EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104868/2019 (V)

Held by CVP on 23, 24 and 25 February 2021

Employment Judge McFatridge
Tribunal Member J Burnett
Tribunal Member R McPherson

Ms K Downes	**Claimant** **Represented by** **Ms Flanigan,** **Solicitor**
Western Isles Health Board	**Respondent** **Represented by** **Mr Watson,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that the claimant was not unlawfully discriminated against by the respondent on grounds of disability. The claim is dismissed.

REASONS

1. The claimant submitted a claim to the Tribunal in which she complained of disability discrimination. The respondent submitted a response in which they denied the claim. They accepted that the claimant was disabled as a result of suffering from diabetes. They denied discrimination. The claim was subject to a degree of case management during which it was established that the sole claim being made was a claim of a failure by the respondent to comply with a duty to make reasonable adjustments in terms of section 20 and 21 of the Equality Act 2010. The claimant

produced further and better particulars of claim in which she alleged that the respondent applied a PCP of requiring dental nurses to work particular shift patterns without a break and that this placed the claimant at a particular disadvantage because of her diabetes. It was stated that a reasonable adjustment would have been for the claimant to have guaranteed break times. The hearing took place over three days over CVP. The claimant gave evidence on her own behalf. Evidence was led on behalf of the respondent from Jane Gillian a Lead Diabetes Nurse Specialist who gave evidence in relation to the nature of diabetes and the medical background as well as direct evidence of her various interactions with the claimant; Derek McDonald, Dental Business Manager with the respondent who had had various meetings with the claimant in relation to her employment; Colin Robertson, Director of Dentistry with the respondent who also spoke of the history of his engagement with the claimant; Christine McMillan, Senior Dental Nurse with the respondent who spoke of her personal involvement and Angus McLennan, a former Interim Theatre Manager with the respondent who had dealt with the claimant's grievance appeal. In addition the parties lodged a statement of agreed facts. A joint bundle of productions was lodged together with a supplementary bundle of productions which was lodged by the respondent's representative a few days before the hearing in order to deal with matters which had been raised in the claimant's witness statement which had not been anticipated. All of the witnesses gave their evidence in chief in the form of a witness statement which they adopted as being true and accurate at the commencement of their evidence. I have referred to the productions by page number in the judgment below. On the basis of the evidence, the productions and the agreed statement of facts the Tribunal found the following essential facts relevant to the claim to be proved or agreed.

Findings in fact

2. The respondent are Western Isles Health Board. The claimant began working for the respondent as a Trainee Dental Nurse on 11 July 2011. She qualified on 20 October 2013 and thereafter worked as a Dental

Nurse. She was based at the Western Isles Dental Centre in Stornoway. There are approximately 45 staff members at the centre including dentists, therapists, nurses, administrative staff, students and tutors. The centre could have up to 12 surgeries operating with a dentist (or student therapist undertaking restricted practice) paired with a dental nurse. Generally speaking, each dentist will have a nurse working with them on a one-to-one basis. For student clinics the arrangement the centre has with Aberdeen University is that there will be one nurse for every three student surgeries however in practice there will generally be a slightly higher ratio of nurses to practitioners.

3. Over the years the claimant's hours of work varied. For a time she was working one day per week. By the time of the events relevant to this claim the claimant's substantive contract was for one day per week however the claimant had had a series of fixed term additions to this whereby she was contracted to work for an additional 22.5 hours per week. There was an ongoing consultation process between the claimant and the respondents regarding whether this extension should be continued or made permanent which, although unrelated to the subject matter of the claim, provides part of the background context.

4. Within the centre, patient appointments are planned approximately two months in advance with the dentist scheduling appointments for the duration necessary for the procedure to be undertaken. The maximum routine appointment duration will be one hour (often it is 30 minutes or 45 minutes). The appointment duration will allow time for extra treatment for the patient on the day and also normally enables the staff to have breaks or do any necessary paperwork with regard to the patient treatment. Each of the surgeries therefore has a bespoke schedule for each day. The senior nurse in charge of making up staff rotas - allocating dental nurses to a surgery, and taking account for sickness and annual leave is normally Christine McMIllan (or if not another of the senior dental nurses). The rota is made up two or three weeks in advance to allow for sickness absence and annual leave. Unfortunately the centre has high sickness absence rates. In the past there have been days when up to eight nurses have been absent for various reasons. This has the obvious effect of requiring

last minute changes to the rota to be made. The centre also operates a daily emergency service.

5. Nursing staff such as the claimant would either work chairside or be assigned to general tasks. A nurse allocated to general tasks will do work which involves cleaning store cupboards, sorting out lab work such as dentures and crowns and checking turnover of stock. Staff on "general tasks" will provide cover for breaks or staff appointments and are free to take a break themselves when required. The rota is designed so as provide for one, two or more nurses on general tasks each day. If the dental nurse is working chairside she is expected to look after the patient and assist the dentist by mixing and making available any materials or instruments required. The nurse also tidies away and cleans between each patient. The tidying and organising is normally started while the patient is seated and whilst the dentist is writing up the patient notes. This means that often the cleaning up work is completed around the same time as the appointment is finished. The centre is open from 9:00am to 5:30pm. No appointments are scheduled between 1:00 and 2:00pm (lunch is half an hour on Fridays to allow for an earlier finish time). This means that staff have a guaranteed break at lunchtime. Start and finish times may vary slightly due to patient need. For example it may well be the case that a nurse will be allocated to a surgery where the first appointment is not until the middle of the morning.

6. As well as the lunch break, dental nurses such as the claimant were also entitled to one 15 minute break in the morning and one 15 minute break in the afternoon. The system for the timing of breaks is opportunistic. Patients regularly fail to attend or come at the wrong time. Staff are encouraged to use these periods to take their 15 minute break.

7. The respondent have a management system known as Exact which monitors the usage of each dental surgery and confirms the times the surgery is utilised. In 2018 the respondent had 1738 broken appointments equating to 150 full days of lost clinical time. The respondent anticipate that there will be around seven failed appointments on a typical day. The system of breaks which the respondent have operated during the entire period of the claimant's employment was that staff were required to

manage their own regular breaks in between appointments so as to fit in with the service. The system is largely based on natural mid-morning and mid-afternoon breaks fitted around the demands of patient care. With up to 12 surgeries on the go there will also be free nurses at various points who can provide cover should a natural break not arise. If a nurse has a cancellation or finishes an appointment early then if they have already taken their own break they may cover for another surgery and allow another nurse to have a break. This can sometimes be arranged in advance. Additionally, as noted above there are often two or more floating nurses on general tasks who are available to provide cover so that a nurse can have a break.

8. In addition, as noted above, appointments are scheduled so as to provide some additional time for extra treatment for the patient on the day. Often a nurse will be able to fit in a break if one patient finishes early and it is then possible to delay the start of the next patient by five or 10 minutes so as to accommodate the full period of break.

