EMPLOYMENT TRIBUNALS

Claimant: Mrs B Smith

Respondent: Bestway Panacea Holdings Limited

Heard at: Manchester **On:** **6, 7, 8 and 9 November 2023**
In chambers:
16 January 2024

Before: Employment Judge Barker
Ms Gilchrist
Ms Cadbury

Representation
Claimant: in person
Respondent: Ms Kight (counsel)

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that:

1. The claimant was not unfairly dismissed;

2. The claimant was not subjected to unlawful disability discrimination in that the respondent was not subject to the duty to make reasonable adjustments.

REASONS

Background Matters and issues for the Tribunal to decide

1. The claimant worked for the respondent from April 2013 until her resignation on 11 November 2020. She engaged in ACAS Early Conciliation from 1 February 2021 until 15 March 2021 and by a claim form lodged at the Tribunal on 2 April 2021, brought claims against the respondent of unfair dismissal. Her claim, which was issued without the support of legal representation, was brought on the basis that the respondent did not do enough to support her and she was forced to resign as a result of their actions. In the claim form, the claimant referred to bullying and harassment and referred to the Equality Act 2010.

2. The Tribunal wrote to the claimant in order to clarify her claims, and she wrote on 13 June 2021 that she intended to claim disability discrimination as well as unfair dismissal. At a preliminary hearing before EJ Holmes on 21 October 2021, the claimant was directed to make a formal application to amend her claims. She did so, and the respondent objected. Some correspondence between the parties made further submissions on this issue and the claimant's application and the respondent's objections were decided by EJ Holmes in a case management decision dated 25 March 2022.

3. EJ Holmes decided that the claimant was permitted to rely on three medical conditions, these being Essential Thrombocytosis, Patent Foreum Ovale and Hemiplegic Migraine, in order to bring a claim of a failure to make reasonable adjustments in relation to her request to reduce her hours on or about 30 June 2020. The respondent was allowed to file an amended response. The respondent accepted that the claimant was disabled at the relevant time by reason of Essential Thrombocytosis and that it knew she had this condition at the time, and also accepts that the claimant was disabled by virtue of Hemiplegic Migraine at the time but not that it had knowledge of this.

4. At the start of this hearing, the Tribunal discussed the list of issues that the parties wished the Tribunal to decide and noted that it had not been finalised and agreed. After some consideration and discussion, the list of issues was agreed by the parties as set out in the Annex to this judgment.

5. The Tribunal had the benefit of a bundle of documents which ran to 407 pages and heard witness evidence from the claimant, Mr Modi (the pharmacist at the Whaley Bridge pharmacy at the time) Mr Baum, (a driver training manager) and Mr Robinson (appointed to hear the claimant's disciplinary) for the respondent.

6. At the start of the hearing, the respondent applied for an order that the claimant have to disclose a recording she made of her conversation with Mr Modi on her mobile phone on the morning of 11 November 2020, the day of her resignation. Mrs Smith alleges that it was partly Mr Modi's conduct on 11 November that caused her to resign. She told the Tribunal that the phone recording was not relevant. The Tribunal, having discussed the issue with the parties, concluded that the recording was clearly relevant. The claimant told the Tribunal that the recording was three hours long and it became apparent that only a short extract, no more than five minutes long, related to the relevant conversation with Mr Modi. Therefore, it was this extract only that was to be played to the Tribunal.

Findings of Fact

7. The respondent operates a chain of pharmacies and the claimant was engaged at the relevant time as a delivery driver for two pharmacies in Whaley Bridge in Derbyshire and Disley, in Cheshire. The two pharmacies are located approximately 4 miles apart. In addition to working for the respondent, the claimant had a part-time evening job as a store assistant at Tesco.

8. It is accepted by the respondent that at the time to which these proceedings relate, she was a disabled person by reason of having a form of blood cancer, Essential Thrombocytosis and that they had knowledge of this. They also accept that she was disabled by reason of having hemiplegic migraines. The claimant has

a number of other health issues and her evidence was that when stressed and tired she was also more prone to headaches, including migraines. We accept the claimant's evidence in this regard.

9. The claimant also alleges that she was disabled by reason of patent forum ovale, a heart condition. The respondent disputes both that the claimant was disabled as a result of this and also that they had any knowledge of this condition. Mrs Smith gave evidence and also cross-examined Mr Modi about the fact that the respondent, as a pharmacy which dispensed her own medications for the whole of this period, had knowledge of exactly what her medical conditions were and what effect they would have had on her day to day life.

10. Mr Modi's evidence was that he did have some knowledge of the claimant's medical conditions by reason of having prepared her prescriptions, but that he was not allowed to pass that information on to the rest of the respondent's management as this was confidential to the patient-pharmacist relationship. Therefore, although he had some knowledge of the claimant's conditions, he told no-one else at the respondent. He was also not Mrs Smith's line manager and was not responsible for her workload. Those who were responsible, primarily Mr Cornes, cannot be said to have the knowledge of Mrs Smith's conditions that Mr Modi had and would only have known what Mrs Smith told him directly.

11. The respondent's knowledge of the claimant's medical conditions therefore was limited to what she told them or what they reasonably ought to have known from her, as opposed to what Mr Modi may have deducted from preparing her prescriptions. In terms of what the claimant directly told the respondent, we find that they had no knowledge of her being diagnosed with patent forum ovale, nor did they know that she had been diagnosed with hemiplegic migraine.

12. The respondent knew that the claimant suffered from headaches and anxiety, we find. She also told them that she had had a stroke and was concerned that she may have another one. This information was communicated to Mr Cornes on 16 October 2020. The respondent was also told by the claimant's GP in a letter dated 30 June 2020 that she had "stress-related symptoms" in relation to work and increasing anxiety.

13. In relation to her investigatory meeting with Mr Baum on 2 July 2020, she did not mention any health issues to him on that occasion. In her disciplinary interview on 10 November 2020, when she was accompanied by her union representative, the only reference was to the claimant disclosing "*all the stress from deliveries I get, it just winds me up…. I can't get wound up – I have had a stroke before and I can't risk having another one*."

