employer until the last minute because she was afraid to do so was credible because it is not consistent with the tone and language of the many emails between the claimant and Ms Young [53-91].

20.23. The facts relating to 4 and 5 August 2020 are substantially agreed. The issue between the parties is how the Tribunal should interpret the facts. It was not disputed that there was no correspondence between Ms Young and the claimant between 22 July 2020 and 4 August 2020.

20.24. It was not disputed that the claimant had been told and had accepted that she was expected to return to the office to work two days per week [91].

20.25. It was agreed that the requirements for shielding were substantially changed by the NHS letter to all people who were shielding dated 22 June 2020 [72-75] and the NHS guidance on returning to work that was attached [76-87] and that the guidance was now that from 1 August 2020, people who had been shielding could return to work if they were unable to work from home and the working environment was Covid-secure [77].

20.26. It was not disputed that the claimant's email to Ms Young of 22 July [90] indicated a deterioration in her mental health, but stated that "…I am hoping that my return to the office will help me feel normal again."

20.27. The claimant emailed Ms Young at 10:45am on 4 August 2020 [92] and stated:

> *"I am really feeling anxious about returning to work tomorrow I am stressing about it so much its making me ill.*

I feel I cant just immediately do this I feel safe at home working and its going to take little steps to get myself used to going out.

Can I call you in a bit for a chat?"

20.28. It was agreed that Ms Young did not respond before the clamant rang her later on 4 August. The exact contents of the conversation are disputed, so we will deal with them below, but we would make the following findings on what was agreed evidence:

20.28.1. Ms Young's witness statement attempts to draw a comparison with the claimant's situation and that of an older colleague, BD. The point of the comparison seemed to be that BD was anxious about returning because she was older and therefore at higher risk of infection. We found the compassion to be spurious and indicative of an attitude on the part of the respondent that the claimant's disability warranted less weight than the concept of seeming to be fair to all the administration staff;

20.28.2. The thrust of the respondent's case appeared to be that 'all the other administration staff were returning, so why shouldn't the claimant', which we find to be a deliberate failure to consider the effect of the anxiety that the clamant developed as a result of her concerns about contracting Covid;

20.28.3. We find no fault in Ms Young's suggestion that the claimant seek medical assistance, given the nature of the mental health crisis she had disclosed; and

20.28.4. It was agreed that the claimant told Ms Young that she was going on holiday the following week.

20.29. The claimant emailed Mr Toms at 6:26am on 5 August 2020, the day of her agreed return. Her request was to be allowed to continue to work from home, as she asserted that she could do all the work from there and did not need to visit the office. She explained that she was struggling with the thought of returning and needed to take steps to "…get used to getting back to normal and going outside…" The claimant asked Mr Toms to "contact me to discuss" after 10:00am.

20.30. Mr Toms replied by email at 08:34am on 5 August [99-100]. It was his unchallenged oral evidence that he spoke to Ms Young before he replied to the claimant. The whole email bears reproduction, as it is the key to the case:

"Hi Lisa,

I am sorry that you are struggling with coming back to work but to maintain fairness I have asked all office staff to

return to work a minimum of two days a week to support both myself and the managers at Shenley.

At all stages we have followed the government guidelines and feel we have put in place measures which enable our staff to feel the workplace is safe.

All shielded staff have returned to work and I do not accept that you can fulfil your role fully from home and to be fair to other staff you are required to return to work today.

Your colleagues have agreed to alter their days to accommodate your return and we have done everything possible to allow safe working.

I can only reiterate the view of our HR manager Joan Young that if your anxiety is preventing you from returning to work then you must seek medical advice and provide the necessary documentation to claim SSP.

I am unable to phone you between 10 and 12 as I have interviews.
Please confirm that you will be returning today as requested.

Regards

Andy"

20.31. We make the following findings on the above email:

20.31.1. Mr Toms repeated the idea that the claimant's request was unfair on her colleagues;

20.31.2. He made no attempt to rationalise his response by reference to the claimant's disability or her appeal to be allowed to take "small steps" towards her return;

20.31.3. He made the statement that "all shielding staff had returned to work", whilst Ms Young, the HR Manager could not say how many shielding staff the respondent had. We find Mr Toms' statement in this regard to be disingenuous and perhaps conflating the specific meaning of "shielding" with the more general lockdown requirement "to work from home" ;

20.31.4. We find Mr Toms' reference to "SSP" if the claimant went off due to ill health to be deliberate. SSP is not the same as company sick pay, which the claimant had always received when off sick previously; and

20.31.5. We find the end of the email contained a veiled threat that there would be repercussions for the claimant if she

did not return to work on 5 August. There was no offer to call the claimant at a time that would have fitted in with Mr Toms' diary. There was no reassurance to the claimant to stay at home until they could speak and resolve the matter.