9. Over the years the system has worked well and provides dental nurses a break mid-morning and mid-afternoon.

10. On 5 April 2017 a routine staff meeting took place which was attended by the claimant and Mr McDonald as well as other dental nurses. The issue of breaks was discussed. There had been some comments that some staff were occasionally not getting their tea-breaks. Mr McDonald found this surprising but in order to ascertain how much of a problem this was (if any) he asked all staff to record in their time sheet if they did not get their breaks on a particular day. He also said that they could e-mail him in order to advise him of this. In the period since that meeting Mr McDonald did not receive e-mails from anyone indicating that they were not getting their tea-breaks. Following the issues raised by the claimant in her grievance Mr McDonald carried out a check of nurses' time sheets for the period from 5 April 2017 onwards. During that period one nurse (not the claimant) had indicated on her time sheet two occasions when she had not received her breaks. No-one else raised the issue. The claimant did not raise the issue at any point by noting in her time sheet that she had not received a break.

11. The claimant suffers from diabetes which the respondent accept amounts to a disability in terms of the Equality Act. In addition to this the claimant suffers from a number of other health issues. She has had a very large number of absences over the years. She had a substantial number of conversations with Mr McDonald regarding her various medical conditions. The reasons for the claimant's absence as quoted from sick lines, occupational health reports etc were varied. They included

(a) Recovery from surgical procedure
(b) Serious illness
(c) Chronic condition
(d) Back pain
(e) Musculoskeletal problems
(f) Overtreatment of thyroid problem
(g) Complex regional pain syndrome
(h) Awaiting hospital investigations
(i) Weakness symptoms
(j) Acute reaction to stress
(k) Anxiety with depression
(l) PTSD
(m) Nerve pain
(n) Lupus
(o) Chronic pain syndrome
(p) Sore neck
(q) Fainted yesterday and feeling unwell after
(r) Breathing difficulties, painful bones
(s) Hypoglycaemia
(t) Angioedema of face
(u) Allergic reaction causing swelling
(v) Headache/vomiting
(w) Covered in rash/hives
(x) Exhaustion
(y) Anaemia/hospital admission

12. Mr McDonald would have a return to work meeting after each of the claimant's absences. At one of these return to work meetings on

2 October 2017 the claimant spoke about wanting "a break during the morning and afternoon". She did not provide any further information at that stage as the reason for the break. Mr McDonald reassured the claimant that she could have breaks at any time if she needed them. She did not indicate that she was not getting breaks or that the system as then operated was causing her any difficulty.

13. As noted above the respondent, over the years, agreed to vary the claimant's hours and in addition made a substantial number of other adjustments in relation to her medical conditions. Mr McDonald felt that the claimant was often uncomfortable or reluctant to share any detailed information about these medical conditions and only communicated what she wished the respondent to know. In October 2016 the claimant increased her hours to 22.5 per week. Both Mr McDonald and Mr Robertson were concerned as to whether the claimant would be able to manage this given her various medical conditions and indeed the claimant did have further absences. In the period October 2016 to March 2018 she had nine periods of absence equating to 28 days. The claimant increased her hours to 30 hours per week at the end of March 2018. This was on the basis of a fixed term contracted increase. Mr McDonald had initially resisted this due to concerns about the claimant's sickness levels but the claimant managed to convince him that her health had improved and her attendance would also show an improvement. The claimant then had 16 working days' absence in April/May 2015 and 55 days' absence in the period June 2018 to September 2018. The reason for these absences were blood disorders, costochondritis, exhaustion and hospital investigations, weakness symptoms.

14. The respondent's management were aware that the claimant suffered from diabetes however their understanding was that this was very much under control. Although Mr McDonald had many many conversations with the claimant regarding her health issues she never at any time raised any issues regarding her diabetes. Her diabetes did not have any impact while she was at work. The claimant's timekeeping was generally poor and Mr McDonald was aware that one of the reasons which was sometimes

given by the claimant was that she had had a hypo. This was in addition to other reasons for lateness which she gave from time to time.

15. The claimant was due to go on to half pay had she remained on sick leave after mid-September 2018. The claimant contacted Mr McDonald towards the end of August to advise that she now felt fit to return to work. She had first contacted Mr McDonald by e-mail on 12 August 2018 to say that she was looking to contact occupational health to arrange a plan for returning to work. Mr McDonald thereafter tried to contact her but was unable to do so until she e-mailed again on 30 August and said that the occupational health doctor said that a reduced hours phased return could be arranged within two weeks.

16. The claimant attended occupational health on 29 August 2018 and a report was produced dated 30 August 2018 which was lodged (pages 55-56). This stated the claimant was fit to return to work with restrictions. It referred to the claimant's health condition as being pain and fatigue. It went on to state the claimant should be fit for all duties but was likely to be unable to sustain these over the full day. It stated she would benefit from a phased return and some brief rest periods while working should this be able to be accommodated. It did not refer at all to her diabetes. Under further advice Dr Lando stated

> "At present she has pain and fatigue. It is these symptoms that prevent her from working."

He recommended a phased return but stated that

> "Because her activity level is dictated by her symptoms rather than the condition the best return to work plan is best decided by a discussion and mutual agreement."

17. The claimant met with Mr McDonald on 3 September 2018 to discuss the report. Mr McDonald discussed and agreed the initial stage of the phased return with the claimant. He highlighted that she needed to keep in regular touch and indicated that he would take HR advice in relation to her fixed term additional hours' contract. The claimant said that she did not want to work in student clinics. She also said that she might have problems

kneeling down and cleaning the base of the dental chair. Mr McDonald indicated that those adjustments would be accommodated. They were accommodated by the respondent following her return to work. Mr McDonald also said that he would not expect the claimant to be doing much clinical work in the first few weeks. He also informed the senior dental nurses that she might need support. Mr McDonald arranged that the claimant be assigned to general tasks for the first few weeks so that she would not be required to be chairside in a surgery. At the return to work meeting on 3 September there was no mention whatsoever of the client's diabetes nor was there any mention of breaks or any specific requirement relating to breaks. With regard to phased return the agreement was that the claimant would work three mornings the first week and that the timings for subsequent weeks would be agreed later as set out in the occupational health report.

18. Mr McDonald took HR advice and following that advice a case conference was arranged with the claimant present which took place on 26 September 2018. As well as the claimant there were representatives of HR and occupational health at this meeting as well as a staff side representative for the claimant. The case conference was positive and agreement was made for the claimant to work three days per week and that another case conference would take place early in December. It was also agreed that the claimant's fixed term contract would be extended. At the meeting Mr McDonald expressed some concerns about the claimant keeping in touch. The claimant's staffside representative indicated that the meeting had been supportive and that the adjustments that had been agreed were fair. At no time during the meeting was there mention of diabetes or tea breaks. Following the meeting, Marion Campbell, the occupational health Nurse who had been in attendance, wrote to the claimant summarising the discussion. The letter was lodged (61-63). Following the meeting, the claimant and Mr McDonald met with Ms McMillan and discussed the claimant's proposed working pattern. Ms McMillan was informed that the claimant's staffside representative had requested that the claimant's nursing colleagues be told the reason why the claimant needed assistance cleaning the dental chair and high shelving. Mr McDonald and Ms McMillan agreed with the claimant what colleagues would be told.