14. It is also accepted that the respondent at times struggled to recruit to the position of delivery driver. It is accepted that the position is a responsible one, as drivers must ensure that the correct medication is delivered to the correct patient and on time.

15. We find that the claimant enjoyed her job prior to 2020. We find that she enjoyed the autonomy and the skill involved in finding efficient routes around her delivery area. We also accept that her role meant that she was a well-known figure in the community.

16. The claimant claims as part of her evidence to this Tribunal that she was bullied and isolated by the respondent for 7 years. We find that her feelings in this regard were partly as a result of a misunderstanding as to who she was managed by. Mr Modi, the pharmacist at the Whaley Bridge store at the time, told the Tribunal that he was not responsible for managing the claimant, as the management of delivery drivers was part of a different line of responsibility. He told the Tribunal that her manager was David Cornes. We also understand that Mr Cornes' manager was Kirsty Downie. Mr Modi was responsible for the staff in the pharmacy. The claimant was not classed as a member of pharmacy staff by the respondent. The claimant expressed surprise at this information. We find that historically it may have been the case that delivery drivers were more likely to be managed by those from a pharmacy but that this had not been the case for some years. However, we find that the claimant did not appear to have appreciated this. This, we find, explains why the claimant considered herself to have been "isolated" by pharmacy staff, particularly at Whaley Bridge.

17. The claimant was also extremely busy. By her own admission, she sometimes had "a bit of a temper" and sometimes that was visible in her dealings with her colleagues. We find that her approach to her work for the respondent was to finish it as efficiently and quickly as possible. We make no criticism of the claimant for this, as there is no suggestion that she was not highly effective as a delivery driver. She was also, we find, under time pressure due to her other job at Tesco and again, we make no criticism of her for this, but record it as part of our findings of fact. However, these circumstances meant that the claimant was at times frustrated and impatient when her job did not run as smoothly as it ought to have done, and that she expressed this frustration at times when speaking to her colleagues at the respondent.

18. The claimant had agreed some years earlier to help the respondent by taking on additional duties delivering for the Disley pharmacy for 10 hours per week in addition to the pharmacy at Whaley Bridge where she worked for 16 hours per week. Overall, this meant that her working hours for the respondent were approximately 26 hours per week and her weekly working hours at Tesco were 20.75 hours per week. Her shifts in Tesco were done after her shifts at the respondent, either from 7pm until midnight or 7pm to 10pm. We note that this is a long working week by any standards, but given the claimant's health issues, this was particularly demanding for her. Nevertheless, the claimant had very few absences from work, either from the respondent or from Tesco.

19. It is the claimant's case that the respondent's treatment of her resulted in her suffering from stress and headaches and that the respondent's actions made her unwell and tired. The respondent's case is that it was both of the claimant's jobs that contributed to this, as well as the impact of the Covid-19 pandemic, and not just her employment at the respondent.

20. It was the claimant's case that she discussed giving up the Disley hours in 2019 on a return to work interview on the grounds that it was damaging to her health. However, we do not accept that stress was the reason for the issue being mentioned in her return to work interview at that time. It was, we find, because she had been assessed in hospital due to a suspected pulled muscle, because of the weight of the boxes she had been carrying. The claimant says that the issue of

stress due to the additional hours was also discussed, but we do not accept that this was the main reason for any discussion about possibly giving up working at Disley at the time.

21. The Tribunal accepts that the start of the coronavirus pandemic in March 2020 increased the pressures on the respondent's pharmacy service and its community deliveries. However, the respondent's service was placed under further pressure by the planned introduction of a new "Flexipod" work management system. This had been planned and scheduled to be introduced in 2020 and the introduction of the new system continued despite the impact of the pandemic. Flexipod was an electronic device which was installed as an app on a mobile phone, and supported the respondent and its drivers with the routing and workflow relating to the delivery of prescriptions.

22. For the claimant, the impact of the Flexipod system involved her being issued with a mobile phone which had the Flexipod app installed on it. When she collected the medication from each pharmacy to deliver to patients, she had to access the Flexipod system on her mobile phone. This relied on her handset being able to access the internet either via Wifi or data roaming. The Flexipod system then used a routing system, based on Google Maps, to order her deliveries in what it considered to be the most efficient route around the area in which the patients lived.

23. The claimant was provided with training by Adrian Baum on the new system and he gave evidence that she appeared to become familiar with the system quickly and that she did not have any apparent issues during the training, which due to the circumstances of the pandemic was done by video. However, when her mobile phone arrived at her house, she struggled to set it up. There is evidence in the bundle of a number of text messages and phone calls between her and her line manager, David Cornes, in which Mr Cornes attempts to assist the claimant. He asked her to provide her SIM card number to help her to work the phone, but the claimant reported that the phone did not function as a telephone and she was having to use her own phone to make calls. The claimant's evidence as to whether her phone worked as a Flexipod unit or not was inconsistent. She told the Tribunal that it did not work properly. However, there are numerous contemporaneous documents in the bundle in which she reports that she was "fine" in using the Flexipod unit and that she had a working handset "at last".

24. However, given that the claimant was already extremely busy and under time pressure in ordinary circumstances, we find that the introduction of the Flexipod and also the circumstances of the pandemic meant that the claimant's patience was stretched very thin by her daily routine and the regular issues that she encountered in operating the Flexipod system.

25. Having considered the claimant's evidence and the contemporaneous documentation and the respondent's witness evidence, we make the following findings of fact. The respondent provided to the claimant an adequate training programme on the use of Flexipod, and an adequate amount of support while she was working. However, the Flexipod system did not operate at an optimum level for the claimant. We accept that the area in which she did her deliveries did not have a strong Wifi signal and this inconvenienced her as she had to change the unit settings depending on whether she was in the Whaley Bridge store or Disley.

We also accept that in some areas of her delivery round, in particular in the Kettlehulme area, the unit did not work at all due to poor access to the Internet.

