EMPLOYMENT TRIBUNALS

Claimant: **Ms A Boyd**

Respondent: **Yorkshire Ambulance Service NHS Trust**

Heard at: **Leeds Employment Tribunal by CVP video link**

On: **22, 23, 25 and 26 July 2024**
Deliberations in chambers: 13 August 2024

Before: **Employment Judge Shepherd**
Members: **Mr Eales**
Ms Lancaster
Appearances:
For the claimant: **In person**
For the respondent: **Ms Martin, counsel**

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claim of unfair dismissal is not well-founded and is dismissed.
2. The claims of Disability discrimination are not well-founded and are dismissed.
3. The claim of breach of contract is not well-founded and is dismissed.

REASONS

1. The claimant represented herself and the respondent was represented by Ms Martin.

2. The Tribunal heard evidence from:

Aimee Boyd , the claimant;

Jonathan Milnes, Consultant Paramedic.;

Fiona Bell, Head of Research and Development;

Andrew Flavell, Area Operations Manager;

Lesley Baker, Area Operations Manager;

3. The Tribunal had sight of a bundle of documents which, together with documents added during the course of the hearing, was numbered up to page 580. The Tribunal considered those documents to which it was referred by parties.

The issues

4. In the record a Preliminary Hearing before Employment Judge Brain on 24 January 2024 the claim and issues were set out:

Case Summary

1. The claimant presented her claim form on 1 October 2023. Before doing so, she went through mandatory early conciliation as required by the Employment Tribunals Act 1996. Early conciliation commenced on 20 September 2023 and ended on 22 September 2023.

2. The claimant was employed by the respondent as a paramedic. The claimant gives her employment dates as from 6 April 2019 to 21 June 2023. The respondent has the start date as 8 April 2019 and the effective date of termination as 19 June 2023.

3. The claimant's claim is about:

3.1. Unfair dismissal. This is a complaint brought pursuant to the Employment Rights Act 1996.

3.2. Disability discrimination (by way of unfavourable treatment for something arising in consequence of disability and an alleged failure on the part of the respondent to comply with the duty to make reasonable adjustments). These complaints are brought pursuant to the Equality Act 2010.

3.3. Breach of contract. This is in respect of expenses incurred by the claimant due to her changing her place of work and complying with the respondent's requirements for her to undergo training. This complaint is brought pursuant to the Employment Tribunals England and Wales (Extension of Jurisdiction) Order 1994.

The Issues

1. Time limits

1.1 No time limit issues appear to arise upon the complaint brought by the claimant under the 2010 Act.

[There were time issues in respect of the discrimination claims. This is a jurisdictional point which Tribunal has considered].

1.2 A potential limitation issue arises upon the claimant's complaints of unfair dismissal and breach of contract. This is because, upon the respondent's case, the effective date of termination was 19 June 2023. The claimant did not commence early conciliation until 20 September 2023. Accordingly, if the respondent is correct, then she commenced early conciliation one day out of time.

1.3 For her part, the claimant says that she last undertook work on behalf of the respondent on 21 June 2023. This was by way of participation in a training event. She says that it was agreed that she would then take her annual leave. She had accrued annual leave of over 120 hours. She worked 30 hours a week. Accordingly, there was four weeks of annual leave to take. The claimant's case is that the date of termination was not until on or around 19 July 2023 and the claims are in time. Similar time limit issues arise on the breach of contract claim.

1.4 Accordingly, the issue which arises is whether the claims were made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination.

1.5 If not, then the Tribunal will decide:

1.5.1 Was it reasonably practicable for the claims to be made to the Tribunal within the time limit?

1.5.2 If it was not reasonably practicable for the claims to be made to the Tribunal within the time limit, were they made within a reasonable period?

2. Unfair dismissal

2.1. Was the claimant dismissed? The respondent's case is that the claimant resigned her employment with notice. The claimant's case is that she was constructively dismissed. Alternatively, she says that because the respondent would not allow her to return to her substantive role as a paramedic (after a period of secondment in the role of research coordinator from 4 October 2021 to 31 March 2023), and would only allow her to return to work as a senior clinical advisor in the Emergency Operations Centre, she was dismissed (by application of the principles in Hogg v Dover College [1990] ICR 39, EAT).

2.1.1. Upon the constructive dismissal complaint, which is run in the alternative to the Hogg v Dover College dismissal claim, did the respondent do the following things:

2.1.1.1. Not allowing the claimant to return to her substantive role once the period of secondment ended on 31 March 2023.

2.1.1.2. Failing to reply or failing to satisfactorily reply to the claimant's numerous requests to return to her substantive role.

2.1.1.3. Failing to pay to the claimant expenses she incurred in attending for training and working away from her base (contrary to the respondent's policies).

2.1.1.4. Altering rotas to the claimant's detriment.

2.1.1.5. Requiring the claimant to undergo a period of training for one month unpaid before allowing her to return to her substantive role.

2.1.2. Did these things individually or cumulatively breach the implied term of trust and confidence? The Tribunal will need to decide:

2.1.2.1. whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

2.1.2.2. whether it had reasonable and proper cause for doing so.

2.1.3. Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

2.1.4. Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that she chose to keep the contract alive even after the breach.

2.2. If the claimant was dismissed (expressly by application of the principal in Hogg v Dover College or constructively), what was the reason or principal reason for dismissal. If the claimant is found to have been constructively dismissed, then what was the reason for the breach of contract?