19. The claimant had another period of absence at the end of October 2018. At around this time the claimant's son was diagnosed as a Type 1 diabetic and the claimant told Mr McDonald that she was taking some time off to teach him how to do blood tests and inject insulin etc. Mr McDonald became concerned that the claimant was off for four working days (eight calendar days) and did not keep in touch or inform the respondent when she was returning to work. Mr McDonald attempted to phone her on a number of occasions but received no reply. After the claimant's return to work Mr McDonald asked the claimant about the reason for her absence and the claimant told him "do you expect me to let my son die". Mr McDonald felt this was an entirely inappropriate response. He felt that the claimant was deliberately trying to create a barrier to effective communication.

20. As planned at the previous case conference a further case conference took place on 29 November. There was a discussion regarding the claimant's health. The claimant had recently attended a neurologist appointment in Glasgow. She had also attended a private rheumatologist. She stated that she would provide Mr McDonald with a copy of the report but did not in fact do so. She also said she was two days into her latest trial of medication. The claimant said that she had good days and bad days but was generally managing her work with no real issues. There was no mention of diabetes, tea breaks or the claimant's blood glucose at that meeting. Following the meeting a note was produced (page 66-67). This confirms that these matters were not mentioned. Following the meeting Marion Campbell, the respondent's occupational health nurse wrote to the claimant and confirmed that the claimant's monitoring period would be extended and raised various issues about the appointments which the claimant had in future. There was no suggestion there had been any discussion relating to the client's diabetes control.

21. Following the claimant's phased return Ms McMillan who was Senior Dental Nurse and was responsible for allocating tasks had done her best to make the phased return as easy as possible for the claimant. He checked with the claimant each day during the phased return to ensure that she felt she was managing her workload and adjusted it when

required. She noted the various timekeeping issues but took no formal action regarding these. There was an incident on 12 November when the fire alarm had gone off and Ms McMillan noted that the claimant was not at the roll-call muster. The respondent were concerned that the claimant may have become trapped in the lift. Eventually, one of the nurses established that the claimant had not actually arrived at work by the time the fire alarm went off. The claimant came in late that day.

22. Over the years Ms McMillan had become aware of the claimant's various health difficulties. Her understanding in December 2018 was that the claimant's diabetes was under control since that was what the claimant had told her. There was one incident on 16 November when the claimant had been late turning up to work and had said that she had had a "diabetic turn", apart from that there were no incidents. By the beginning of December 2018 the claimant had been phased off general tasks and was being assigned to a surgery. On 5 December 2018 the claimant was working with Colin Robertson in his dental surgery in the morning. As noted above, the respondent records the work done by dentists and nurses each day in an IT system called Exact. This is a robust system and once entries are made they cannot be subsequently altered. Entries in the system are made at the time. The print outs from the system for various dates in December and January 2018/19 were lodged (page 74-81). These cover the surgeries the claimant worked at. The print out for 5 December was lodged at page 74. It shows that the first patient the claimant had to deal with came in at 10:28. The patient was finished by 10:52. There was then a further patient who came in 15 minutes later at 11:07. It is not known precisely when that patient left but the next patient came in at 12:13 and left at 12:46. These were the only three patients in the morning. The claimant had time for a break of 15 minutes between the 10:28 appointment which ended at 10:52 and the start of the next appointment at 11:07. The claimant took her break at that time.

23. In the afternoon the claimant was scheduled to work with Colin Robertson from 2:00pm until 3:10pm. She was then due to have a break and worked with Lynsey Smith from 3:30 until 4:40. There were also two nurses on general tasks that day who would have been available to cover any breaks

had the claimant asked. The claimant did in fact have a break between 15:04 and 15:30. The last patient was between- 16:23 and 16:38.

24. At around 3:00pm Ms McMillan got a message from a member of staff saying that the claimant had asked him to pass on a message that she should check there was enough glucogel in stock as the claimant had used up all of her glucose tablets. The claimant had indicated to the member of staff that she had been "having hypos" all day. As soon as Ms McMillan received the message at around 3:15 she went down to the surgery to make sure that the claimant had taken a break. She found the claimant laughing and joking with Colin Robertson. She seemed in no hurry to go for her break so Ms McMillan prompted her to leave by reminding her she had to take her break and then was expected to be working with Lynsey at 3:30. Ms McMillan had to ask her a couple of times. She checked she was okay. After the claimant left for her break Ms McMillan finished up cleaning the surgery. Mr Robertson had not noticed anything untoward in the claimant's demeanour that day. He advised Ms McMIllan of this fact.

25. In order to control her diabetes the claimant takes two types of insulin. One of these is injected twice a day in order to provide a background level of insulin. The particular drug which the claimant used for this purpose was called Levemir. In addition to this the claimant also controlled her diabetes by injecting a rapid acting form of insulin before meals. Up until around November 2018 the claimant was on a type of rapid acting insulin called NovoRapid. This takes around 10 minutes to start working and usually passes out of the system (leaving only the background level of insulin) in around two hours. In November 2018 the claimant changed to a different type of fast acting insulin called Fiasp. This is known as an ultra-rapid acting insulin since it starts working within five minutes. It is correspondingly out of the system slightly sooner. Generally speaking, it is easier to control diabetes with Fiasp than with NovoRapid since the Fiasp acts more quickly and is out of the system more quickly. In addition to using insulin, the claimant controlled her diabetes by monitoring her blood glucose level. If blood glucose level is below four this is termed a "hypo" which is short for hypoglycaemic. This means that there is insufficient glucose in the blood. A diabetic will often get to know the

symptoms leading up to a hypo. These can include light-headedness and confusion. A hypo can in certain circumstances lead to unconsciousness. Where a hypo happens in someone's sleep the patient will often fall into a deep sleep but at some stage the liver which stores glucose in the body will release that glucose thus causing a natural recovery. On the other hand if the blood glucose level is too high which is generally taken to be over 13, then the condition is hyperglycaemia. This can also cause symptoms of lethargy. Both conditions can be extremely dangerous and life threatening which is why it is important that diabetics monitor their blood glucose levels on a very regular basis.