26. In addition, we find that the Flexipod system was not as efficient as the claimant in producing an efficient delivery route for her. We accept the evidence that she gave to Mr Baum in their telephone conversation on 2 July 2020 that Flexipod provided her with a route that did not account for, for example, roadworks, or that did not necessarily place stops in a logical order. We also accept that when delivering to multiple apartments in a sheltered housing block, the deliveries were not ordered according to their location in the block, which resulted in her having to make multiple trips up and down the stairs rather than make all the deliveries on one floor at a time.

27. It was also, we find, the case that the pharmacy in Disley was not properly preparing the items for the claimant to take on her delivery round. We accept that the claimant was having to scan and print labels for delivery packages while in the pharmacy, which should have been already done for her. This situation persisted for a considerable period of time. We also accept that there was reason for the claimant to consider that Mr Cornes was not assisting her with this issue by taking up her issues with the branch management. The claimant was, we find, entitled to feel frustrated by this situation, especially as she had taken on the Disley work as a favour to the respondent.

28. The claimant asked Mr Cornes to resign from her Disley duties by email on 28 June 2020. She wrote "*Although I know its not the girls in the shop's fault, they have lost 30 hours, employed a new pharmacist that's never there, but I cannot cope with it any more as it's making me ill*". She went on to list the problems that she had with the Disley branch, including that the packages are never ready, and that there are too many deliveries for the time allocated. She said that she was also having problems with the Flexipod handset, including that wet parcels wouldn't scan and the handset had added miles to her route. She concluded by saying "*I know I'm going to struggle with the drop in wages, but my health comes first, so my last day in Disley will be 24 July 2020*."

29. The claimant and Mr Cornes exchanged emails and text messages on 29 and 30 June about this request. Mr Cornes investigated the issue in consultation with the HR department and reported to the claimant that she couldn't just resign from a branch. He said "*it has to be a work adjustment plan and the company will look into it to see if it was viable*". The claimant was provided with a "Flexible Working Application Form" by Mr Cornes on 30 June, which she completed that day with her request to reduce her hours. She included with it a letter from her GP also dated 30 June 2020, in which her GP reported:

> *"I had a consultation with Mrs Smith this morning with regards to stress related symptoms in relation to work. She has started smoking again and having recurrent headaches. Her anxiety is gradually increasing and I am concerned that her symptoms will escalate further. I would be grateful if you could take this into consideration when discussing Mrs Smith's workload balance."*

30. The claimant told the Tribunal that she provided a considerable amount of further medical evidence with this flexible working request. She said that there was evidence from the Salford Royal Hospital which provided further information about

her medical conditions. We do not accept that she did. David Cornes emailed the GP letter and the two-page form to Kirstie Downie on 6 July 2020 and said "*Just got these in post off Barbara".* He attached three Jpeg pages to the email, which we find were the two pages of the application form and the one-page letter from her GP. We accept Mrs Smith's evidence that Mr Cornes did not act promptly to send these documents to Ms Downie in that she posted them promptly on 30 June 2020 and it was reasonable to assume that Mr Cornes will have received them days earlier than 6 July.

31. However, the process of considering the claimant's flexible working request was interrupted, as matters came to a head somewhat on 2 July 2020 in the Disley pharmacy. The claimant conducted herself in a manner that caused the respondent concern over her behaviour. In the branch, she spoke to Nina Yates, who was the respondent's regional support manager. The claimant gave evidence, which we accept, that she was not aware of who Nina Yates was at the time. Ms Yates was so concerned that she immediately emailed Kirstie Downie to report that the claimant's behaviour was unacceptable.

32. Ms Yates' email to Ms Downie on 2 July 2020 notes that she spoke to Mrs Smith in the back room where she was organising her deliveries. Ms Yates asked her about Flexipod and Mrs Smith said "*biggest pile of shit they ever introduced*". Mrs Smith also told Ms Yates "*the girls aren't OK because I've screamed at them all this morning*". Ms Yates asked her why and Mrs Smith replied "*because of this fucking thing*", that is, the Flexipod. Ms Yates told Mrs Smith not to take it out on the staff in the branch. Ms Yates reported that while sorting her deliveries, through frustration Mrs Smith was smacking the keyboard against the bench and slamming the printer door.

33. Ms Yates asked the pharmacy team about this and was told "*that's just what she's like*". Ms Yates told Ms Downie that "*our pharmacy team in Disley are, as it seems, continuously bearing the brunt of her outbursts*" and that Mrs Smith's conduct was "*worryingly aggressive*". Mrs Smith disputes Ms Yates' version of events as part of this case, but we consider that Ms Yates' account is reliable and a contemporaneous record of what happened. Ms Yates was clearly not well acquainted with Mrs Smith and did not know her from previous circumstances. The claimant asserts to this Tribunal that Ms Yates and others were punishing her for making a flexible working request which was why Ms Yates reported the incident in an inaccurate way. We do not accept the claimant's submissions. Given that Mr Cornes did not pass the claimant's flexible working forms on to Ms Downie until 6 July, there is no way that Ms Yates could have known that a flexible working request had been submitted and we find no apparent reason why Ms Yates would have thought ill of the claimant for making such a request even if she had known about it.

34. Adrian Baum was asked to investigate the matter and spoke to Mrs Smith by telephone on 2 July 2020. We find that he had some sympathy with Mrs Smith. She told him that on the morning of 2 July she had received an upsetting call and news about her daughter and although "*she acknowledges that she does have a temper*" the incident was caused by frustration and receiving difficult news. Mr Baum expressed his concern about the lack of management of the claimant's issues both with the Flexipod and in Disley and the sheer number of deliveries,

which the claimant reported were occasionally three times the number she was supposed to do.

35. Mr Baum reported his initial findings in an email to Ms Downie and Mr Cornes of 3 July 2020. He took the decision to suspend the claimant from the end of her shift on 3 July, largely because it was not possible to cover her shifts at short notice to allow her to stop working at the end of 2 July.

36. On 7 July 2020, Ms Downie told Mr Cornes to take steps to investigate the viability of the claimant's flexible working request but she told him to wait until Adrian Baum's investigation had been completed before doing so.