20.32. The claimant did not wait until 10:00am and resigned by email timed at 9:30 on 5 August 2020 [99]. Her email simply stated that "Unfortunately, I cannot come into work and appreciate measures have been put in place."

20.33. We do not find that the claimant's WhatsApp exchanges with her colleague KR on 4 August 2020 [93-98] added anything of any weight to the facts in the case.

20.34. The claimant's ET1 was presented on 18 September 2020.

21. There was not much dispute about what happened. The dispute between the parties is the interpretation that should be put on the events that were largely agreed.

Points of Dispute

Factual Basis of Claims

22. It is important to keep in mind the factual basis of the claimant's claims that were set out in the list of issues:

22.1. **"Standard" Unfair Dismissal** – the factual basis of the claimant's claim was that the claimant, who was advised to shield, was required to work in the respondent's office for two days per week from the week commencing 3 August 2022. Facts relating to those circumstances are the only ones that we considered in respect of this claim.

22.2. **Automatic Unfair Dismissal** – the factual basis of the claim was that the claimant refused to return to her place of work in circumstances of danger which she reasonably believed to be serious and imminent and which she could not reasonably have been expected to avert. . Facts relating to those circumstances are the only ones that we considered in respect of this claim.

22.3. **Discrimination arising from disability** – we are restricted to making findings of fact on:

22.3.1. The "somethings arising" contended for*;*

22.3.2. Whether the respondent's requirement that the Claimant should work one or two days in the office and its failure to allow her to work from home amount to unfavourable treatment because of all or any of those "somethings"; and

22.3.3. Proportionality.

22.4. **Indirect Disability Discrimination –** we are restricted to making findings of fact on:

22.4.1. Whether the respondent applied the PCP contended for: requiring all administrative assistants to work at the respondent's head office on two days per week from the week commencing 3 August 2020;

22.4.2. Did the PCP put disabled individuals at a particular disadvantage when compared with non-disabled individuals;

22.4.3. Did the PCP put the claimant at that disadvantage; and

22.4.4. Proportionality.

22.5. **Reasonable Adjustments** – we are restricted to making findings of fact on:

22.5.1. Whether the respondent applied the PCP contended for: requiring all administrative assistants to work at the respondent's head office on two days per week from the week commencing 3 August 2020;

22.5.2. Did the PCP put individuals with the claimant's disability at a particular disadvantage when compared with individuals who did not have that disability;

22.5.3. Did the respondent know that the claimant was likely to be placed as such disadvantage; and

22.5.4. Did the respondent take such steps as were reasonable to avoid any disadvantage?

23. We make the following findings of facts that were in dispute on the balance of probabilities:

23.1. We find that it is more likely than not that Mrs Young did not see the claimant's first shielding letter [44-48] on the office WhatsApp group [163]. We make that finding because:

23.1.1. Mrs Young was the only witness who knew whether or not she had seen it and we found her denial to be credible;

23.1.2. The claimant did not produce an email or any other document to corroborate her assertion that she had sent the first shielding letter to the respondent;

23.1.3. The claimant's email of 22 May timed at 14:20pm does not indicate that she had already told Mrs Young she was shielding or that she had already sent her a copy of the shielding letter;

23.1.4. The claimant's same email offers to send Mrs Young "a copy" of the letter, if she required it, rather than saying that she would send "another copy", which we would have expected had the claimant already sent one; and

23.1.5. The claimant's evidence in chief (§23) states that the letter was scanned to Ms Young, when there was no evidence that it was.