2.3. Was this a potentially fair reason?

2.4. Did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that reason as a sufficient reason to dismiss the claimant?

2.5. The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case.

3. Remedy for unfair dismissal

3.1. The claimant does not wish to be reinstated to her previous employment with the respondent.

3.2. The claimant does not wish to be re-engaged to comparable employment or other suitable employment with the respondent.

3.3. If there is a compensatory award, how much should it be? The Tribunal will decide:

3.3.1. What financial losses has the dismissal caused the claimant?

3.3.2. Has the claimant taken reasonable steps to replace her lost earnings, for example by looking for another job?

3.3.3. If not, for what period of loss should the claimant be compensated?

3.3.4. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

3.3.5. If so, should the claimant's compensation be reduced? By how much?

3.3.6. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

3.3.7. Did the respondent or the claimant unreasonably fail to comply with it by ?

3.3.8. If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

3.3.9. If the claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?

3.3.10. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

3.3.11. Does the statutory cap of fifty-two weeks' pay or £105,707 apply?

3.4. What basic award is payable to the claimant, if any?

3.5. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

4. Disability

4.1. That the claimant was disabled at the material time for the purposes of the 2010 Act complaint is conceded by the respondent. The claimant has neutropenia. With this condition, she is immunocompromised. The condition is happily well controlled. However, it gives rise to several physical and mental impairments. In light of the respondent's concession, it is not necessary to set these out here. There is an issue about the respondent's knowledge of disability at the material time. This will be addressed by the respondent in the amended grounds of resistance.

5. Discrimination arising from disability (Equality Act 2010 section 15)

5.1. Did the respondent treat the claimant unfavourably by:

5.1.1. Not allowing her to return to her substantive role at the end of the secondment on 31 March 2023.

5.1.2. Refusing the claimant permission to work on the paramedic bank.

5.1.3. Requiring the claimant to undergo a month's unpaid training before allowing her to return to her substantive role.

5.2. Did the following things arise in consequence of the claimant's disability:

5.2.1. Removing her from her substantive role because she was immunocompromised.

5.2.2. Requiring the claimant to work in the Emergency Operation Centre and then arranging for her to work in a seconded role as research co-ordinator.

5.3. Was the unfavourable treatment because of any of those things? In essence, the claimant found herself unable to work in her substantive role because of her disability. Accordingly, being removed from her substantive role and filling other roles was because she was immunocompromised which arises from her disability. This in turn led to the alleged unfavourable treatment in paragraph 5.1. (For the avoidance of doubt, the claimant has no issue with re-training in and of itself. Her objection was to the expectation that she should spend one-month unpaid undergoing training).

5.4. Was the treatment a proportionate means of achieving a legitimate aim? The respondent will plead as to their legitimate aim in the amended grounds of resistance. It may be anticipated that the aim of the training was to ensure that the claimant had the necessary skills to enable her to safely carry out her substantive role (in the interests of herself and patients).

5.5. The Tribunal will decide in particular:

5.5.1. was the treatment an appropriate and reasonably necessary way to achieve those aims;

5.5.2. could something less discriminatory have been done instead;

5.5.3. how should the needs of the claimant and the respondent be balanced? (The claimant pointed out that female employees who are placed on light duties when pregnant and take a period of maternity leave are not required to undergo re-training at all upon their return to work. This may be an important feature upon the question of justification).

6. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

6.1. Did the respondent know or could they reasonably have been expected to know that the claimant had the disability? From what date?

6.2. Did the respondent have the following PCPs: A requirement that those who have been away from their paramedic role for a period of time undergo a month's unpaid training before being permitted to return.

6.3. Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that those with the claimant's disability were more likely to be removed from paramedic duties due to being immunocompromised than those without a disability. Accordingly, those with the claimant's disability were more likely be away from their substantive role and require re-training before being allowed to return.

6.4. Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

6.5. What steps could have been taken to avoid the disadvantage? The claimant suggests that the respondent pay for training and allow her to return to her substantive post.

6.6. Was it reasonable for the respondent to have to take those steps and when?

6.7. Did the respondent fail to take those steps?

7. Remedy for discrimination

7.1. What financial losses has the discrimination caused the claimant?

7.2. Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

7.3. If not, for what period of loss should the claimant be compensated?

7.4. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

7.5. Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

7.6. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

7.7. Did the respondent or the claimant unreasonably fail to comply with it?

7.8. If so is it just and equitable to increase or decrease any award payable to the claimant?

7.9. By what proportion, up to 25%?

7.10. Should interest be awarded? How much?

8. Breach of Contract

   8.1. Did the respondent act in breach of contract by failing to reimburse the claimant's expenses incurred by her in travelling to training sessions and working away from her base?

   8.2. Did this claim arise or was it outstanding when the claimant's employment ended?

   8.3. Was that a breach of contract?

   8.4. How much should the claimant be awarded as damages?

Findings of fact

5. Having considered all the evidence, both oral and documentary, the Tribunal makes the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings that the Tribunal made from which it drew its conclusions.

6. Where the Tribunal heard evidence on matters for which it makes no finding, or does not make a finding to the same level of detail as the evidence presented, that reflects the extent to which the Tribunal considers that the particular matter assists in determining the issues. Some of the Tribunal's findings are also set out in its conclusions, to avoid unnecessary repetition and some of the conclusions are set out within the findings of fact.