37. There was then a further meeting on 8 July 2020 with Mr Baum and Mrs Smith. Mr Baum produced an investigation report. He concluded that the claimant's behaviour did not warrant a disciplinary sanction but instead that a "Letter of Concern" should be issued. He noted that she had experienced issues with Flexipod including in relation to the poor signal in her delivery area and had raised the issues of the disorganised nature of Disley with David Cornes but that he had not taken action over this with the pharmacy directly. It was separately acknowledged by Ms Yates that Disley was not well organised, leaving Mr Baum to conclude that what Mrs Smith said about Disley pharmacy was true. Therefore, Mr Baum concluded that it was not appropriate to move the issue to a formal disciplinary but instead issue an informal letter, warning the claimant about her manner and choice of language.

38. Before this letter was issued, the claimant had a telephone conversation with Mr Cornes, who advised her that Disley had been told that they had to have everything ready for her start time. He reported to Ms Downie "*that seemed to change her mind a little by asking if she could continue at Disley for another 2 weeks to see how it goes. I did say yes on the understanding that if anything starts to revert to them not going their job properly she must ring me straight away."*

39. Mr Cornes obtained the claimant's consent to this in writing and in an email dated 20 July 2020 the claimant said

> *"As agreed, I will try Disley for another two weeks, if everything goes OK I would like to stay on in both shops and as I stated earlier, now I have a working handset, things are a lot less stressful."*

40. The claimant's case before the Tribunal is that it was a failure to make reasonable adjustments by the respondent that she was not permitted to change her hours to drop her Disley work from June 2020 onwards. However, it is clear that it was the claimant's own request that she carry on with Disley in July 2020 and that she did so voluntarily.

41. Two weeks later, on 31 July 2020, Mr Cornes sent the claimant a text message to ask "*Do you still want to reduce your hours?*". The claimant admitted that she did not reply to this message. Mr Cornes messaged the claimant again on 4 August 2020 to ask if they could speak the next day, to discuss matters including "*your thoughts on Disley*".

42. It was not until 14 September 2020 that the claimant requested to reduce her hours again. She messaged Mr Cornes to say "*please can you text me the conditions of dropping Disley by reducing my hours. After last week's nightmare of nastiness and bitching, then the delivery rules changing to suit the situation, I've had enough"*.

43. We find that it was reasonable of the respondent to assume that between 31 July 2020 and 14 September 2020 that the claimant was content to work in Disley. She had agreed to a two-week trial period and had been asked at the end of the two weeks if she wanted to reduce her hours. She had not communicated with the respondent about this any further until 14 September.

44. Mr Baum and Mr Cornes were then made aware by the claimant that she had not received any formal outcome of the initial investigation into the incident of 2 July 2020. She chased Mr Cornes for an answer in early August and both Mr Cornes and Mr Baum sought information from the respondent's HR department about where the claimant's letter was. It was eventually sent to the claimant on 18 August 2020. The respondent's HR department admitted that it had been missed by them. Mr Baum understandably expressed his frustration with this and we find that this was an unacceptable delay by the respondent.

45. The letter itself, which the claimant reported she was devastated by, was clear that no formal action would be taken against her and that the letter did not form part of the respondent's disciplinary procedure. However, it did clarify that her behaviour had been unacceptable on 2 July and should not be repeated.

46. The evidence before the Tribunal is that although Mr Cornes was aware of the issues in Disley, and had promised to do something about it, by 21 August 2020 those problems persisted. Wilf, another delivery driver, was working in Disley and reported to Mr Cornes "*no wonder Barbara gets stressed at Disley, their new SLA is 22 and they are dishing out 34 deliveries with high number of failed deliveries and keep putting the fails back in the box for redelivery without checking they are in…*" Ms Downie told Mr Cornes in a reply to this email "*OK so you need to then escalate this to Nina…. They need to organise how they structure the working week… ultimately she doesn't have to do that volume in 3 hours, Barbara should be requesting overtime to complete so that she is not under pressure etc (that is if she's OK to work the OT).*" There is no evidence before us that Mr Cornes took any action in this regard. There is also no evidence that matters improved in Disley.

47. Therefore by the time the claimant informed Mr Cornes on 14 September 2020 that she wanted to reduce her hours, Mr Cornes was fully aware of the problems in Disley has having persisted and of the pressure that the claimant was under. Although we accept that her email requested to change because of "nastiness and bitching" and changes to the "delivery rules", Mr Cornes would also have known that the problem with an excessive workload persisted, but he took no action in relation to her renewed request to reduce her hours. He was also aware, as a consequence of her GP letter of 30 June 2020, that the additional stress was having an adverse effect on her health.

48. The claimant asked Mr Cornes again on 16 October 2020 and his response was "*I will have to ask Kirsty when she is back on Monday*". This is not correct; he had already been instructed by Ms Downie that it was for him to investigate what

might be possible in terms of adjustments to the claimant's hours and who may be able to cover the round. There was, we find, no need for him to speak to Ms Downie and he ought to have taken action himself but did not. This is not acceptable conduct by Mr Cornes, even more so because the claimant's message back to him on 16 October stated that

> *"I am going to end up having another stroke if I am not careful, what with the traffic and the amount of deliveries… I used to love this job but now I dread it."*

49. No further action was taken by Mr Cornes to arrange for the claimant to reduce her hours, or to manage her workload and circumstances in Disley.

50. On 28 October 2020, Mr Cornes received two text messages from the claimant which read "*Today will be my last day I am so sick of it all"* and *"Just had a massive row with Raj he said he was gonna report me, so sick of his lies and exaggerated bull, sending me to dead people is the last straw. I've cleared out the van and I'll drop it off later when the shops shut".*

51. Mr Cornes did not respond to the claimant's request to reduce her hours until 2 November 2020 when he sent her (again) the flexible working application form and a copy of the flexible working policy and offered to discuss it with her on 4 November along with her "*grievances and what I can do to help*". This was, we find, far little and far too late. This was poor management of the claimant by Mr Cornes.