23.2. We find that the claimant's evidence that she took her daughter to school only twice during lockdown; on 17 and 18 June 2020, was not credible. We make that finding because:

23.2.1. The claimant's email to Ms Young on 26 June 2020 [88] states that her daughter had not wanted to go to school for "the last couple of days" and "had done it again today";

23.2.2. Despite Mr Donnelly's attempts to paint this as a misremembering, the claimant was pushed on the point in cross-examination and was absolutely adamant that she had only taken her daughter to school on 17 and 18 June 2020; so

23.2.3. We find that the claimant took her daughter to school on 17 and 18 and 25 and 26 June 2020.

23.3. We find the claimant's asserted distress at the suggestions of Ms Young and Mr Toms to seek assistance from her GP to be exaggerated in the circumstances. We make that finding because:

23.3.1. In her email to Ms Young of 26 June 2020 [88], the claimant said she was not feeling good about being home all the time and that she had spoken to her GP surgery about "dark thoughts". It is not necessary to reproduce the whole of the quotation in these Reasons: the parties know what was written;

23.3.2. In her email to Ms Young of 22 July 2020 [90], the claimant alludes to a very serious mental health crisis that we do not need to repeat in these Reasons;

23.3.3. However, it was not disputed that in the same email [90] indicated a deterioration in her mental health, but stated that "…I am hoping that my return to the office will help me feel normal again." We find that the claimant was giving unclear messages about her wellbeing and intentions;

23.3.4. We find any employer would have concerns about the mental wellbeing of an employee who had expressed such thoughts;

23.3.5. The claimant said in her email to Mr Toms of 5 August 2020 [100] that she had been told to "...pull herself together…". She accepted in cross examination that no one at the respondent had said that to her;

23.3.6. The claimant's email to Ms Young on 4 August 2020 [92] stated that she couldn't face returning to work and was so stressed about the prospect that it was making her ill;

23.3.7. Again, we find any employer would be acting reasonably in advising an employee who had made the disclosures that the claimant did to seek medical advice; and

23.3.8. We find that after we look at the actual words used in the words used by Ms Young and Mr Toms in their emails, it was the claimant who put a pejorative interpretation on what was written about the claimant's anxiety, with one exception – the comment of Mr Toms about SSP in his email of 5 August 2020.

23.4. We find that the claimant's written evidence about her interactions with her GP lacked detail, were inconsistent with her oral evidence and were not credible. We make that finding because:

23.4.1. The claimant was adamant that the anxiety that she experienced about the risk of infection from Covid was not a free-standing mental impairment of itself, but was a consequence of her physical impairment (§40 of her witness statement);

23.4.2. The claimant's evidence about contacting her GP, who prescribed an increase in Sertraline (§41) contained no indication whatsoever about the date of that consultation;

23.4.3. The claimant produced no GP records;

23.4.4. Under cross examination, the claimant said that her email to Ms Young of 4 August [92] was not stating that she was too ill to work, but she then went on to list the stressors on her at the time:

23.4.4.1. The stress of being at home;

23.4.4.2. Wanting to be at work; and

23.4.4.3. Fear of catching Covid.

23.4.5. We find that none of these related to the claimant being specifically afraid of catching Covid in the work environment;

23.4.6. In answer to questions from the Tribunal, the claimant gave new evidence about her interaction with her GP. She confirmed that she had had a telephone appointment in which the GP had increased her doe of Sertraline. That is consistent with paragraph 41 of her witness statement;

23.4.7. The claimant was initially unable to say when this appointment had been, even though the date would have been in her GP notes and easily accessible. The claimant was initially unable to say whether the appointment had been before or after Ms Young had suggested she contact her GP;

23.4.8. The claimant went on to say that her GP had suggested signing her off work and initially said a fit note had been issued;

23.4.9. She then said that the appointment would have been at the end of June or the beginning of July.

23.5. We find that the evidence shows that the claimant undertook the following activities between the start of shielding and the end of August 2020:

23.5.1. She took her 5-year-old daughter to school on 17, 18, 25 and 26 June 2020. We take judicial notice of the fact that the claimant's daughter would have been mixing with other children and ran a risk of contracting Covid, no matter how stringent the precautions were at the school;

23.5.2. From 2 June 2020, the claimant placed her daughter with a childminder who also looked after her own 2 children and children from another family. We take judicial notice that the claimant's daughter had an increased risk of contracting Covid because of this;

23.5.3. The claimant admitted that she visited a pharmacy whilst she was shielding; and

23.5.4. The claimant went to stay with her father at his home for two weeks in August 2020, starting on the week commencing 10 August 2020, with her family and her 16-year-old daughter and her daughter's partner, who had been living in a separate household from the claimant.