7. The claimant was employed by the respondent from April 2019. She was employed as a Paramedic on Band 5. When the claimant commenced employment with the respondent she was a Newly Qualified Paramedic (NQP) which requires completion of a two-year programme. After successful completion of the programme, a NQP becomes a Fully Qualified Paramedic on Band 6. The NQP programme (471) states:

> "The aim is to support NQPs to provide evidence of their journey as a paramedic, from being new registrants to growing into confident and capable professionals. Evidence of this journey will include the use of continuous learning, reflection and self-audit.…"

8. The claimant was diagnosed with Neutropenia which is a condition which meant that she had lower than normal white blood cells and her immune system is compromised.

9. On 8 April 2021 the claimant's band was changed to band 6. Jonathan Milnes stated that the transition to band 6 was in view of the significant stress the claimant was under due to her health concerns. He did not sign off her NQP portfolio at the time and said this could be picked up at a later date when the claimant was fit to return to operational duties.

10. On 20 May 2021 an Occupational Health report (198) indicated that the condition could be temporary or long-term and the claimant should not do any face-to-face patient roles.

11. The claimant was temporarily transferred to the Emergency Operations Centre (EOC) on 4 June 2021 (201). This was a band 2 role but Andrew Flavell, the Area Operations Manager provided that claimant's band 5 salary was protected. This was, in fact the band 6 status as provided for by Jonathan Milnes.

12. On 29 September 2021 the claimant was permanently redeployed to EOC (226) as a Senior Clinical Advisor. In the letter from Andy Flavell it is stated:

> "… Your most recent occupational health report (07/09/21) stated that you were fit for work with reasonable adjustments and extra precautions need to be put in place to prevent infections from the public. It also stated that your illness came under the disability act as it is an ongoing illness that has lasted over 12 months.
>
> We do still have the view that hopefully you will be able to return to operational duties in the future, however before you can return to Operations I will need an OH report stating you are fit for work in Operations and any such return to an Operations role will be subject to a successful application when vacancies arise.
>
> You are in full agreement that permanent redeployment would be supportive at this time and are looking forward to your working within the research department. I reminded you even when you are redeployed I will still be available for support.…"

13. The claimant sent an email to Jonathan Milnes on 30 September 2021 (524) stating:

> "As I'm permanently redeployed to EOC, I'll have to reapply to come back out on the road, when I can come back, but that's okay – I have a few career paths open to me now, so that is a huge relief…"

14. On 4 October 2021 the claimant commenced a secondment to the post of Research Coordinator within Research and Development (212). This secondment was extended to 18 months to end on 31 March 2023.

15. On 10 May 2022 (283) the claimant sent an email to Lesley Baker enquiring about her getting a bank contract.

16. On 13 May 2022 (284) the claimant requested a change to her contract to go part-time from 1 August 2022 reduce her hours to 30 per week. She stated that she had nothing against research and just wanted:

> "… a better work life balance for when I get a bank contract working on the road, and when I start my BSc in September."

17. On 17 May 2022 the claimant sent an email to Jonathan Milnes indicating that she had spoken to Lesley Baker about getting a bank contract and she had asked if Mr Milnes could confirm if the claimant was an NPQ/Para.

18. On 17 May 2022 (289) Jonathan Milnes replied to the claimant:

> "That's excellent news.
>
> I believe that we progressed you into band 6 to prevent any undue stress while you were off work and give you one less thing to worry about. You would need to provide your NQP portfolio to work to the scope of practice of the band 6 paramedic…"

19. On 30 May 2022 the claimant sent an email to Andrew Flavell (296) stating that she had an unexpected drop in her neutrophil levels (white blood cells). She referred to her previous emails about a bank contract and that she needed to put this on pause.

20. On 13 October 2022 (302) Jonathan Milnes wrote to the claimant stating:

> "I think there is some confusion around "redeployment" and what that is, you would not be "redeployed" back to ops.
>
> The time period of support is based on my experience and historical packages put in place.
>
> During your time practicing as a frontline paramedic, you were involved in an incident which resulted in the declaration of an SI, you were also incredibly stressed, anxious and worried about incidents and the decisions you had made. This often led to you becoming quite emotional and needing time and support to help you manage these emotions; which is completely fine and normal and forms some of the basis for my view of at least 4 weeks support – I want to ensure you have enough support wrapped around you that the role doesn't affect your mental health caused unnecessary/preventable stress.
>
> As a member of staff who works within the clinical directorate this is not a "return to work" following sickness as the role of frontline paramedic is not your substantive role. You are at work, this is a "return to practice" programme that we need to build bespoke for you.
>
> I suppose what would be useful is a bit of a "plan on a page", this needs to specifically include what you mentioned in your previous email and what support you have or will need to have to support you emotionally.
>
> Let's look at pulling a plan together, and I will ask Lesley and Fiona to potentially have a conversation around budgets, but let's not worry about that for now."

21. On 15 October 2022 Lesley Baker sent an email to the claimant (301) indicating that she was employed by research and not A&E ops:

> "As with any staff member who has a long period away from operational shifts/practice we are sometimes happy to support a bank contract depending

> on individual circumstances but only when you are fit to practise fully in that role but we cannot fund supporting someone into a bank contract.
>
> In your own time you can do these any time but yes they are unpaid, we are happy to allow you to third man, work with Jono, training etc but there will be no payment for these.