26. There are two methods of monitoring blood glucose. The claimant used both methods. One of these involved pricking the finger so as to release a small amount of blood which is then analysed. The second method is non-invasive. The claimant has an electronic monitor subcutaneously implanted in her arm. This monitor is permanently monitoring glucose levels in the interstitial fluid. The implanted device can be read either using a dedicated scanner called a Libre scanner, alternatively there is an app which can be downloaded on a phone which means that one's telephone can be used as a Libre scanner. This is what the claimant did. The process of using the scanner is simple and simply involves placing the scanner in the vicinity of the implant. The scanner shows the blood glucose level and has directional arrows showing if glucose levels are going up, rapidly going down or more or less staying the same. One issue is that because the Libre scanner is reading the level of glucose in the interstitial fluid it is around 10 minutes behind the actual glucose level in the blood and this can cause difficulties which is why patients including the claimant are recommended to also use the pin-prick method. If the patient suspects a hypo then the medical recommendation is to use the blood glucose meter and a pin-prick test so as to obtain up-to-date reading and then take an appropriate amount of glucose in order to increase the level in the blood. Patients such as the claimant are often happy to take glucose on the basis of readings from the Libre scanner alone.

27. Many diabetic patients including the claimant would carry glucose with them so that it would be readily available should they either feel the

symptoms of a hypo coming on or if it is required through their monitoring of blood glucose. In addition, patients who become so unwell that they are unable to take glucose as a result of a hypo may be treated with a substance called glucogen. This is a rapid-acting concentrated form of glucose which can be placed in an unconscious patient's mouth in order to rapidly increase their blood glucose level. Given that the respondent often require to treat patients who may be suffering from diabetes the respondent kept a certain amount of glucogen available for emergency treatments at the dental hospital. It therefore caused Ms McMillan some concern on 5 December when the claimant had apparently asked a member of staff to check if the respondent had enough glucogen. She also became concerned later that afternoon when she was present when the claimant had a conversation with another dentist, Colm, about her diabetes and indicated that she had used up a lot of glucose that day.

28. The symptoms of a hypo are light-headedness, anxiety, agitation, palpitations, feeling very hungry and jelly/wobbly legs. Usually the advice is that if the glucose level is confirmed as being below four then the patient should take 20 grams of rapid-acting glucose. They should then wait 10 minutes and re-test their glucose level. If it is above four they should then take 20 grams of a starchy carbohydrate such as a digestive biscuit or toast, if it is less than four they should repeat with the rapid acting glucose and wait 10 minutes again. In general, a patient with diabetes such as the claimant would be advised to take breaks approximately two hours after each meal. It does not have to be exact but should be around about then. For example if the claimant was starting work at 9:00 with a one hour lunch between 1:00 and 2:00 then a break between 10:05 to 10:50 in the morning and between 3:05 to 3:50 in the afternoon would be appropriate. This would be a good time for the claimant to routinely test her glucose levels and treat as appropriate. Given that scanning glucose levels with a Libre scanner is very quick, easy and unobtrusive, there is nothing to stop a patient scanning her levels much more often than this if she wishes and in the case of the claimant no actual break would be necessary. She could do the test in the surgery without interrupting her work other than momentarily.

29. Although hypos are relatively common they require to be treated seriously as a medical emergency. Often a patient with diabetes will have up to two or three per week. It is highly unlikely that a patient would have seven hypos in one day. In addition it is unlikely that if a patient was having a hypo this would not be fairly clear to those around them particularly if they were working closely with them.

30. Ms McMillan felt that it was very odd that the claimant was saying that she had had seven hypos all day particularly as she checked with Mr Robertson and he had not noticed anything amiss. Mr Robertson also felt that it was strange that the claimant was using such a large amount of glucose. Ms McMillan felt that she didn't quite understanding what was happening. She believed that the claimant understood her health better than anyone else and she could not reconcile what the claimant was saying about suffering from multiple hypos with what she had seen herself which was the claimant being perfectly all right when she had gone down at 3:15 to make sure she took her break.

31. Following the incident on 5 December Ms McMillan took steps to ensure that she checked up on the claimant each day that the claimant worked so as to make sure that the claimant was taking appropriate breaks.

32. On 7 December the claimant sent an e-mail to Mr McDonald (page 85):-

> "Hi Eric
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> As we discussed this is to let you know I was sick and away from work on Monday 3rd December. I was due to start on new insulin on Wednesday 5th December when I was at work. I had no breaks that day until 4.30pm and had seven hypos which I successfully dealt with in surgery. This involves eating glucose tablets in the surgery and also using my phone out of view of the patient to test blood sugar levels. This is far from ideal but I also appreciate that this will not be an everyday occurrence (due to starting new insulin that day). I told Christine McMillan about this and also Colin Robertson who I was working with that day. I was quite upset as she told me that I should have carried glucose around with me in case it happens I always do but I had to use seven packets of glucose tablets that day.

I've also made her aware that I have to use my phone to test my blood sugars to prevent this happening. If I don't get a break then this has to happen in surgery. Two weeks ago she told me in front of seven other nurses that my phone should not be in surgery and should be in my locker. I found this really humiliating.

It would help me if I could get a break each morning and afternoon the way most other nurses do for the sake of my health and being able to do my job properly. The day this happened there were nurses and senior nurses who were sitting at computers. I am still sick today and away from work (Friday 7th December) due to anaemia, fatigue and pain. I called the staff sick line this morning to let them know. Please would you be able to forward me a copy of my contract.

Kind regards,

Jo."

33. As it happens Mr McDonald was absent from work from 7 December until 11 December and did not receive this until then. On 9 December the claimant wrote a further letter to Mr McDonald which was lodged (page 86-87). This raised a number of points relating to the meeting on 29 November. It did not mention anything about the claimant's diabetes or blood glucose levels.

34. There was medical emergency training on 11 December 2018 and the first time Mr McDonald could meet with the claimant was when she returned to work on 12 December. Mr McDonald duly met with the claimant on that date. In advance of this meeting he had spoken to Ms McMillan and Mr Robertson. Ms McMillan informed Mr McDonald that the claimant's claims in her e-mail were untrue. Mr McDonald also spoke to Colin Robertson who advised that he had worked with the claimant that day and there was no indication whatsoever that the claimant had had seven hypos during the day and that she had appeared to be just her usual self all day. At the meeting Mr McDonald indicated to the claimant that his enquiries did not support the accusations and claims that she had made. The claimant became emotional but refused to expand further or seek to explain the differences between her version of events that day and the version of others which was supported by the information on the Exact

patient management system. The claimant's position was that she had worked all day without a break. Mr McDonald felt that the claimant was trying to divert away from the subject. Mr McDonald did try to get the claimant to explain what exactly she wanted. The claimant indicated that she wanted guaranteed breaks each day at precisely 10:30 in the morning and 15:30 in the afternoon. Mr McDonald explained to the claimant that whilst the claimant would be permitted to take these breaks he could not guarantee another member of staff would be available to give her cover at exactly these times.