23.6. We find that the precautions taken by the respondent to create a Covid-secure environment were adequate and reasonable. We make that finding because:

23.6.1. It was not disputed that the respondent created 12 iterations of its Covid Risk Assessment (we only saw version 5 [56-67] and one page of version 6 [164]). This demonstrates to the Tribunal the seriousness with which the respondent approached the risk;

23.6.2. In her resignation email [99], the claimant acknowledged that precautions had been put in place;

23.6.3. We find that the office where the claimant worked was large and spacious. The photographs of the room showed that there were 6 desks situated within it and plenty of windows that opened [105]; and

23.6.4. We find that the risk assessment relating to the administration offices current at the date that the claimant was due to return [164] was proportionate.

23.7. We find that the respondent's evidence of the necessity for the claimant to return to the office to work on two days per week from 5 August 2020 did not meet the standard of proof required to be credible. We make that finding because:

23.7.1. Although the respondent's evidence that the Manager that the claimant mainly worked for was struggling to cope in the lockdown was not challenged, its evidence about exactly why that was attributable to the claimant not being in the office was vague and lacked detail;

23.7.2. We find that the criticism of the claimant's performance (§24 of Ms Young's statement) should carry little weight, as it was never raised with the claimant during her employment. If the claimant was completing work on a Thursday evening that the accountant did not see until she returned to work on the following Tuesday, then any reasonable employer would have addressed this with the claimant, rather than letting it go;

23.7.3. We found Ms Young's oral evidence about the need for the claimant to be in the office to have face to face chats with her Manager and for him to be able to "throw papers at her" were not things that necessitated the claimant being in the office in the age of email and Teams. In oral evidence Ms Young was not able to identify which of the claimant's duties had to be done in the office and could only be done by her;

23.7.4. We find that the respondent produced no cogent evidence that it had put any thought whatsoever into alternatives to the claimant being required to return to the office for two days per week;

23.7.5. We find that the respondent's reasoning for acting in the way it did – that the claimant only refused to return on 5 August – did not absolve it from addressing the issue when it arose; and

23.7.6. Ms Young accepted that she had received a WhatsApp message on 20 August from the claimant [116] but had not acted on it or responded to it. In cross examination Ms Young accepted that it could be a grievance.

23.8. We find that when taking the evidence as a whole, the act and the manner of the respondent's requirement for the claimant to return to the office for two days a week starting on 5 August 2020 was behaviour that was likely to destroy or seriously damage the trust and confidence between the claimant and respondent and that the respondent did not have reasonable cause for doing so;

23.9. We find that the claimant resigned in response to the respondent's conduct that was likely to destroy or seriously damage the trust and confidence between the parties because it was never challenged that she had resigned because of the requirement to return to work and the failure of the respondent to consider alternatives;

23.10. The claimant was therefore constructively dismissed;

23.11. We find that the reason for dismissal was conduct. Ms Williams submitted that the reason was capability, as the claimant was unable to fulfil her duties. We find that the reason was conduct because the claimant was capable of fulfilling her duties, as she had done for some months. We have found that the respondent has not shown on the balance of probabilities that it was reasonably necessary for the claimant to return to the office on 5 August 2020. We therefore find that her conduct by requesting to continue working from home on 5 August prompted Mr Toms' email response on 5 August [99-100], which precipitated the claimant's resignation;

23.12. We do not find that the claimant refused to return to her place of work in circumstances of danger which she reasonably believed to be serious and imminent and which she could not reasonably have been expected to avert. We make that finding because:

23.12.1. In her resignation email [99], the claimant wrote "Unfortunately, I can not come into work and appreciate measures have been put in place." We find that to be an acknowledgement on the part of the claimant that the

respondent had put Health & Safety measures in place to protect the workforce in general and her in particular;

23.12.2. The risk assessment [164] made specific provisions for employees who were shielding;

23.12.3. The claimant had already ventured outside her shielding bubble on several occasions and proposed to do so again the following week; and

23.12.4. Although we accept that the danger perceived by an employee may not be restricted to the workplace, we find that the claimant could avert any danger.

23.13. Although the point is moot, given our findings in the preceding sub-paragraph, we find that a constructive dismissal is possible in cases brought under section 100 because:

23.13.1. Section 95 of the Employment Rights Act 1996 states that it applies "For the purposes of this Part…" That means Part X of the Act. Section 100 is included in Part X;

23.13.2. The first issue that Tribunal is required to determine in a constructive dismissal case is whether the claimant was dismissed;

23.13.3. In making that assessment, it is legitimate for the Tribunal to come to the conclusion (if it so finds on the facts) that a claimant made a reasonable decision in circumstances of danger which the employee reasonably believed to be serious and imminent and which she could not reasonably have been expected to avert, (while the danger she perceived from Covid persisted) to refuse to return to her place of work; and

23.13.4. The Tribunal may then find that it was respondent's failure to act on the concerns she raised (on 4/5 August) that was the fundamental breach.