22. On 1 January 2023 the claimant submitted an application for a paramedic role with the respondent.

23. On 24 January 2023 the claimant had a meeting with Lesley Baker and Abigail Holmes from HR (323). It was indicated to the claimant that, as she had not undertaken clinical work for a significant period, there would need to be a period of training of around one month to ensure she was safe to provide clinical care to patients. The claimant was not employed as a paramedic and was employed in a nonclinical role. The claimant was told that she would need to arrange for this period of training separately. Once her research secondment ended, she could return to EOC and complete her training as a Senior Clinical Advisor and work within that role may provide evidence to support the clinical skills she needed when applying for a paramedic role. The claimant indicated that she had applied for another job with another trust.

24. The claimant was informed that her job was actually as an EOC Clinical Advisor. The claimant said she had applied as an external applicant to get a bank contract.

25. Lesley Baker informed the claimant that she would give the claimant a bank contract when she was up to speed clinically as the claimant had not done anything clinically for two years. If she returned to EOC she should be “literally be more or less up and running”..

26. The claimant was reassured that her contract was not ending at the end of March. Lesley Baker stated that the claimant’s contract was in EOC and not Ops. If she was in Ops they would support her back.

27. The claimant stated that she did not enjoy working in the EOC. She had no friends or family around their so she had no support network. Whilst working in the Research team she could work from home and that was great she could go and work from her parents’ or her boyfriend’s house. None of them were close and that was part of the reason she had been looking to move to a different service.

28. The claimant had a meeting with Andrew Flavell and Abigail Holmes on 1 February 2023. The claimant indicated that her family and friends did not live anywhere nearby and that was why she had applied to another service.

29. On 27 February 2023 (378) the claimant informed James Goulding, her line manager in EOC, that she had been offered a job in another service with a start date of 14 April 2023.

30. On 8 March 2023 (377) the claimant wrote an email to James Goulding indicating that her formal notice letter would follow by the end of the week.

31. On 16 March 2023 the claimant sent an email to James Goulding indicating that she had not sent a formal notice letter because her job at South East Coast ambulance was conditional upon her passing pre-employment checks

32. On 17 March 2023 the claimant said that her job offer with South East Coast ambulance was conditional upon passing pre-employment checks and her start date may need to be pushed back to 30 June 2023.

33. The claimant returned to work in the EOC on 20 March 2023. On that date she commenced training as a Senior Clinical Advisor.

34. On 11 May 2023 (396) the claimant sent an email to Lesley Baker stating that she had completed the two weeks PACCS course as well as six weeks of 1:1 mentoring and asked if they could revisit the returning to operational duties.

35. On 5 June 2023 the claimant submitted her notice of resignation. In the claimant's letter of resignation dated 5 June 2023 (399) she stated:

> "… After more than a year from being given the all clear by my Clinical Consultant, I am still no closer to returning to my previous role of Paramedic, one which I love and am qualified and experienced to undertake. I have been told different things by different members of staff regarding this, and despite this promise having been put in writing to me, I have still been denied the opportunity to return to operational working.
>
> Instead, I have repeatedly been told by Lesley Baker, Area Operations Manager, that I will have to do a month of unpaid work to be deemed suitable to return to operational duties…"

36. In an email of 5 June 2023 (404) the claimant sent an email to James Goulding, her Line Manager asking that her last working day would be 19 June 2023 and that she would take her annual leave at this point.

37. On 6 June 2023 (46) James Goulding wrote to the claimant indicating that they were trying to sort her leaver paperwork out and that her leaving date would be 20 June 2023 with her last working day as 19 June 2023. This was agreed by the claimant.

38.On 13 June 2023 an HR assistant wrote to the claimant (414) confirming that her last day of employment with the respondent was recorded as 19 June 2023. The employee leaver form (408) also provided an actual leaving day of 19 June 2023.

39. ACAS Early conciliation commenced on 20 September 2023 and ended on 22 September 2023. The claimant presented her claim to the Employment Tribunal on 1 October 2023.

The Law

Time limits

Unfair dismissal

40.The time limits for unfair dismissal claim are set out in section 111 of the Employment Rights Act 1996. The complaint must normally be presented to the Tribunal within three months starting with the Effective Date of Termination, or within such period as the Tribunal considers reasonable where it was not reasonably practicable for the complaint presented within three months. Contractual notice, whether oral or written, runs from the date after the notice is given.

41. The Tribunal's discretionary power under section 111 of the ERA 1996 to extend the time is subject to a two-part test. First the Tribunal must be satisfied that it was not reasonably practicable for the claim to be presented in time. Secondly, the Tribunal must be satisfied that the claim was presented within such further period as the Tribunal considers reasonable.

42. These time limits are not simply legal niceties that can be waived at the Tribunal's discretion. They are clearly expressed in mandatory terms that an Employment Tribunal shall not consider a complaint unless it is presented within the prescribed time limit. The 'not reasonably practicable' formula requires the Tribunal to make a finding of fact and the onus of proving that presentation in time was not reasonably practicable rests on the claimant. In the case of **Trevelyans (Birmingham) Limited v Norton EAT 175/90** it was said that when a claimant knows of his or her right to complain of unfair dismissal, he or she is under an obligation to seek information and advice about how to enforce that right.