35. He explained to the claimant the various options that were available to her in order to ensure she received her break. Three of these options were basically the naturally occurring breaks which tended to happen without any need for arrangement by the claimant or anyone else. The first of these was if a patient did not appear ("DNA"). If this happened at the time of the break then the claimant could take her break. The second would be if an appointment with a patient was finished early and the third would if the claimant delayed taking in the new patient so as to enable her to obtain a break. The fourth possibility was that the claimant plan in advance with one of the other dental nurses. This is easy to arrange if, as on most days, there are one or two nurses on general tasks who were not doing chairside work. It was more difficult with other nurses since they could not say when their patient would definitely be finished. The fifth was that the claimant could use the telephone in each surgery to phone for another nurse to come down and give her a break when she needed one. She could phone the resource room where Ms McMillan worked or she could phone the management office. Alternatively she could phone the tea room where there tended to be nurses having their own break or indeed call at reception. This would mean that a nurse, if one was available, could immediately come down and allow the claimant away for her break. The sixth and final option which Mr. McDonald clearly gave the claimant was that if she needed a break then she should simply tell the clinician that this was the case and leave. If necessary she could leave mid-appointment. Mr McDonald was quite clear in telling the claimant that this was very much an option for her. There was a discussion about what happened if there was no answer from the tea room or the resource room.

The resource room and the tea room are only a few seconds' walk from the furthest surgery and it was suggested she could walk there. The claimant also had the option of contacting Mr McDonald or Colin Robertson direct. That having been said, Mr McDonald made it absolutely clear to the claimant that she had his authority to leave the surgery at any time in order to have a 15 minute break hence guaranteeing that the break was available to her. The claimant indicated to Mr McDonald that she understood the difficulties with precise times for breaks and said that she was more than happy with this range of options. Mr McDonald said that he would also raise the matter at the daily huddle. This was a brief meeting which took place every day between Mr McDonald, Mr Robertson and the chief nurse where they had discussed outstanding points.

36. Mr McDonald also raised with the claimant again the possibility of her working in student clinics. In those clinics the pace is slower and appointments are longer and the patient not attending rate is higher. Due to the slower pace nurses can easily cover for one another and guaranteed breaks would be easier to manage. The claimant said again she did not want to work in the student clinic.

37. Mr McDonald again tried to get the claimant to provide further detail of the claims she was making in her e-mail of 7 December 2018 but she did not answer. She was emotional and continually changed the subject bouncing around from one topic to the next. At the end of the meeting however she indicated to Mr McDonald that she was satisfied with the range of options open to her regarding her guaranteed breaks each day.

38. Following the meeting Mr McDonald discussed the matter with Mr Robertson and Ms McMillan and they both agreed that they would keep a close eye on matters and ensure that the claimant received her break every day at around the time she required. Ms McMillan indicated that she already decided that she was going to do this. Ms McMillan did in fact ensure that the claimant received a break morning and afternoon for the remaining shifts she worked prior to the termination of her employment.

39. Although the respondent could and did guarantee that the claimant would receive a break whenever she wanted it and more specifically a break

which was roughly mid-morning and mid-afternoon every day there were specific technical difficulties which made it extremely difficult for the respondent to guarantee breaks at specific times each day. Most of the time breaks occur naturally. The only way of guaranteeing that the claimant could have breaks at the precise times that she wanted would be essentially to arrange the rota around her. This would mean not only arranging one clinician's rota around her but, due to the fact there are constant changes, it would be necessary to arrange the rota of two clinicians around this. This would result in cancellation of appointments and reduce the ability of the respondent to see the same number of patients in a day. In addition to this there are high levels of absence which also causes a number of last minute changes. The respondent's budget was being cut from 2014 onwards at up to 5% per annum which meant they did not have the luxury of being able to hire additional staff.

40. The claimant worked a further five shifts before 9 January. She had breaks morning and afternoon on the days she worked. On Wednesday 9 January the claimant worked in the morning with Colm Rice. The exact print out for the day lodged at page 81. Her first appointment started at 11 o'clock which meant she was free up until that time apart from setting things up. It also meant she could take a break at 10:30. She then had three appointments. There was a 28-minute break between the second and third appointment between 11:39 and 12:07. The third appointment finished at 12:10 and the claimant then had a meeting with Colin Robertson and Eric McDonald.

41. The claimant had been absent on 7 January 2019 and had e-mailed Mr McDonald to say that this was due to what she described as an unexplainable seven hour long hypoglycaemic episode during the night. The claimant then e-mailed Mr McDonald again on Tuesday 8 January (page 95). She raised the issue of her contract renewal. She indicated that she had not heard about the renewal of her contract before Christmas and that this had caused her a lot of stress and upset over the Christmas period. She also said that she had been to see her GP and that her GP had recommended that she look for another job "as the stress has impacted on my health". She said she had no appetite and had lost 10

pounds in weight over Christmas. Mr McDonald had been extremely upset to receive this since he felt that he was being unjustly criticised. Mr McDonald had discussed the matter with Mr Robertson who had indicated that he could not understanding the claimant's comments about her contract since he had discussed the matter with her before Christmas and she had appeared completely satisfied with the position and the explanation he gave.

42. The meeting on 9 January was mainly for the purpose of finalising the documentation for the renewal of the claimant's fixed term contract. The claimant agreed that she had been to see Mr Robertson on 21 December and had known that her contract was to be renewed and was entirely satisfied but would not explain to Mr McDonald why she blamed him in her e-mail for ruining her Christmas. Once again Mr McDonald's perception was that the claimant got emotional and kept changing the subject. There was then a discussion regarding tea breaks. Mr McDonald and Mr Robertson both explained the difficulty of ensuring another member of staff was always going to be available precisely at 10:30 and 15:30 each day. Once again they went through the six options available to the claimant. They confirmed to the claimant the discussions that they were having at the daily management huddle and the fact that staff were aware of the need for the claimant to be given a tea break. They confirmed that there was no 100% guarantee and that it might mean on occasion that the claimant would have to take some responsibility regarding the options discussed. One of these options was for the claimant to simply leave surgery mid-patient should she require a break. The claimant confirmed to them that she understood the difficulty.

43. The discussion regarding the contract extension was difficult in places. The claimant's permanent contract was for 7.5 hour weekly. This had been increased to 22.5 hours on a fixed term basis and that term was due to expire. The claimant's to Mr McDonald of 9 December dealt with her contract extension. Mr Robertson formed the view that the claimant was trying to position herself as a victim. The difficulty for the respondent was that the claimant had been absent so often they were not in a position to judge her ability to fulfil the additional hours. The claimant was pressing

not only to have the additional hours made permanent but in fact for full time working. Mr McDonald's position was that the respondent could not reasonably ask a person to work hours which impacted their health negatively and the claimant's attendance suggested she was already struggling with 22.5 hours. The claimant's position was that she had a right to be offered full time working and that if it turned out that she was unable in fact to work full time then the respondent would simply have to accept that she went off sick. The claimant's position was that denying this to her was unfair. She also indicated that Mr Robertson also felt that since the claimant was now describing her diabetes as a disability the claimant's view seemed to be that the respondent required to do whatever it was she wanted and that any questioning of whether she could take on extra hours and any monitoring of her attendance was discriminatory. In addition, Mr McDonald and Mr Robertson were concerned that whilst Mr Robertson had met with the claimant before Christmas and reassured her that there was no change in her hours she had still contacted the respondent after Christmas to say that she spent the holiday period worried and upset.