Disability

23.14. We find that the claimant was, at all times, a disabled person as defined in section 6 of the Equality Act 2010 and that at all times, the respondent was aware of her disability: rheumatoid arthritis. This was agreed;

Discrimination Arising from Disability

23.15. We find that from 22 July 2020 (the date when the claimant was first notified of the respondent's wish that she return to work at the office on two days per week from w/c 3 August 2020 by Ms Young's email

[90]) the claimant's disability caused, had the consequence of or resulted in:

23.15.1. Stress and anxiety brought about by the prospect of having to work at the respondent's office.

23.16. We do not find that the other "somethings' contended for were caused, had the consequence of, or resulted in a "something" in the requisite period:

23.16.1. Placement in the Covid-19 extremely vulnerable category;

23.16.2. A requirement to shield at home;

23.16.3. A requirement to work from home unless it was "impossible" to do so;

23.16.4. An inability to return to work at the Respondent's head office for one or 2 days a week from w/c 3 August 2020; and/or

We make these findings because as at 1 August 2020, the claimant was no longer advised to shield, the requirement to work from home had been softened and we have found that the claimant was able to work at the respondent's premises from 5 August, as there was no medical evidence to suggest that she couldn't and because of her other activities whilst shielding.

23.17. It was not disputed that the requirement to work in the office on two days per week was unfavourable treatment because of the effect on the claimant's anxiety;

23.18. We find that the requirement was not a proportionate means of achieving a legitimate aim, as the respondent did not demonstrate on the balance of probabilities that the requirement to support other workers by requiring the claimant to attend work was legitimate. We also find that the treatment was disproportionate because of the failure to consider or discuss with the claimant alternatives to her attendance in the office;

Indirect Discrimination

23.19. We find that the respondent applied the PCP of requiring all administrative staff to work at its offices for two days per week from week commencing 3 August 2020, because it was not disputed that the PCP was applied;

23.20. We find that the PCP put persons with whom the claimant shares the protected characteristic of disability at a particular disadvantage

compared with persons with whom the claimant does not share the characteristic. It was not disputed by the respondent. It was apparent that there was an increased risk to persons with rheumatoid arthritis because of their supressed immune system if they were required to attend a workplace when compared to being allowed to work from home;

23.21. We find that the PCP put the claimant at that disadvantage;

23.22. We make the same finding as to proportionality as in paragraph 23.18 above in respect of discrimination arising from disability above;

Reasonable Adjustments

23.23. We find that the respondent applied the PCP of requiring all administrative staff to work at its offices for two days per week from week commencing 3 August 2020, because it was not disputed that the PCP was applied;

23.24. We find that the PCP put individuals with rheumatoid arthritis at a substantial disadvantage compared with persons who do not have that disability;

23.25. The PCP put the claimant at a substantial disadvantage compared with someone who does not have the disability because of the susceptibility to infection and the exacerbation of the effects of infection with Covid;

23.26. We find that the respondent was well aware that the claimant was likely to be placed at such risk because it saw the claimant's shielding letters;

23.27. We find that the respondent did not take such steps as were reasonable to avoid the disadvantage. We find that it did not even contemplate making such adjustments, as Mr Toms and Ms Young appear to have made up their minds that everyone in the administration team was to return to the office for at least part of their working week;

23.28. We repeat our finding that the respondent's justification for requiring the claimant to return to the office for part of their working time was not credible;

23.29. The respondent did not consider whether the claimant needed to return to the office and did not consider whether her 'in person' duties could have been undertaken by a colleague, by a redistribution of workload, or the employment of a temporary replacement;

Remedy

24. We have listed the case for a remedy hearing, but would encourage the parties to resolve the issue of remedy without the need for an additional hearing, if possible. We would remind the parties that:

    24.1. The claimant's claims of discrimination all arise out of the same basic facts;

    24.2. The Joint Presidential Guidance on awards in discrimination cases makes reference to the Vento bands of injury to feelings awards being fixed by the date of issue of the proceedings. The relevant version of the Guidance is the Fourth Edition; and

    24.3. Our case management orders will require additional information from the claimant.

Employment Judge Shore
5 September 2022

Sent to the parties on:

…….
For the Tribunal Office:

……..……..