Discrimination time limits

43. Section 123 of the Equality Act 2010 states:

(1)...Proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.

...
(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) a failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

44.The Court of Appeal made it clear in **Hendricks v Metropolitan Police Comr [2002] EWCA Civ 1686,** that in cases involving a number of allegations of discriminatory acts or omissions, it is not necessary for a claimant to establish the existence of some 'policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken'. Rather, what he has to prove, in order to establish 'an act extending over a period', is that (a) the incidents are linked to each other, and (b) that they are evidence of a 'continuing discriminatory state of affairs'. The focus of the enquiry should be on whether there was an “ongoing situation or continuing state of affairs” as opposed to “a succession of unconnected or isolated specific acts”. It will be a relevant, but not conclusive, factor whether the same or different individuals were involved in the alleged incidents of discrimination over the period. An employer may be responsible for a state of affairs that involves a number of different individuals.

45. The Tribunal has discretion to extend time if it is just and equitable to do so, the onus is on the claimant to convince the Tribunal that it should do so, and 'the exercise of discretion is the exception rather than the rule' (**Robertson v Bexley Community Centre [2003] EWCA Civ 576**).

Unfair dismissal

46. In the n the case of **Hogg v Dover College [1990] ICR 39** the EAT held that there was a dismissal when the claimant was given new terms of contract which were wholly different from the previous terms. It was concluded that the new terms were so radically different from the old terms that the situation could only be described as the termination of one contract and the formation of a new one and were properly characterised as the removal of the old contract by substitution of a new and substantially inferior contract.

Constructive dismissal

47. Section 95 Employment Rights Act 1996 states:

(1) For the purposes of this Part an employee is dismissed by his employer if …

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.”

48. This is known as constructive dismissal. It is well established that the test to be applied is a contractual test. The case of **Western Excavating v Sharp [1978] IRLR 27** provides guidance. The Court **of** Appeal stated

> "There must be a repudiatory breach of contract, that is, a significant breach of contract going to the root of the contract which shows the employer no longer intends to be bound by one or more essential terms of the contract. The employer's breach must cause the employee to resign as a result".

49. In the case of **Woods v W M Car Services (Peterborough) Ltd**, the Court of Appeal quoted from the EAT Judgment of Sir Nicholas Brown-Wilkinson, the then President of the EAT.

> "It is clearly established that there is implied in a contract of employment a term that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. To constitute a breach of this implied term it is not necessary to show the employer intended any repudiation of the contract. The Employment Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its cumulative effect judged reasonably and sensibly is such that the employee cannot be expected to put up with it.

50. In the case of **Wright v North Ayrshire Council UKEATS/0017/13/BI** the EAT found that the Tribunal had been wrong to rely on the principle that, where there was more than one cause, it was only the main (i.e. effective) cause of the resignation which should be considered to decide whether there had been a constructive dismissal. The EAT said that the search was not for one cause which predominated over others, or which would on its own be sufficient, but to ask whether the repudiatory breach had 'played a part in the dismissal'. It was enough that the repudiatory breach was an effective cause and not the effective cause of the resignation.

51. If an employee waits too long after the employer's after the employer's breach of contract before resigning, he or she may be taken to have affirmed the contract with the result of loss of the right to claim constructive dismissal. In the words of Lord Denning in **Western Excavating v Sharp,** the employee "must make up his mind soon after the conduct to which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged"

Last Straw Doctrine

52, In the case of **Lewis v Motorworld Garages Limited [1985] IRLR 465** Glidewell LJ said this at para 37:

> "If the employer is in breach of a contract of employment, of such seriousness that the employee would be justified in leaving and claiming constructive dismissal, but the employee does not leave and accepts the altered terms of employment; if subsequently a series of actions by the employer might constitute together a breach of the implied obligation of trust and confidence; is the employee then entitled to treat the original action by the employer which was a breach of the express terms of the contract as a part - the start - of the series of actions which, taken together with the employer's other

actions, might cumulatively amount to a breach of the implied terms?
In my judgment the answer to this question is clearly 'yes'."

Disability discrimination

Discrimination arising from Disability

53. Section 15 of the Equality Act 2010 states:

"(1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B unfavourably because of something arises in consequences of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

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

54. Under section 15 there is no requirement for a Claimant to identify a comparator. The question is whether there has been unfavourable treatment: the placing of a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person, the determination of what is unfavourable will generally be a matter for the Employment Tribunal.

55. The starting point for a Tribunal in a section 15 claim has been said to require it to first identify the individuals said to be responsible and ask whether the matter complained of was motivated by a consequence of the Claimant's disability; see **IPC Media Ltd v Millar [2013] IRLR 707**: was it because of such a consequence?

56. With regard to justification, The EAT in **Hensman v Ministry of Defence UKEAT/0067/14/DM, [2014] EQLR 670** applied the justification test as described in **Hardy and Hansons Plc v Lax [2005] ICR 1565**, CA to a claim of discrimination under section 15 Equality Act 2010. Singh J held that when assessing proportionality, while an ET must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer. In effect the Tribunal needs to balance the discriminatory effect of the stated treatment against the legitimate aims of the employer on an objective basis in considering whether any unfavourable treatment was justified.