52. The incident of 28 October 2020 was reported by the claimant to Mr Baum in an email dated 29 October 2020. She reported that "*I have been trying to reduce my hours for months but there has always been excuses so my patience was getting pretty low, so what happened yesterday tripped me over the edge*". She had been doing deliveries for Mr Modi at Whaley Bridge when she delivered medication to an address where an individual told her that he had just been into the chemist to tell them not to deliver any more as that person's mother had passed away. The claimant reported that the individual was not angry but upset.

53. The claimant reported *"as this wasn't my last delivery I started to stew and by the time I got back to the chemist I was fuming and as soon as I saw the pharmacist I confronted him asked why he hadn't rung me to say don't deliver, he denied the man even coming into the shop, so I just exploded…. I do not want to resign, I just wanted some respect."*

54. Mr Modi's evidence was that the claimant said on 28 October "*call me before I go and do a delivery to someone that has died.*" Mr Modi's evidence was that he told her that he did not know about the death and her response was to speak louder and louder about how the relative of the deceased had told him "*5 minutes before I left*". Mr Modi told the claimant not to speak to him like that and "*if you cannot talk to me properly, don't talk to me at all – get lost"*. The claimant walked into the shop and said "*what gives you the right to talk to me like that*" and called Mr Modi a "*fucking wanker*". As she walked out, she said "*go on, report me, I want to get sacked"*. It was Mr Modi's evidence that there were customers in the shop when she made these comments and one of the customers told Mr Modi that he shouldn't have to put up with being spoken to like that. We accept that Mr Modi's account of

this incident is accurate. It was reported by him to the respondent's management team in an email shortly afterwards.

55. Mr Cornes conducted an initial investigation into the incident, and spoke to Mrs Smith in connection with this at 10am on 4 November 2020, which meeting lasted for approximately 45 minutes. The claimant then responded to the email from Mr Cornes about changing her hours on 4 November 2020 at 11.05am. She ended her email by saying "*I would like to finish at Disley on 20 November 2020 if possible, but to continue at Whaley Bridge*".

56. Therefore we find that, despite the argument with Mr Modi at Whaley Bridge on 28 October, the claimant did not consider her employment to have ended. She did not find that she had no choice but to resign in response to the argument with Mr Modi on 28 October 2020. Nor did she resign in response to being investigated over this incident by Mr Cornes, which investigation meeting took place on 10am on 4 November 2020. She submitted her request to remain at Whaley Bridge at 11.05am, shortly after the meeting with Mr Cornes finished. Either she considered this to be a fundamental breach of her contract but was prepared to ignore it and continue working, or she did not consider it to be a fundamental breach of contract at all.

57. The claimant has raised a number of concerns with the Tribunal about the fact that the minutes of her investigatory meeting with Mr Cornes were not in the Tribunal bundle in their final form. It was clear from the email evidence in the bundle that the claimant requested of Mr Cornes that he amend the notes of their discussion to include a comment that she did not realise that swearing at work was gross misconduct until Mr Cornes told her during their meeting and also that she did not regularly deliver to the son of the deceased patient also, only his mother. However, these amendments were not reflected in the version of the investigatory meeting minutes in the bundle. The claimant told the Tribunal that she considered that this was fraud on the part of the respondent. After discussions with the respondent the final form of the minutes was obtained and disclosed to the Tribunal. The Tribunal did not consider this to be fraudulent conduct by the respondent, but an oversight on the part of the legal representatives which was subsequently corrected. It did not have a material impact on the proceedings.

58. Mr Cornes' investigation outcome was that the matter should proceed to a disciplinary hearing and Christian Robinson was appointed to chair the meeting, which took place on 10 November 2020. The claimant was accompanied by a representative from her union, USDAW. The incident on 28 October was discussed and the claimant acknowledged that her behaviour (swearing and arguing) was "*probably not*" acceptable and she agreed to apologise to Mr Modi, as recommended by her union representative who noted that "*bridges need to be built here*". The claimant told Mr Robinson that her relationship with her line manager Mr Cornes was "*fine*" and that he was "*supportive*".

59. Mr Robinson's decision was handed down in the meeting, which was to issue a written warning to the claimant as this was the second incident of unacceptable behaviour in a short space of time. Mr Robinson also said he was "*going to speak to pharmacist and try to do mediation*".

60. Following the meeting, the claimant was told by Mr Cornes by email on 10 November that she was to return to work the next day, 11 November 2020. Mr Cornes instructed her "*please apologise in pharmacy as asked for in meeting. Act professionally. If you have any issues, frustrations, please phone me, Christian or Kirsty*".

61. Mrs Smith returned to work on 11 November and attended the Whaley Bridge pharmacy in the morning. It is agreed that she spoke to Mr Modi. The claimant's evidence was that Mr Modi made inappropriate comments to her, in that she says he said "I thought we had got rid of you this time, if you're working here then I'm not".

62. The claimant provided a covert recording of part of this conversation, recorded on her mobile phone, although she accepts that none of the covert recording captures Mr Modi making this remark. Having listened to the relevant section of the recording during the hearing, we note that the audio contains an apology from the claimant and Mr Modi telling her that they did not need to discuss what had happened, as he was leaving. He told her that he had been looking to move form some time. The claimant then noted that she would offer to resign, and Mr Modi told her not to worry, after which the claimant was insistent she would resign.

63. We find that the general tone of the conversation between Mrs Smith and Mr Modi was professional and courteous, if somewhat awkward. There was no suggestion whatsoever of the kind of remark that the claimant alleges Mr Modi made to her. Mr Modi's witness evidence was that he told the claimant that he did not want to talk about the issue, which evidence we accept.

64. The claimant left the pharmacy shortly after the conversation and sent a text message to Mr Cornes at 9.26am, which read

> *"David, you didn't tell me Raj had handed his notice in, I can't work with that on my conscience so this is my notice. I will do a letter of resignation when I get home. I will do this morning, but you will have to get cover for this afternoon sorry."*

65. We find that this is the reason for the claimant's resignation. This is a record of her immediate reaction to her conversation with Mr Modi and a genuine statement of her feelings at the time, which were that she was upset by the news. Mr Cornes immediately asked the claimant to ring him and said "*I don't want you to make a rash decision, I would like to know what was said this morning*", but the claimant did not ring him.