44. After the meeting the claimant had her lunch break at the usual time. In the afternoon she was due once again to work with Colm Rice. For some reason the claimant decided that she would work in a different surgery and started working with Colin Robertson. She assisted him between 14:05 and 14:33. Ms McMillan required to come down during this appointment and remind the claimant that she was in the wrong surgery and that she should be assisting Mr Rice. After this the claimant had the opportunity for an 18 minute break. She then saw three patients with Colm Rice 14:51-15:19, 15:19-15:39 and 15:39-15:47.

45. At 15:47 the claimant left Mr Rice's surgery and went up to the tea room. On her arrival in the tea room Ms McMillan sent another dental nurse (Angela) down to take over as dental nurse for Mr Rice so as to allow the claimant to take a break.

46. The claimant had been chatty whilst working with Colin Robertson during his surgery. Mr Robertson did not see any evidence that the claimant

was suffering a hypo or was anything other than fit and well and in good spirits.

47. On her arrival at the tea room the claimant appeared to be upset and indicated that she was having a hypo. Various of the nurses present gave her chocolate and other carbohydrates from their bag. By this time Mr Robertson had arrived at the tea room having been told that the claimant was having a hypo. When Mr Robertson arrived the claimant was sitting in a chair and was quiet. Mr Robertson was told that the claimant had taken glucose tablets but that they didn't appear to be taking effect rapidly enough. Mr Robertson was aware of the basics of treating diabetes. His view was that if a diabetic patient does not appear to be right in themselves the presumption is that they are having a hypo. The reason for this is that the consequences of a hypo can be severe whereas the consequences of a hyper (too much glucose) are relatively trivial. He was aware that it would therefore be appropriate to treat the claimant as suffering from a hypo and react accordingly. He was aware the appropriate action was to administer glucogen and then seek medical attention. Mr Robertson administered glucogen to the claimant. He thereafter took the claimant to A&E with Ms McMillan. At A&E the nurse said to the claimant "Oh you are back again". The nurse then described an incident which had taken place the previous Saturday where the claimant had called a taxi to take her to A&E where she said she was having a hypo. The claimant's glucose level was checked at the hospital and found to be 11 which is somewhat high. This may have been because the glucogon and the other carbohydrate she had taken was having an effect.

48. The claimant did not ever return to work after 9 January 2019. Mr Robertson's view was that the claimant was working towards manufacturing a claim of constructive dismissal. Shortly after she went absent Mr Robertson had a call from a Unison official acting on behalf of the client who stated that the claimant was not prepared to return to work "whilst her life was at risk". Mr Robertson considered the claimant was misrepresenting the situation to the union. The claimant lodged a grievance. This was lodged (page 90-91). This was lodged around

11 January. At around this time Mr McDonald went off sick and was absent from work for some time. He blamed his absence on the stress of having to manage the claimant.

49. On 16 January Mr Robertson e-mailed the claimant in relation to the grievance process (page 99). He referred to the claimant's letter of 9 December 2018 as well as the grievance. He referred to the fact that he had arranged with the claimant's union representative that the claimant would attend an informal meeting with him on 14 January however the claimant had cancelled this at the last moment. He again invited the claimant to have an informal meeting with him in order to discuss matters. The claimant did not respond to this. A formal grievance hearing was then fixed to take place on 6 March 2019. The claimant's union representative contacted the respondent on 3 March to say that the claimant was changing her union representative and asking for the hearing to be postponed. The respondent agreed to this.

50. The grievance hearing took place on 9 April 2019. It was conducted by Angus McLennan who at that time was an interim theatre manager with the respondent. He retired on 23 August 2020. He was an experienced grievance manager. Mr Robertson also attended the meeting and the claimant was represented by her union rep. A note of the meeting was lodged (page 112-148). The notes were taken by Diane Campbell an HR Support Officer with the respondent. The Tribunal accepted these as being an accurate record of what took place. Mr McLennan's focus was on coming to an arrangement with regard to breaks going forward rather than looking back at precisely what had happened on 9 January. Mr Robertson explained the difficulty with guaranteed breaks at precise times. Mr McLennan's impression was that Mr Robertson was genuinely trying to seek a way to make it work. The outcome of the grievance was that the opportunity of half an hour mid-morning and mid-afternoon for the claimant to check sugar levels was something which the respondent could guarantee. Mr McLennan accepted they could not guarantee that the break would always be precisely at 10:30 or 15:30. Mr McLennan's understanding was that 15 minutes before and 15 minutes after 10:30 and 15:30 was reasonable. During the course of the meeting the claimant

checked her glucose level using the app on her phone. This demonstrated to Mr McLennan that this was something which could be done within seconds and how straightforward it was. He noted that the claimant did this after 4pm, the meeting having started at 2pm. Mr McLennan realised at the time that the claimant had not done this around 3:30pm as she was requesting.

51. After the grievance hearing Mr McLennan decided that he would obtain information from the specialist diabetes nurse Jane Gillan simply so as to ascertain exactly what the claimant's requirements were. He was in contact with Jane Gillan and Carol McDonald of the respondent's information government section throughout May 2019 about what diabetes information was required and what consent would be required from the claimant in order to obtain that. The claimant consented to him obtaining the information on the basis that he would destroy what he received after the grievance and wouldn't use the information for other purposes. He then spoke to Jane Gillan on the telephone and Jane Gillan also answered some questions from him in writing. Her written answers were lodged (page 151). In answer to the question what she considered to be a reasonable adjustment as regards breaks for a person with Type 1 diabetes on a basal/bolus regime she answered

> "To be able to take 10 minute break mid-morning and mid-afternoon (as well as usual lunch break). This would enable XXX to scan Libre using either her mobile phone or Libre scanner and if necessary take a carbohydrate snack/drink."

52. Ms Gillan made it absolutely clear to Mr McLennan that the break did not need to be at exactly 10:30am or 3:30pm and that a half hour time frame as suggested by Mr Robertson was reasonable. Ms Gillan confirmed that it would be reasonable for every Type 1 diabetic to follow this advice and there was nothing in the claimant's specific circumstances to indicate that it would not be applicable in this instance. It appeared to Mr McLennan that the claimant did not need a specific time for a break. It also appeared to him that she could check her blood glucose using the app on her phone as often as she liked since it was completely unintrusive. She also had control over breaks and that the option was there not to call a patient

through straight away. Mr McLennan sent out his grievance outcome on 12 July. This was lodged (page 152-154). He confirmed that the arrangements going forward proposed by Mr Robertson appeared to meet the reasonable requirements of the claimant's condition. He did not uphold the grievance.