57. The statute provides that there will be no discrimination where a respondent shows the treatment in question is a proportionate means of achieving a legitimate aim or that it did not know or could not reasonably have known the Claimant had that disability.

58. In the case of **Pnaiser v NHS England [2016] IRLR 170** it was provided as follows:

"In the course of submissions I was referred by counsel to a number of authorities …from these authorities, the proper approach can be summarised as follows:

(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see **Nagarajan v London Regional Transport [1999] IRLR 572**. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises.

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in **Land Registry v Houghton UKEAT/0149/14** a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator. "

59. In the case of **City of York Council v Grosset [2018] IRLR 746** the Court of Appeal held that section 15(1)(a) requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) 'something'? (ii) and did that 'something' arise in consequence of B's disability?

Failure to make reasonable adjustments

60. Section 20(3) of the Equality act 2010 provides:

> "…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, [there is a requirement] to take such steps as it is reasonable to have to take to avoid the disadvantage."

61. Section 212(1) provides that "Substantial" is defined at to mean "more than minor or trivial".

62. Whilst there is no definition of 'provision, criterion or practice' found in the legislation, and it is left to the judgment of individual Tribunals to see whether conduct fits this description, not every act complained of is capable of amounting to a PCP. In **Simler LJ in Ishola v Transport for London [2020] IRLR 368** Simler LJ stated:

> "In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP.
>
> In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that 'practice' here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or 'practice' to have been applied to anyone else in fact. Something may be a practice or done 'in practice' if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one."

63. In **Environment Agency v Rowan [2008] IRLR 20**, the EAT provided guidance on how an Employment Tribunal should approach a reasonable adjustments claim The Tribunal must identify:

"(a) the provision, criterion 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."

64. In **Bank of Scotland v Ashton [2011] ICR 632**, Langstaff J held:

" The Act demands an intense focus by an Employment Tribunal on the words of the statute. The focus is on what those words require. What must be avoided by a tribunal is a general discourse as to the way in which an employer has treated an employee generally or (save except in certain specific circumstances) as to the thought processes which that employer has gone through."

65. In **Chief Constable of Lincolnshire Police v Weaver UKEAT/0622/07/DM**, the EAT held that a Tribunal must also take into account wider implication of any proposed adjustment, not just focus on the claimant's position. This may include operational objectives of the employer, which may include the effect on other workers.

66. In her submissions Ms Martin referred to the case of **Newcastle Upon Tyne Hospitals NHS Foundation Trust v Bagley (2012) UKEAT/0417/11)** in which it was held that the substantial disadvantage must arise from the disability otherwise the duty to make reasonable adjustments will not arise. Reasonable adjustments are about the individual. The duty to make reasonable adjustments does not arise just because the PCP may affect a greater number of disabled people than non-disabled people. The question is whether the claimant herself was put at a substantial disadvantage by the PCP in comparison with people who are not disabled. In the case of **Bagley** it was stated:

'… the tribunal in para 3.53 appears to approach the claim as if it is an indirect discrimination claim rather than a reasonable adjustments claim... This error emerges at several points in the Judgment (see eg paras 5.6, 5.7, 5.8). Thus the tribunal states "Mainly disabled people would be in the position of needing PIB [permanent injury benefit]", ie it appears to be considering that substantial disadvantage can arise if proportionately more disabled than non-disabled people are affected by a particular PCP. However, this sort of "statistical" or **Enderby v Frenchay Health Authority [1994] 1 All ER 495, [1993] ECR I-5535, [1994] ICR 112]** type discrimination (cf **Bury Metropolitan Borough Council v Hamilton and others (2011) UKEAT/0413-5/09/CEA [2011] IRLR 358, EAT)** has no place a reasonable adjustments claim"

Burden of Proof

67. Section 136 of the Equality Act 2010 states:

"(1) This Section applies to any proceedings relating to a contravention of this Act.

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

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

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or Rule.

(5) This Section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to –

(a) An Employment Tribunal.”

68. A Tribunal must also take into consideration all potentially relevant non-discriminatory factors that might realistically explain the conduct of the alleged discriminator.

69. The Tribunal had the benefit of detailed written submissions provided by the claimant and Ms Martin on behalf of the respondent. These were helpful. They are not set out in detail but both parties can be assured that the Tribunal has considered all the points made and all the authorities relied upon, even where no specific reference is made to them.

Conclusions

Time limits

70. It was submitted by Ms Martin that the claims were out of time. The claim of actual dismissal on the principle set out in the case of Hogg v Dover College identified at the preliminary hearing on the grounds of the claimant being provided with a different role or different contract was substantially out of time. This was when the claimant was redeployed to the EOC.

71. With regard to the claim of constructive dismissal, this is a contractual issue. The claimant resigned and the contract came to an end when her notice expired. It was agreed that her last working day would be 19 June 2023. This is confirmed in her leaver’s form and her P 45.

72. The expiry of the notice given by the claimant must be the day upon which the contract comes to an end and she was to hand back her ID, uniform and Trust equipment. The fact that the claimant attended the conference in Manchester to present the poster was because she was the lead author of the research paper. The decision made as to who presented the paper was that of Fiona Sampson from the University of Sheffield.

73. There was an agreement between the parties and the claimant’s last day of work was 19 June 2023. She was not paid and did not seek wages for 20 June

2023 and 21 June 2023. The effective date of termination was 19 June 2023. The claimant did not commence early conciliation until 20 September 2023, two days out of time.