66. Mr Modi's contemporaneous evidence, sent in an email on 11 November at 11.24, was that the claimant came in to the Whaley Bridge branch and asked to speak to him, and apologised. Mr Modi reported that "*I said I did not want to discuss it and that I have asked to be moved. She said it would not be fair on the girls*."

67. The claimant issued a resignation email to the respondent on 11 November 2020 at 11.39. In it she alleged that she went into a room to apologise to Mr Modi *"and all he said was, don't bother I've asked for a transfer. If that's the game they want to play that's fine*." She alleged that "the girls", meaning the staff in Whaley Bridge, had "*sided with him*" and that "*to treat me like that is disgusting and*

childish" although she did not expressly state what she considered to be disgusting and childish about their behaviour. As part of these proceedings she alleged that Mr Modi had arranged it so that all the staff were standing around looking at her in an intimidating manner when she came in, but we do not accept that there is any evidence that this happened as described by Mrs Smith. We accept that the conversation would have been awkward and the staff would have had a curiosity about what would be said by both of them, and that Mrs Smith would have found this uncomfortable, but there is no evidence of any malicious behaviour or intent by Mr Modi.

68. By the time the claimant next messaged Mr Cornes, she had become angry with Mr Modi again. Her message at 16.35 said "*Hi just found out that my phone was still recording from a phone call I had this morning so when he's telling you lies about what went on, I have it all on tape".*

69. We find that the claimant did not resign in response to any of the alleged breaches of trust and confidence in her list of issues, but because she could not face working with the staff of the Whaley Bridge branch, believing herself to be the cause of Mr Modi's resignation. She knew that he was a popular member of the respondent's staff and that the pharmacy assistants liked working with him and would have been sorry to see him leave. She would, we find, have been worried that they would have blamed her for his departure and that would have made her relationship with them awkward and difficult. This is despite telling Mr Robinson during the disciplinary hearing that she got on with the Whaley Bridge staff.

The Law

70. In section 95(1)(c) of the Employment Rights Act 1996 it is said that a constructive dismissal occurs where "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct."

71. In ***Western Excavating (ECC) Ltd v Sharp 1978 ICR 221***, the Court of Appeal held that an employee would only be entitled to claim that he or she had been constructively dismissed where the employer was guilty of a 'significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract'. It was not sufficient that the employer was guilty of unreasonable conduct - he must be guilty of a breach of an actual term of the contract, and the breach must be serious enough to be said to be 'fundamental' or "repudiatory".

72. For an employee to succeed in their claim for constructive dismissal four conditions must be met:

    a. There must be a breach of contract;
    b. The breach must be fundamental and capable of entitling the employee to repudiate the contract;
    c. He or she must leave in response to the breach
    d. He or she must not delay too much otherwise the breach will be deemed to have been waived.

73. The burden of proof is on the claimant to show that on the balance of probabilities there has been a fundamental breach of contract, including a breach of trust and confidence.

74. Whether or not there has been a breach of contract, including of the duty of trust and confidence, is an objective test. That means that the Tribunal will decide for itself whether there has been a breach or not. It is irrelevant that the claimant subjectively believed there to be a breach.

75. In ***Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606***, it was held that;

"The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between employer and employee"

76. For there to be a breach, it is not necessary that the employer intended any repudiation of the contract: the issue is whether the effect of the employer's conduct as a whole, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it (***Woods v WM Car Services (Peterborough) Ltd 1981 ICR 666***.)

77. Also, the term is only breached where the employer has no 'reasonable and proper cause' for his actions (***Gogay v Hertfordshire County Council 2000 IRLR 703.)***

78. In relation to the claim of disability discrimination and the time limit for presenting the claim, the Tribunal will ask whether the treatment complained of was a one-off act or an ongoing act of discrimination?

79. Was the treatment complained about to the Tribunal within three months (subject to ACAS Early Conciliation) of the incident or the last act in a series of incidents?

80. If there was no complaint within three months (subject to ACAS Early Conciliation) of the incident or the end of the ongoing act, was the complaint made within such further period as the Tribunal considers is just and equitable (as per s123 Equality Act 2010)?

81. Section 123(3) and (4) Equality Act 2010 make special provision relating to the date of the act complained of in the following situations:

> *(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) 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.

82. The Tribunal must consider a number of factors in deciding whether a claim presented late can still be considered on a "just and equitable" basis.

83. These include, but are not limited to, the prejudice each party would suffer as a result of the decision reached, and the circumstances of the case, such as the length of the delay and the reasons for the delay, the extent to which the evidence might be affected by the delay and the steps taken by the claimant to obtain advice once he knew of the possibility of taking action. The Tribunal must also take into account the merits of the claim.

84. It is not the case that it is never just and equitable to extend time where there is no good explanation for the delay. ***Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA*** held that any explanation put forward by the claimant is a matter that the Tribunal should consider but is not the deciding issue of whether or not the Tribunal should extend time.

85. Duty to make reasonable adjustments: Provision, criterion or practice (s20(3) Equality Act 2010). Did the respondent have a provision, criterion or practice (PCP) that put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time? If so, did the respondent know or could it reasonably have been expected to know, that the claimant was likely to be placed at any such disadvantage? If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

86. ***Glasson v Insolvency Service 2024 EAT 5***, while the employer was aware of the claimant's disability, it did not have knowledge, actual or constructive, of the particular disadvantage upon which the claimant relied and so did not have a duty to make reasonable adjustments.

87. ***Q v L EAT 0209/18 EAT*** - an employment tribunal erred in holding that the employer had been fixed with knowledge of the claimant's disability in circumstances where its occupational health adviser had not passed on details of the claimant's medical history and had no express authorisation to do so under data protection rules.

Application of the Law to the Facts Found

Unfair dismissal – sections 94 and 98 ERA 1996

88. It is the claimant's case that she resigned in response to multiple breaches by the respondent of the duty of trust and confidence, or that cumulatively these actions by the respondent amounted to a breach of trust and confidence, that she resigned in response to.

89. However, we find that the claimant resigned in response to the information that Mr Modi was leaving Whaley Bridge, because she considered that she would not be able to work with the remaining staff as they would blame her for his resignation. She did not therefore resign in response to any breaches by the respondent.

90. None of the alleged breaches of trust and confidence in the claimant's list of issues are the cause of her resignation, we find. On 4 November 2020, the claimant expressed a clear wish to remain in the respondent's employment and a clear wish to remain working with the Whaley Bridge pharmacy. In the meeting on 10 November, the claimant agreed to return to work at Whaley Bridge and apologise to Mr Modi. We do not accept that Mr Modi said to the claimant "I thought we had got rid of you this time, if you're working here then I'm not". We accept that he told her he was leaving, however we do not accept that this information alone amounted to a breach of trust and confidence.

91. Taking each of the alleged breaches in turn, we conclude as follows. In relation to the first allegation, that the respondent required the claimant do things that were not part of her job, such as getting forms signed by customers for Mr Modi, we do not accept that this was a breach of trust and confidence. The requirement to have customers sign forms was, we find, part of a reasonable management instruction and contrary to the claimant's allegations, there was no evidence of these forms resulting in any personal financial gain for Mr Modi.

92. In relation to the allegation that she was sent to a Covid patient without following the correct procedures and without her knowledge, there was no evidence that the correct procedures were not followed by the respondent in this regard. We accepted the respondent's evidence that they would not have been aware of which patients might have been Covid-positive, and that Covid protocols were in place for the delivery of medication in any event. Furthermore the respondent had reasonable and proper cause in the pandemic to continue to provide medication to all its customers, even where there was a risk of those customers being Covid-positive.

93. In relation to the following allegations, which were that the respondent constantly ignored her and never acted on issues she raised, disregarded its duty of care towards her, did not deal with issues brought up in the workplace and did not helping or providing hands-on support to her on flexi-pod when she was suffering with stress, we conclude as follows. Firstly, the respondent did not constantly ignore her. They cannot be said to have never acted on issues raised. The claimant was given support in relation to Flexi pod issues. However, we accept that Mr Cornes was at times slow to deal with issues that the claimant brought to his attention. He also failed, between 14 September and 28 October 2020, to address her request to reduce her hours. Even if the claimant's case is taken at its highest, such that these can be said to be breaches of trust and confidence, by requesting to remain at work on 4 November and after the disciplinary meeting on 10 November, the claimant had waived these breaches, such as they were. Despite of any such breaches, she wished to remain at work at Whaley Bridge. She did not resign in response to them, such as they were.

94. In relation to the allegation that the respondent did not offer to support her when she indicated she wanted to reduce her hours because of her health, we have indicated that there was a period between 14 September and 28 October

where the claimant's manager Mr Cornes failed to support her change of hours request. However, for the reasons stated in the above paragraph, this was not the reason for her resignation.

95. In relation to the allegation that the respondent falsified information, such as trying to submit a copy of the notes of a disciplinary meeting without including the claimant's amendments, this is in relation to an allegation about the conduct of the respondent's solicitors in these proceedings and so cannot have formed part of the claimant's motivation for her resignation on 11 November 2020, before these proceedings were started.

96. Finally, in relation to the allegation that Mr Modi intimidated witnesses into not providing comments in the 29 October investigation, there is no evidence on which we could have concluded that Mr Modi acted in this manner. Even if there was such evidence, for the reasons stated above (including that the claimant sought to return to work at Whaley Bridge on 11 November), this cannot have been the cause of her resignation.

97. Therefore, the claimant was not constructively dismissed due to a breach or breaches of the duty of trust and confidence by the respondent. Any such breaches as there were, were waived by the claimant on 4 November and 11 November when she confirmed her wish to continue working at Whaley Bridge. The actual reason for her resignation, being Mr Modi's resignation, was not a breach of the respondent's duty of trust and confidence. Therefore, the claimant simply resigned and was not constructively dismissed.

Was the disability discrimination claim issued out of time? Can it be presented to the Tribunal after a just and equitable extension of time?

98. The disability discrimination claim was issued out of time. It was not raised until the claimant was invited to clarify her claims by the Tribunal which she first did on 13 June 2021. Her formal application to amend was not made until 17 November 2021. Had the duty to make reasonable adjustments arisen, we find that the respondent's temporary failure to do so would have been known to the claimant approximately two weeks after her request on 14 September 2020, so 28 September 2020. She therefore had until 27 December 2020 to contact ACAS and did not do so.

99. In the circumstances, was it just and equitable to extend time to allow such claims to be considered? We find that it was. The claimant's claim form makes multiple references to her health and also refers to the Equality Act 2010. The claimant issued the claim on her own without the assistance of a lawyer. It was apparent that she wished to include reference to her ill health and the impact of working at the respondent in her claim, but did not spell out that this included disability discrimination. There was no prejudice to the respondent in extending time to allow the claims to be presented, as the issues in the disability discrimination complaint overlap with the claimant's constructive unfair dismissal complaint and the greater prejudice is to the claimant in denying her an opportunity to have her discrimination claim heard.

Disability discrimination – failure to make reasonable adjustments (ss20-22 EQA 2010)

100. For the disability discrimination claim it is submitted by Mrs Smith that the respondent failed to make reasonable adjustments, in that they failed to allow her to reduce her hours in June 2020 and that she continued to make deliveries for Disley thereafter. She relies on the disabilities of Patent Forum Ovale, hemiplegic migraine and Essential Thrombocytosis.

101. In order to decide whether the duty to make reasonable adjustments arises, the Tribunal must consider whether the respondent knew or could it reasonably have been expected to know that the claimant had the disabilities and from what date. The relevant time for the respondent's knowledge in this case is during the claimant's employment, and certainly at June 2020 and thereafter when the reduction in hours was being discussed.

102. The respondent accepts that it knew that the claimant was disabled by reason of Essential Thrombocytosis during the period to which these claims relate. The respondent accepts that the claimant was also disabled by reason of hemiplegic migraine at the time, but not that it had knowledge of this. The respondent does not accept that the claimant was disabled at the relevant time by reason of Patent Forum Ovale.

103. We found that the claimant did not ever directly tell the respondent that she had either Patent Forum Ovale or hemiplegic migraine. Ought the respondent to have reasonably known that the claimant was disabled because of either condition, from what other information they had? We find that in the absence of further medical information, the respondent ought not reasonably to have known that the claimant was disabled by reason of hemiplegic migraine or patent forum ovale. As stated above, any knowledge that Mr Modi had as the claimant's pharmacist could not be imputed to the respondent, due to Mr Modi's duty of confidentiality (as in ***Q v L EAT 0209/18 EAT)***. The only information the respondent had about the claimant's ill health was that she was becoming stressed and anxious and suffered from headaches. She also told them that she had a stroke "before" but did not say when.

104. In the absence of further information, it cannot be said that the respondent ought to have known that the claimant suffered from a physical impairment that had a substantial adverse effect on her normal day to day activities. She was never off sick and the respondent knew she had a second job at Tesco. There was no information from which the respondent ought to have distinguished regular job stress, in a demanding and uncertain environment at the time (due to the pandemic) from effects caused by a disability. Therefore, although the respondent knew that the claimant was disabled by reason of Essential Thrombocytosis, they did not know that she was disabled by reason of anything else or that Essential Thrombocytosis had any effect on her day to day activities such as that there was a need for adjustments to her workload.

105. We agree with the claimant's claim that the respondent had a provision, criterion or practice at her place of work that employees had to work their contractual hours. This was particularly relevant at the time of these complaints because of the pressures that the respondent's service was under, due to the Covid-19 pandemic. The question is then whether the provision put the claimant at a substantial disadvantage compared to someone without the claimant's disability,

in that she was more tired and as a consequence suffered from more migraines? We accept that on the balance of probabilities, this did put the claimant at a substantial disadvantage.

106. Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage? We find that the respondent did not know, and could not reasonably have been expected to know, that the claimant was likely to be placed at the disadvantage. The respondent had no medical evidence of any such disadvantage. The claimant had not taken any sick leave. Her GP letter of 30 June 2020 did not mention any issues other than stress and anxiety. Although the respondent knew that the claimant was stressed and prone to headaches, there were a considerable number of issues that contributed to these issues, such as the Flexipod issues, the disorganisation at Disley, the Covid-19 pandemic and the claimant's second job at Tesco. The issue of the claimant's health was not raised by her union representative or her at any of the investigation or disciplinary meetings, other than that the claimant mentioned that she had a stroke some time ago and couldn't have another one.

107. Therefore, as the respondent did not know and could not reasonably have been expected to know that the claimant was likely to be placed at the disadvantage, the duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage did not arise. There was no obligation on the respondent to make reasonable adjustments and so it did not fail to do so in the circumstances.

Employment Judge Barker

Date 23 February 2024

JUDGMENT SENT TO THE PARTIES ON

27 February 2024.

FOR THE TRIBUNAL OFFICE

ANNEX – AGREED LIST OF ISSUES

UNFAIR DISMISSAL

1. Did the respondent do the following things to the claimant:
    a. Require the claimant do things that were not part of her job, such as getting NMS signed by customers for RM
    b. Not offer to support her when she indicated she wanted to reduce her hours because of her health
    c. Send her to a Covid patient without following the correct procedures and without her knowledge
    d. Constantly ignore her and never act on issues she raised
    e. Disregard its duty of care towards her
    f. Falsify information, such as trying to submit a copy of the notes of a disciplinary meeting without including the claimant's amendments
    g. Not deal with issues brought up in the workplace
    h. RM intimidating witnesses into not providing comments in the 29 October investigation
    i. Not helping or providing hands-on support to C on flexi-pod when she was suffering with stress
    j. On 11 November 2020 RM said to the claimant "I thought we had got rid of you this time, if you're working here then I'm not" and that he was leaving.

2. If so, did those things either individually or cumulatively amount to:
    a. Conduct without reasonable and proper cause
    b. Calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee

    and therefore amount to a breach of the implied term of mutual trust and confidence?

3. If so, did C resign in response to that breach?

4. Did C delay her resignation such that she affirmed any such breach?

5. If C's dismissal was unfair:

    a. Would C have nevertheless been dismissed for a potentially fair reason and if so, when?
    b. Did C contribute towards her dismissal by virtue of her own conduct?

DISABILITY DISRIMINATION – FAILURE TO MAKE REASONABLE ADJUSTMENTS

6. Does the Tribunal have jurisdiction to hear C's claim?
    a. What is the notional date from which the time limit is to run;
    b. Was that date within 3 months of the date when C presented her claim for disability discrimination (17 November 2021);
    c. If not, would it be just and equitable to extend time to allow the Tribunal jurisdiction to hear C's claim?

    If so,

7. R accepts that:

a. the claimant was disabled at the relevant time by reason of Essential Thrombocytosis and that it knew she had this condition at the time, and
b. the claimant was disabled by virtue of Hemiplegic Migraine at the time but not that it had knowledge of this;

8. Does Patent Foreum Ovale amount to a disability? R accepts that it is a physical impairment which C had long term. The issue to be determined is whether the impairment had a substantial adverse effect on C's ability to carry out normal day to day activities.

9. Did R know or ought R reasonably to have known that C was disabled by virtue of Patent Foreum Ovale and Hemiplegic Migraine?

10. Did R apply a provision, criterion or practice ("PCP") to the claimant? The claimant says that the criterion was the requirement for employees to work their contractual hours;

11. Did that practice put C at a substantial disadvantage in relation to a relevant matter as compared with a person who did not suffer with C's disabilities?

    a. The claimant says the disadvantage is that she was more tired and as a result suffered from more migraines;
    b. Was that substantial?
    c. Did the application of the PCP cause this disadvantage, and if so, how?
    d. Would a person without C's disabilities be put to the same disadvantage?

12. Did the respondent know or ought they reasonably to have known that the PCP put or would put the claimant to that substantial disadvantage?

13. If so, did the respondent take such steps as it is reasonable to take to avoid that disadvantage? The claimant asserts that the respondent should have permitted her to reduce her hours in June 2020 and not carry out deliveries for the Disley pharmacy from that point onwards.