53. The claimant's employment subsequently terminated without the claimant ever in fact returning to work.

Observations on the evidence

54. All of the witnesses gave their evidence in chief through witness statements and were then cross examined on their evidence. Generally speaking the Tribunal were impressed with the evidence of the respondent's witnesses. They answered questions in a measured way. Although they made appropriate concessions their evidence did not change and they generally confirmed the evidence given in their witness statements. They were careful not to go beyond matters they had direct knowledge of. More importantly their evidence was entirely in line with the contemporary documentation. The Tribunal considered their evidence to be both credible and reliable. The Tribunal was less impressed with the claimant's evidence. Her evidence was not clear or consistent and in many respects was contradicted by the contemporary documentary evidence in ways which she could not properly explain. The Tribunal felt that in her reaction to cross examination she sometimes showed the same traits as had been commented upon by Mr McDonald in his evidence as to the way the claimant had behaved at various meetings. There were a substantial number of points where the claimant simply claimed that she could not remember. We were unfortunately in agreement with the respondent's representative that these instances appeared to coincide with her being questioned about events which were detrimental to her case such as the details of what happened on 5 December 2018. It was also put to the claimant that at the meeting of 12 December 2018 the claimant had been told she could leave the surgery at any time. The claimant's answer was that these matters had occurred two years ago. She mentioned on a substantial number of occasions that she had been unwell at the time.

55. On the other hand the claimant gave clear evidence in relation to allegations she made which were entirely unsupported by any other evidence and that did not appear to be credible in view of other evidence as to what was going on at the time. The claimant gave evidence of having been told by Ms McMillan to put her phone away after her alarm went off to warn her to check her glucose levels. She was able to give very detailed evidence in relation to where she and everyone else was allegedly standing. The Tribunal found it extremely surprising that in circumstances where she was apparently told this in front of a large number of witnesses she did not bring one single witness along to the hearing to corroborate this. The claimant's evidence regarding her ill health on 5 December and 9 January was directly contradicted by the evidence of Mr Robertson and Ms McMillan. The tribunal noted that Mr Robertson had in fact worked with the claimant closely on both dates when she was required to carry out technical tasks as a dental nurse and he had not noted any issues. In addition to this the evidence of Ms Gillian was that she took the claimant's evidence that she had suffered seven hypos during the course of a single day using up all her glucose with a considerable pinch of salt. The claimant's evidence regarding a key point of her case; namely the respondent's alleged refusal to let her take breaks was surprisingly vague. The only dates she made specific allegations about were 5 December and 9 January. It is absolutely crystal clear from the documentary evidence that there was plenty of time for the claimant to take breaks on these dates and the tribunal did not accept the claimant's evidence about what happened on those dates. The claimant could not explain away her evidence was contradicted by the evidence from the Exact system. There was, on the other hand, clear oral evidence from the respondent's witnesses in the form of Mr Robertson and Ms McMillan relating to the breaks the claimant had in fact taken on those dates. The claimant could provide absolutely no explanation and as noted above tended to try to change the subject or simply say that she could not remember when these matters were put to her. When she did respond the claimant's evidence on this crucial point was simply an assertion that 'more often than not' she was unable to take breaks. The Tribunal simply did not accept this. The Tribunal noted that the claimant's evidence regarding the key meeting of 12 December was that she could not remember about what was

discussed. The Tribunal accepted that on that date, as on previous occasions, the claimant was told that if all else failed she was entitled to take a break by simply abandoning the surgery if she needed to.

56. The claimant asserted in her evidence that it was not possible for a dental nurse to leave a practitioner to work on their own. She first of all cited what she termed 'insurance reasons'. She subsequently indicated that there was some legislation which prohibited this. The Tribunal was satisfied from the evidence of the respondent that there was absolutely no insurance reason or legislative provision which prevented a dental nurse leaving a dentist or other practitioner to work with a patient on their own if they needed a break.

57. Generally speaking the Tribunal did not find the claimant's evidence credible or reliable. We preferred the evidence of the respondent's witnesses.

58. It was clear from the evidence of certain of the respondent's witnesses that they believed that the claimant's motive for bringing her claim was not genuine. It was put to the claimant that in late 2018 certain of her relatives were involved in employment disputes with the respondent and that the claimant's allegations were a response to this. It was suggested in evidence that it was suspicious that the claimant's diabetes not having caused her any problems at work for a period of years had suddenly become a major issue over the course of a few weeks at the end of 2018. Mr Robertson also made various comments in evidence regarding the claimant's poor diabetes control outwith the work environment. It was clear from Mr McDonald's evidence that he found dealing with the claimant extremely challenging and in fact he blamed her for his subsequent stress related absence. The Tribunal did not feel it necessary to make any findings of fact in relation to the specific points made by the respondent's witnesses since they are not relevant to the claim.

59. The Tribunal also agreed with the respondent's representative that some of the claimant's evidence was not in her witness statement and was not put to any of the respondent's witnesses. An example of this was her evidence regarding the rarity of senior nurses covering appointments for

a dental nurse to receive a break. In addition, certain allegations made by her in her witness statement such as having had to attend A&E in 2016 were not put to the respondent's witnesses despite it being alleged that they would have knowledge of this. Some of her evidence was contradicted by the bundle, for example the claimant asserted that blood glucose and the need for breaks had been addressed in various occupational health reports but when she was directed to the report she could not find the reference since it was not there. Other parts of her evidence were somewhat confused. She was cross examined as to why she had not raised the issue of breaks and her blood glucose levels at either of the case conferences in September or November 2018. Her answers on this point were extremely confused. When asked about one meeting she would give an answer referring to the other one. Eventually her evidence was to the effect that someone (she could not remember who) had said at the meeting in September that she could not raise any issue to do with her diabetes since the meeting was to do with her chronic pain syndrome only. The Tribunal did not accept this. With regard to the November meeting her final position appeared to be that she had not raised the issue because she thought the meeting was to do with other things. We would also agree with the respondent's representative that certain matters were raised by the claimant for the first time in re-examination which meant the respondent's representative did not have the opportunity to ask her questions on them. We have discounted these points which were relatively minor and were not supported by any other evidence. We were satisfied that the claimant simply mentions these as part of her general tendency to give irrelevant answers to questions and were satisfied that there was no deliberate attempts by the claimant's agent to elicit evidence unfairly in this way.

Issues

60. The sole claim being made was that the respondent had failed to comply with a requirement to make reasonable adjustments. The claimant's

further and better particulars were lodged at p45-47. The particulars of the response were lodged at p48-51. The legal basis of the claim is set out at paras 11-13 of the further particulars of the claim. The claimant asserted that the respondent had applied a pcp of requiring dental nurses to work particular shift patterns without a break. It was claimed that this put the claimant at a substantial disadvantage because she was more likely to enter into a hypoglycaemic state as she required to monitor her condition, to inject insulin, prevent hypoglycaemic attacks and eat if required. It was stated that the disadvantage would have been removed or at least minimised if the claimant had guaranteed break times as she could time her breakfast and lunch in accordance with those break times and that this would have been a reasonable adjustment given the respondent's size and available resources.

Discussion and decision

61. Both parties made full written submissions which they supplemented orally. Since these written submissions are available there is no need for the tribunal to seek to summarise them however they will be referred to where appropriate in the discussion below.

62. The duty to make reasonable adjustments is set out in section 20 of the Equality Act 2010. It provides three requirements the first being set out in section 20(3) and being

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

Section 21(1) provides that

> "A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments."

63. There was substantial agreement between the parties as to the relevant law. Both parties raised in submission the issue of what constituted a PCP.

We agreed with the claimant's representative who referred to the most recent case of ***Sheikholeslami v University of Edinburgh [2018] IRLR 1090*** where this is discussed. We also agreed that the PCP is a concept which is not to be approached in too restrictive a manner. The claimant's representative referred us to the case of ***Carrera v United First Partners Research UKEAT/0266/15.*** We agreed with Lady Hale that a liberal rather than an overly technical approach should be adopted. We were also conscious of the stricture in the case of ***Wolfe v North Middlesex University Hospital NHS Trust [2015] ICR 960*** against conflating considerations of reasonableness with a factual version of whether a PCP had in fact been applied to the disabled person.

64. We also accepted in general terms that the submissions made by the claimant's representative to the effect that an adjustment need not entirely remove the disadvantage but should prevent the PCP having the effect of placing the disabled person at a substantial disadvantage. We accepted that, as set out in ***Cumbria Probation Board v Collingwood [2008] All ARD 04 September EAT,*** there is no requirement for a reasonable adjustment that the claimant prove that the suggestion made will remove the substantial disadvantage. The question is whether the reasonable adjustment would have effectively given the claimant a chance of having the disadvantage removed.

65. With regard to the issue of knowledge we noted that a respondent effectively has an escape clause in the form of schedule 8, part 3, paragraph 20 of the Equality Act. This states that A is not subject to a duty to make reasonable adjustments if A does not know and could not reasonably have been expected to know …. that an interested disabled person has a disability and is likely to be placed at a substantial disadvantage referred to… . We considered however that this was a matter which we would only require to decide if we found there had been a failure. We considered that the first step was to establish as a matter of fact whether the respondent had applied the PCP or not. As noted above the PCP was stated to be the practice of requiring dental nurses to work particular shift patterns without a break. The Tribunal's unanimous view on the evidence was that the respondent did not apply such a PCP. Their

clear position was that all dental nurses did receive breaks. They were not in any way required to work without a break. In the particular case of the claimant she had been clearly given additional assurances to the effect that she was guaranteed a break on the basis that she had the right to simply leave the surgery at any time should she need a break.

66. The claimant's representative in her submissions sought to extend the PCP to say that although she conceded that staff often were able to take breaks that because there was no structure, staff had to arrange their own cover or rely on the dentist's permission which meant that sometimes breaks were not possible. She stated that on those occasions when breaks were not possible this meant that the PCP applied from time to time.

67. There was no real evidence provided to the Tribunal that there were occasions when breaks were not possible. In evidence Ms McMillan confirmed that she had herself worked as a dental nurse for many years. She accepted quite properly that there had been occasions when she had worked without a break. She did not give evidence that breaks had not been possible. The claimant's evidence on the issue amounted to no more than an assertion that more often than not she was not able to take breaks. The Tribunal rejected this evidence. There were two specific dates which the claimant referred to and it was abundantly clear from the written evidence as well as the respondent's witnesses that the claimant had taken breaks on both these dates.

68. Furthermore, the Tribunal accepted the evidence of Mr McDonald and Mr Robertson that the claimant was told on numerous occasions that in her case, even if none of the other methods worked which would allow her to take a break in the usual way with cover being provided, then she was entitled to simply leave the surgery without cover being in place. It was perfectly clear to the Tribunal that the PCP contended for by the claimant was simply not applied by the respondent and the case therefore falls at the first hurdle.

69. We should say that although the claimant's further and better particulars refer to a general requirement to take breaks, there did appear to be a

suggestion in the claimant's evidence that actually the PCP was not allowing nurses breaks at specific times. This was not the case on record. If that was the claimant's true position then it is appropriate to say that the Tribunal considered that there were two principal difficulties with any case based on this PCP. The first is that the medical evidence was that the claimant was not placed at any particular disadvantage by not being permitted to take her break at the same precise time each day. This was not a PCP that placed her at any particular disadvantage. The second was that the Tribunal was absolutely satisfied that even if it had been something which placed the claimant at a particular disadvantage it would not have been a reasonable adjustment for the respondent to guarantee the claimant take her breaks at precisely the same time each day essentially for the reasons advanced by the respondent's agent.

70. In submissions the respondent's agent made various points in relation to the question of knowledge or disability. Generally the Tribunal agreed with the respondent's position on this however for the reasons stated we do not consider that it is necessary for the Tribunal to make any detailed findings regarding this. The fact of the matter is that the respondent did not apply the PCP contended for and the claim must therefore fail.

71. The Tribunal necessarily heard a considerable amount of evidence about precisely what PCP the respondent did apply to the claimant. This can be summarised as a PCP that she was permitted to take breaks whenever she wished. In order to do this she required to take advantage of any natural gaps which arose either through patients not attending, patients finishing their treatment early or delaying bringing the next patient in. If there were no such natural breaks she could arrange for another nurse to replace her while she was taking her break either by arranging cover in advance or if this had not been done, by either telephoning or briefly leaving the surgery in order to find a dental nurse available to do this and finally, if none of the previous five methods worked, by simply advising the dentist that she was required to take a break and leaving the surgery. This PCP did not place the claimant at any particular disadvantage as a result of her disability. Even if it had (and our finding is that it did not) the respondent would not have been under any duty to make further

reasonable adjustments to it since the claimant did not advise them of the nature and extent of the substantial disadvantage which she alleged was imposed upon her by the PCP. We considered their reference by the respondent to the case of ***Newham Sixth Form College v Sanders [2014] EWCA civ 734*** to be correct. It was clear from the evidence that the respondent was entirely unclear as to why the claimant was suddenly making an issue over breaks. The claimant did not herself in any way clarify why it was that the existing arrangements somehow suddenly placed her at a disadvantage. The further research which the respondent carried out following the grievance did not in any way support the claimant's position.

72. In any event, for the reasons given above, the view of the Tribunal the case falls long before it gets to the stage of considering knowledge or constructive knowledge that the PCP was likely to have the effect of placing the claimant at the disadvantage contended for. For the above reasons the claim of a failure to make reasonable adjustments does not succeed. The claim is dismissed.

Employment Judge: Ian McFatridge
Date of Judgment: 11 March 2021
Entered in register: 20 March 2021
and copied to parties