74. In the Employment Appeal Tribunal case **of Wallace v Ladbrokes Betting and Gaming Ltd UKEAT/0168/15/JOJ** it was held that the claimant's unequivocal notice of resignation was unaffected by subsequent discussions through correspondence between the parties. Once she had resigned on notice, the claimant could not subsequently unilaterally withdraw or extend her notice period. In the absence of any such agreement, the effective date of termination remained the date on which the notice expired .

75. In the circumstances the claim for constructive unfair dismissal is out of time. It is unfortunate that it is only one or two days out of time. However, time limits are limits for a reason.

76. The alternative unfair dismissal claim Identified by Employment Judge Brain at the preliminary hearing was she was dismissed by reason of the principle set out in Hogg v Dover College with regard to the claimant being required to return to work in the EOC rather than in Operations as a paramedic. That claim is clearly out of time as the date on which the claimant's research secondment was due to end was 31 March 2023 and her return to work was 1 April 2023.

77.The claimant was aware of her right to claim unfair dismissal. In her resignation letter (399) she referred to have a case for constructive dismissal and being open to discussing a settlement agreement.

78. The claimant said, in her evidence to the Tribunal, that she had looked on the government website and various solicitors' websites. She had involvement from her trade union. The fact that she was awaiting the outcome of an internal appeal does not make it not reasonably practicable for the claim to be presented within time.

79.The Tribunal is satisfied that it was reasonably practicable for the claim of unfair dismissal to have been presented within time.

80. With regard to the claims of discrimination, the dates of some the allegations of discrimination are earlier than the date of termination of the claimant's employment. The claim of discrimination arising from disability relates to the claim of not allowing the claimant to return to her former role as a paramedic at the end of the secondment on 31 March 2023.

81. The claim of failure to make reasonable adjustments is brought on the basis of the requirement to undergo a month's unpaid training. This requirement was made clear to the claimant prior to the end of the claimant's secondment.

82.The relevant date for the claims of discrimination was, at the latest, 31 March 2023 and those claims are out of time. The Tribunal finds that there was no continuing act. The claimant has not provided any reason why it would be just and equitable to extend time in respect of the discrimination claims and the Tribunal has no jurisdiction to hear them.

83. The Tribunal has gone on to consider the substantive claims as if they had been presented in time or that time had been extended.

Unfair dismissal

84.The Tribunal is satisfied that there was no actual dismissal as in the case of Hogg v Dover College. The claimant was permanently redeployed to the EOC as a Senior Clinical Advisor on 29 September 2021. There was no refusal to allow her to return to a substantive role as a Paramedic and requiring her to return to work in that role was not a dismissal.

85. The issue identified as failing to pay the claimant's expenses related to two periods. The claimant accepted that she had been paid for the period for training in the Senior Clinical Advisor role. The claimant did not submit a claim for expenses in respect to the other period.

86. There was an issue with regard to the claimant's rota for one week in May 2023 which was resolved the day after it was raised.

87. The Tribunal is not satisfied that any issues with regard to the claimant's expenses claims or rotas were part of a repudiatory breach of contract or that they were part of the reason for the claimant's resignation.

88. The claimant had informed the respondent on 24 January 2023 that she had applied for a role with another service. She indicated that part of the reason she was looking for a move to another service was that she didn't feel the respondent had supported her and she didn't feel that she got "the hugest amount of support before she went off sick".

89. The claimant continued to work for the respondent after that time. She said that the final straw was the lack of a reply to her email 11 May 2023 (396). That email was a request to Lesley Baker to revisit the claimant returning to operational duties.

90. The claimant had indicated that she had been offered a job with another service on 27 February 2023 and that the start date her new job may need to be changed to 30 June 2023.

91. The claimant resigned from the respondent's employment on 5 June 2023 with notice to expire on 19 June 2023. In the circumstances, the Tribunal finds that the claimant had affirmed the contract. The claimant had continued to work for the respondent for a number of months.

92.The reason the claimant resigned at that time was that she had been offered a job with another ambulance service and which was close to the support she would receive from her family and friends and doing the work she wanted to do.

93. The Tribunal accepts that the claimant was not happy that she was unable to take up a role of paramedic with the respondent without undergoing further training. However, that was no longer her substantive role and she was aware of the

situation from January 2023 and, at the latest, the end of her secondment to the Research department on 31 March 2023.

94. The Tribunal is not satisfied that there was a repudiatory breach of contract by the respondent or that the claimant resigned in response to any such breach.

Disability discrimination

Discrimination arising from disability – Equality Act 2010 section 15

95.The claimant was not prevented from returning to her substantive role which then was that of a Senior Clinical Assistant in the EOC. She returned to that role following the end of her secondment to the Research department.

96. The respondent did not refuse the claimant permission to work on the paramedic bank. The claimant would be supported with the bank contract when she was signed off as able to be operational as a band 6 paramedic.

97. There was a requirement that paramedics should be confident and competent to act as the lead clinician in relation to incidents in order to be given a bank contract.

98. The claimant was required to undergo training before she would be able to work on a bank contract. That was not returning to the claimant's substantive role which was that of a Senior Clinical Adviser in the Emergency Operations Centre. This was not unfavourable treatment of the claimant.

99. With regard to the identified something arising in consequence of claimant's disability, the first was that of removing her from her substantive role because she was immunocompromised. It is accepted that the claimant was unable to perform front-line operational paramedic duties because of her immune system being compromised and that was something arising in consequence of disability.

100. The second something arising was that the respondent required the claimant to attend work in the Emergency Operation Centre and then arranged for her to work in a secondment role as a research coordinator.

101. It was submitted by Ms Martin that there were too many links before it could be established that there was treatment arising in consequence of the claimant's disability. These were stated to be as follows:

a. The claimant has neutropenia.
b. Something arising from neutropenia is that the claimant is immunocompromised.
c. Something arising from the claimant being immunocompromised is that she cannot perform operational paramedic duties.
d. Something arising from the claimant being unable to perform operational paramedic duties is that she instead works in the Emergency Operations Centre.

e. Something arising from the claimant's work in the Emergency Operations Centre is that the claimant did not enjoy the work and so applied for a research secondment.

102. Ms Martin submitted that this was too many links and by the time one gets to link e. it cannot be said that it is arising in consequence of the claimant's disability.

103. The Tribunal is satisfied that the claimant was removed from working as a paramedic as a consequence of something arising from disability. The decision to undertake a research secondment was not something arising in consequence of disability.

104. The claimant was not given a bank contract because she was not assessed as competent and confident to be a fully qualified operational band 6 paramedic.

105. If there had been unfavourable treatment because of something arising from the claimant's disability then the Tribunal is satisfied that the respondent's treatment is justified. The respondent was pursuing the legitimate aim of ensuring that operational paramedics had the requisite skills and experience to provide care to patients in a safe manner.

106. The respondent's actions were a proportionate means of achieving that aim. The requirement for the claimant to undertake a period of training to ensure that she was competent and confident to be a fully qualified operational band 6 paramedic was a proportionate means of achieving the legitimate aim. The Tribunal finds that nothing less discriminatory could have been done. The claimant was told that if she returned to her role as a Senior Clinical Assistant her clinical skills would be refreshed although, she would still have to carry out some "third manning shifts". The actual amount of that training was to be assessed.

107. With regard to the duty to make reasonable adjustments, the identified PCP is a requirement that those who have been away from their paramedic role for a period of time should undergo a month's further training before being permitted to return.

108.It was submitted, on behalf of the respondent, that the claimant was in exactly the same position as anyone else who been away from operational duties from a long time for whatever reason and wanted to obtain a bank contract as a paramedic. The PCP would disadvantage everybody in exactly the same way. Somebody who was not disabled who had to undergo unpaid training would be at the same disadvantage.

109. If there is no group or individual substantial disadvantage then there is no duty to make reasonable adjustments. Any person in the same material circumstances as the claimant who was not disabled and who wanted to obtain a bank contract as a paramedic would be subject to the same requirement and would have to complete a period of 'third manning' if they were clinically up to speed.

110. The claimant was applying for a bank contract. She made it clear that she was applying as an external candidate. If she had been applying for a substantive role as a paramedic rather than a bank contract, then the position would have been different

although the claimant would still have to undertake a period of training before she was fully operational.

111. However, had the claimant obtained a substantive role as a paramedic within operations then that training would be paid for by the operations department as it had been when the claimant was training as a Newly Qualified Paramedic. This was set out in an email from Abigail Holmes, Senior HR Adviser in an email dated 23 November 2022 (312).

112. The claimant had been required to undertake shifts observing and “third manning” at the start of her new role with South East Coast Ambulance Service.

113. The claimant had not worked as a paramedic since April 2021. The claimant had applied for a role as a paramedic with the respondent on 1 January 2023 at around the same time as she had applied for the role with South East Coast Ambulance Service. She had been invited to an interview by the respondent but had withdrawn her application. The respondent needed to ensure that the claimant met the competencies required as a Fully Qualified band 6 Paramedic before she could go back on the road.

114. In order to be offered a bank contract the claimant had to be fully operational and be able to commence shifts as a paramedic without the need for further training. If the claimant had applied for a job as a substantive paramedic she would have been given training as part of substantive employment.

115. A bank contract required a paramedic who was able to undertake shifts. The claimant could get up to speed on her clinical practice through her substantive role as a Senior Clinical Advisor but she would still require a period of third manning before she could be offered a bank contract.

116. There was a difficulty with regard to funding these shifts as there was no budget for such training within the EOC and funding could not be offered by Lesley Baker as they didn’t have the available funding to train the claimant within the Operations budget. However, that would be the same position for anyone applying for a bank contract as a paramedic whether or not they had claimant’s disability.

117. The claimant was provided with the means to get up to clinical speed by undertaking the Senior Clinical Adviser training, which she did, within her substantive role in the Emergency Operations Centre.

118. This is the same position as someone applying for a role as a bank nurse. They have to be able to work on a ward or in another capacity without further training. That is the concept of a bank contract. The claimant was an external candidate and must be able to demonstrate that she can immediately take on a shift.

119. In all the circumstances, the unanimous judgment of the Tribunal is that the claims of unfair dismissal, disability discrimination and breach of contract are not well-founded and are dismissed in their entirety.

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Employment Judge Shepherd

19 August 2024

Sent to the parties on:

21 August 2024

For the Tribunal Office: