



## EMPLOYMENT TRIBUNALS

**Claimant:** Mrs Z Cockles

**Respondent:** Devon Partnership NHS Trust

**Heard at:** Exeter **On:** 7 and 8 March 2022

**Before:** Employment Judge Matthews

**Members:** Ms R Hewitt-Gray  
Ms P Skillin

**Representation:**

**Claimant:** In Person

**Respondent:** Mr T Challacombe of Counsel

## UNANIMOUS RESERVED JUDGMENT

1. The Respondent discriminated against Mrs Cockles (a disabled person) in that it failed to comply with its duty to make reasonable adjustments by reference to sections 20 and 21 (duty to make adjustments and failure to comply with duty) and 39 of the Equality Act 2010.
2. The Respondent is ordered to pay to Mrs Cockles £10,613.59, being compensation for injury to feelings in respect of the discrimination of £9,000 and interest on that sum of £1,613.59.

## REASONS

### INTRODUCTION

1. Mrs Zena Cockles' claims and the issues involved were discussed at a preliminary hearing before Employment Judge Roper on 26 August 2021. These were set out in paragraphs 46-50 of the Record of a Preliminary Hearing (the "CMO" 446-454) sent to the parties on 13 September 2021.

2. The CMO was discussed at the start of this Hearing and referred to periodically thereafter. As a result, the agreed scope of the Hearing narrowed.
3. As noted in the CMO, the Respondent Trust had accepted that Mrs Cockles had a disability being the mental impairment of Bi-polar Disorder.
4. As also noted in the CMO, the Trust argues that Mrs Cockles' claims are out of time.
5. As further noted in the CMO, the only claim remaining before the tribunals and to be decided at this Hearing is of a failure to make reasonable adjustments by reference to sections 20, 21 and 39 and to Schedule 8 of the Equality Act 2010 (the "EA"). This is a case concerned with an alleged "provision, criterion or practice" ("PCP") of the Trust claimed to put Mrs Cockles at a substantial disadvantage in relation to her employment by the Trust in comparison with persons who are not disabled. The PCP and substantial disadvantage, if both made out, are said by Mrs Cockles to impose on the Trust a duty to take such steps as are reasonable to have to take to avoid the disadvantage.

6. The CMO identified three possibilities for the PCP:

*"PCP 1: Failing to provide the claimant with structured support, training, mentoring and weekly supervisions?"*

*PCP 2: Failing to heed the recommendations of the October 2019 Occupational Health report (to provide the claimant with structured support, training, mentoring and weekly supervisions; and*

*PCP 3: Requiring the claimant to work in a high secure unit with no ligature training, restraint training or conflict resolution training (despite the claimant having asked for this)."*

7. In this Hearing, Mrs Cockles accepted that, even if PCP 3 was made out, it had not put her at a substantial disadvantage in relation to her employment by the Trust in comparison with persons who are not disabled. Thereafter, Mrs Cockles rested her case on PCP's 2 and 3.
8. It became clear that PCPs 2 and 3 were more or less the same PCP. As will be explained in more detail below, it quickly became apparent that, subject to the time point, the central issue in this case was whether or not the Trust had provided Mrs Cockles with the structured support advised by an occupational health report from the start of her

employment on 25 November 2019 until on or around 9 June 2020 (although it now seems to us on the facts that this latter date should be 7 May 2020). Mr Challacombe, on behalf of the Trust, reserved the argument that not providing that support did not put Mrs Cockles at a substantial disadvantage. If it did, however, Mr Challacombe accepted that providing that support was a step that was reasonable for the Trust to have to take to avoid the disadvantage. If the substantial disadvantage is made out, the Trust's case is that the required support was provided.

9. Mrs Cockles gave evidence supported by a written statement. On the Trust's side we heard from Ms Emma Elston (at the relevant times, a Community Team Manager within the Older Peoples Mental Health Directorate), Ms Katie Eslick (at the relevant times, Manager of the Memory Clinic) and Mr Chris Whitehead (at the relevant times, Directorate Manager of the Older Peoples Mental Health Directorate). Each produced a written statement.
10. There was a 464 page bundle of documentation. The CMO had limited the bundle to 150 pages (plus 5%). These limits are not set arbitrarily. They are set with the hearing time allowance in mind. An additional 300 pages should not have been included without leave of the tribunals. The Tribunal's attention was not drawn to any such leave. Whilst some additions may have been sensible, there was much duplication in the bundle. The bundle contained communications with ACAS, which presumably should not be there. The Trust's instructing solicitors, to whom the CMO gave charge of the bundle, should take note of all of this. Bundles must be prepared carefully in accordance with case management orders.
11. The page numbers in the bundle did not exactly coincide with the PDF version used by the Tribunal. This was a minor inconvenience. It is necessary to add "8" to the page reference in the physical bundle to find the corresponding page in the PDF bundle. (This is a common occurrence when the index is not numbered sequentially with the other pages in the bundle.) References in this Judgment to page numbers are to the pages in the physical bundle unless otherwise specified.
12. There was a helpful chronology and cast list, although not the list of key documents for pre-reading, that had been ordered in the CMO.
13. Despite initial problems with the allocated VHS Room, a switch to a CVP Room meant that the Hearing was completed in the two days allocated to it. This was in no small measure thanks to the constructive approach of both Mr Challacombe and Mrs Cockles to the Hearing. The Tribunal reserved judgment.

14. The hearing was a remote hearing using the CVP platform consented to by the parties. The Tribunal is satisfied that, in this case, the overriding objective of dealing with cases fairly and justly could be met in this way.
15. In deciding this case it is not necessary for the Tribunal to make findings in relation to every disputed fact. Where it is necessary, the Tribunal's findings are on the balance of probability taking account of the evidence as a whole. Where appropriate the provisions of section 136 EA (Burden of Proof) have been taken into account. Credibility was not an issue in this case. Mrs Cockles and the witnesses for the Trust all gave credible evidence. The evidence was notable for the general goodwill between the parties. The difference between the parties is about what amounted to structured support.

## **FACTS**

16. The Trust provides services to people with mental health and/or learning disability needs in Devon, the wider South West and nationally. The Trust's operations span various locations. The Older Peoples Mental Health Directorate of the Trust (the "Directorate") is based at the Trust's headquarters in Wonford House in Exeter, the County City of Devon.
17. The Tribunal neither has, nor needs, much background information on either Mrs Cockles' disability or on her working life prior to taking up the post of Peer Support Worker ("PSW") with the Trust. What we do know is that Mrs Cockles had worked with another Trust (the Royal Devon and Exeter NHS Foundation Trust) as a Clinical Nursing Support Worker in the community for around eight years before moving to the Trust to become a PSW.
18. The PSW role was established elsewhere within the Trust but not in the Directorate. The Directorate wanted to capitalise on the Trust's experience and develop the role within its own operations. We understand a PSW within the Directorate as someone who has personally experienced mental health challenges and is, therefore, in an informed position to provide direct support and practical assistance to the Directorate's service users.
19. Ms Elston qualified as an Occupational Therapist in 2011. In 2013 Ms Elston joined the Trust as a Band 6 Senior Mental Health Practitioner. In our view, Ms Elston's background as a mental health practitioner has a bearing on the case. By the Summer of 2019 Ms Elston was a Community Team Manager within the Directorate.

20. One of Ms Elston's tasks was to manage the two PSWs recruited for the Directorate. These were Mrs Cockles and a Ms S. Ms Elston managed Mrs Cockles from her starting date of 25 November 2019 until Ms Elston went on maternity leave on 5 March 2020, a period of just over fourteen weeks.
21. Ms Elston had been involved in the recruitment process for the PSWs. In July 2019 Mrs Cockles had contacted Ms Elston direct about the application Mrs Cockles had put in for the job (81-82). Ms Elston's evidence is that there was a telephone conversation between the two and she would have explained to Mrs Cockles that *"part of the role would be working out how Peer Support Workers worked in the Directorate"* (WS 7).
22. On 15 August 2019 Ms Elston interviewed Mrs Cockles for the role, in company with Mr Lewis Powell (Ward Manager for Rougemont Ward) and Mr Mark Bridgman (Peer Support Manager). Ms Elston recalls that *"we explained to Ms Cockles that the role was new to the Directorate, but that this was exciting because it means the successful candidate would work with DPT to shape the role and identify what would work best."* (WS 8).
- 23.8). At the interview Ms Elston became aware of Mrs Cockles' disability.
24. Mrs Cockles was successful at interview. Mrs Cockles' start date was delayed by a combination of factors including the need for a referral to occupational health.
25. Mrs Cockles saw Dr Violeta Atanasova (Specialty Doctor in Occupational Medicine with the Exeter Occupational Health Service) on 14 October 2019. The report is at 87-88. It should be referred to for its full content but includes this:

*"Mrs Cockles has underlying psychological condition. She is not completely asymptomatic and feels that this is triggered by some ongoing difficult personal circumstances. I have advised her to continue to monitor her mood and should she feel that it continues to dip to contact her GP."*

**Fitness for work**

*"I feel that she is fit for work with adjustments mentioned below." ....*

*"It is advisable that regular structured support under the form of weekly discussions is considered for the first month of her starting the job and regularly thereafter."*

26. There is no mention of a training or mentoring requirement in the occupational health report.
27. On 13 November 2019 the Trust made a formal offer of employment to Mrs Cockles (47-50). Mrs Cockles was to be based at Knightshayes, Whipton Hospital with a start date of 25 November 2019. The contract was for a fixed term of twelve months (this was later extended by three months to 24 February 2021).
28. The offer included a job description for the established PSW role (35-46). Mrs Cockles' evidence is that this was the job she was recruited to do. It is common ground between the parties, however, that it is not the job that Mrs Cockles did. From the Directorate's perspective, the job description was to be worked up and adapted to suit the new PSW role within the Directorate. Whilst we think that Mrs Cockles knew that, Ms Elston accepts that it was not ideal (WS 16). Ms Elston explains that the Directorate envisaged that the PSWs would liaise with service users, either face to face or by telephone, to gather feedback on how the Directorate could broaden and improve its services (WS 17). Ms Elston adds *"There was a lot of flexibility about how Ms Cockles could go about doing this and the role could grow and develop in-line with what worked best for everyone."*
29. On Mrs Cockles' first day working for the Trust, 25 November 2019, she met Ms Elston and Mr Bridgeman. They spent several hours talking about the PSW's job. Ms Elston explained that she would be Mrs Cockles' line manager. Ms Elston gave Mrs Cockles a timetable to cover the first three days (92) and some annual leave and training dates were agreed for Mrs Cockles for December. A review date of 2 January 2020 was set. That review date was in line with the Trust's policy to hold recorded supervision meetings every 37 days.
30. Around this time Ms Elston talked to Mrs Cockles about the weekly discussions for the first month and regular discussions thereafter that had been recommended by occupational health. Mrs Cockles expressed a preference for *"regular check-ins as opposed to more structured supervisions"* (Ms Elston WS 25). In any event, Ms Elston reports she had regular contact with Mrs Cockles.
31. Ms Elston, quite reasonably, felt that she had put everything in place to launch Mrs Cockles on an exploratory evaluation (the Tribunal's words) of the role of PSW in the Directorate, the results of which would be formally reviewed on 2 January 2020.
32. Things, however, immediately went off track. In the informal grievance that Mrs Cockles later lodged on 25 June 2020 (284-295,

the “Grievance”) Mrs Cockles records what happened in the first two weeks or so of her employment:

*“The first week I started I had an email saying two places I had to go to and spend the day there getting to know them. When I arrived at those places they didn’t know I was coming, who EE” [Ms Elston] “was, what a PSW does and they didn’t know what I could do to help them. The other weeks I did not do anything. I told EE over the phone the teams didn’t know what to do with me or that I was even coming and they were too busy to see me so I went to Wonford House to do some elearning in the hot desking area”.*

33. The bundle contains evidence that Ms Elston had forewarned the management of the units concerned that Mrs Cockles would be visiting them but the message doesn’t seem to have got through to the right people. Of course, the point was that Mrs Cockles was expected to use her initiative to make her mark as a newly appointed PSW and that is what Ms Elston hoped Mrs Cockles would do. However, it ought to have rapidly become apparent to Ms Elston that Mrs Cockles was in serious trouble and struggling with this expectation.
34. On the second day of doing the job we see this exchange of emails (97-98):

*Mrs Cockles to Ms Elston “Just a quick question, staff and patients have asked me what I do and where I work. I have said Peer Support Worker in the community. Is this correct? I’m only asking because people don’t know what it is and I don’t really know how to explain it. Have you got any advice or a way I can explain it to people when they ask lol.*

*Hope this makes sense.”*

*Ms Elston to Mrs Cockles “I think what you are saying is fine, I would suggest that you could say this is a developing role in OPMH but something like in general Peer Support Workers look at specifically supporting and advocating for patients and helping to improve patient experience and services and that you do this from a peer approach and understanding rather than a clinical one if that makes sense?*

*How are you getting on?”*

Mrs Cockles to Ms Elston *"I though it was along those lines. I've spoken a lot with Lewis today on the job role and how things can develop and he's been fantastic.*

*I met Nick on Belvedere as well and all 3 of us was coming up with ways that I could be used to gain feedback, not just tick box standard feedback but genuine honest feedback to help improve our service we provide.*

*I might be going off on a tangent but I was kinda thinking the way to get that information in a way that would be beneficially the trust is to build a relationship with the individual, tell them that I am there for them and not part of any team, share my experience and how the service did and did not help me.*

*I don't know if that is the kinda thing you are looking for?*

*Sorry if I've rambled on, it has been a great day and talking to Lewis he mentioned Bristol Dementia Well-Being Service and just taking a quick look could help me with some ideas so I'll take a proper look later on."*

Ms Elston to Mrs Cockles *"That all sounds great to me!*

*Glad you had a good day its sounds like it's been really interesting."*

35. Standing back from this exchange, what an objective observer would first see is a lack of clarity on Mrs Cockles' part about what she should be doing. That is surprising given the time Ms Elston and Mr Bridgeman had invested in talking to Mrs Cockles about it. However, there was clarification and reassurance on both sides. Whilst the exchange might have surprised Ms Elston, she was entitled to take the view, that she presumably did take, that this was initial nerves (the Tribunal's words) on Mrs Cockles' part.

36. Only two days later, however, on 28 November 2019, Ms Joanna Friend (Senior Peer Support Worker) sent an e-mail to Ms Kerrie Dale (Involvement and Engagement Manager) (102-103). The email recorded issues that Mrs Cockles had raised with Ms Friend:

*"1. Doesn't have all the log-ins necessary for starting – Develop etc. We rang up for them while we were at the Chapel;*

*2. Her "base" (Franklin) weren't aware she was coming – maybe because of shift workers?*

3. *She didn't know who her line manager was – assume this is Emma but maybe needs to be really crystal-clear who is managing on a day-to-day basis;*

4. *She didn't seem to have a very clear brief of what her first weeks would involve;*

5. *Needed to know the specific services she would be gathering feedback from or where they are;*

8. *Doesn't know how to use trust systems as she hasn't had her corporate induction yet."*

37. Ms Dale forwarded this to Mr Bridgeman with the following commentary (102):

*"I have had a conversation with Jo this afternoon following her catch up with ZC (OPMH PSW). It appears that she is feeling rather anxious about her role not to dissimilar to our conversation yesterday about C." [A reference to Ms S, the other PSW] "I asked Jo to bullet point concerns raised (see below) as it will be helpful to better understand why there appears to be a disconnect between what the PSW's are experiencing and what we are hearing from both yourself Mark and Emma. Can I ask you both to take this forward please and see what learning we can glean?"*

38. We note that Ms Dale appears to have immediately picked up the "disconnect" she describes.

39. Mr Bridgeman referred Ms Dale's email to Ms Elston. Ms Elston recognised that Mrs Cockles was having some "on-boarding issues" (WS 28). Ms Elston was meeting Mrs Cockles the following Tuesday, 3 December. We can see how she proposed to deal with the points raised, in her email response to Mr Bridgeman at 101. That email can be referred to for its full content. Key passages are these (responding to Ms Friend's numerical points):

*"4." .... "by the end of our meeting Monday she had a time table to cover the week as well as agreed annual leave for December and agreed training dates for December today I sent a plan for each day next week. I will discuss this further on Tuesday when I see Zena." ....*

*"6." .... "I felt we were clear with the plan for the next few weeks and we both checked on Monday that Zena and" [Ms S] "were happy with this plan we also have a date set to come back together and put a formal job plan in place once*

*they have both had the opportunity to learn more about both OPMH and peer support.”....*

*“I have had phone call/email contact with both Zena and” [Ms S] “every day this week and am concerned that neither of them have raised these concerns with either myself you or Naomi but we are hearing them through other people instead. However, I do appreciate that starting a new role where you are not based in just one team and the role is new is both exciting and daunting and of course want to support both” [Ms S] “and Zena as much as possible.”*

40. Pausing to take stock at this point, the picture is this. Ms Elston’s comment to Mr Bridgeman, that the concerns were only coming to them through other people, was not entirely correct. It ignored the documented exchange between Ms Elston and Mrs Cockles only two days before, on 26 November. The same and additional related points were now coming up again. Ms Dale had summed it up as a *“disconnect between what the PSW’s are experiencing and what we are hearing from”* Ms Elston and Mr Bridgeman. There is no record of what happened when Ms Elston met Mrs Cockles on Tuesday 3 December. Presumably Ms Elston provided further explanation and reassurance. What Ms Elston does not seem to have done is address what appears to have been the real issue. Borrowing from Ms Dale’s words, Ms Elston did not deal with the *“disconnect”*. The Tribunal appreciates that Ms Elston was a busy person having to make a judgement call. Nonetheless the pointers to how Mrs Cockles was experiencing the new post were there. On two recorded occasions in the first week of her employment Mrs Cockles was raising concerns which obviously went to her ability to be able to cope with the lack of structure in her job. (Generally, on this need, see 318 where Mrs Cockles, on 24 August 2020 writes: *“I feel lost at the moment. As anyone would feel with no routine or structure I cant function properly”*). This was against the background of the recommendation in the occupational health report and in the context of the line manager involved being Ms Elston, a qualified mental health practitioner working in the mental health directorate of an NHS Trust. It seems to the Tribunal that any objective observer would immediately see a need for intervention by Ms Elston in the form of more structured support.

41. The *“disconnect”* obviously continued. In the Grievance Mrs Cockles says this about the period from 12 December 2019 to 3 January 2020:

*“From 12/12/19-3/1/20 I did not know what I was doing. I spent time with knightshayes community team at whipton*

*hospital as EE said that was my new base. They had no idea what to do with me, one day I sat at a desk for 5 hours as they were busy and had nothing for me to do. The manager asked me during this time if I could do their garden. In December I had my first group meeting at Langdon with MB” [Mr Bridgeman] “and other peer support workers from other areas. I told him how hard I was finding things and I really didn’t know what I was supposed to be doing. I told him knightshayes wanted me to design their garden and he said as long as I include patients then its fine. 30/12/19 met manager at knightshayes and she told me exactly what she wanted me to organise as her team were too busy to do it.*

*Spoke to EE over the phone the following week as the garden project was becoming too hard to do and she said I am not to do it as it’s not my job. I said no one was giving me any work at knightshayes as they said to me they have their own support workers so they don’t know what I can do. I asked EE to help me because it is extremely hard to explain to managers and clinicians my job when I don’t know myself. She said she will speak to the manager at knightshayes and she will change my base from knightshayes to Rougemont as I will have more of a team there.”*

42. On 2 January 2020 Ms Elston, Mr Bridgeman, Mrs Cockles and Ms S met for the planned review. It seems to have been a lengthy meeting of around four hours (Ms Elston WS 30). The outcome is recorded in an email from Ms Elston to Mrs Cockles and others (121). The subject was “OPMH Peer Support Worker Role Meeting.” The PSW role had evolved and Mrs Cockles and Ms S were to make follow up telephone calls to discharged patients to discuss service improvement. Mrs Cockles was to set up weekly drop-in sessions to offer peer support on Rougemont Ward and more training was planned. Ms Elston comments (WS 30) “*I thought this was a very useful meeting and*” .... “*I was reassured that Mrs Cockles was fully aware of the job role expectations at that time.*”

43. Somewhat in contrast to Ms Elston’s reassuring note, Mrs Cockles records this for 9 January 2020 in the Grievance:

*“Emailed EE again about my laptop as it was so hard trying to get into Rougemont all the time as I had no ID, no name badge, no keys or fobs to get in and around the place. EE replied 13/01 saying she will chase them up.”*

44. On 21 January 2020 Ms Elston had a supervision meeting with Mrs Cockles. The note is at 123. It includes:

*“How are you*

*Having recently started a new role, moved house and it being the Christmas period Zena has understandably found things a bit intense. However over the past fortnight things have started to settle and Zena is feeling more confident in her role.”*

45. Otherwise, the note records the way the role was developing and what Mrs Cockles was doing. It does not record any particular problems. This is in stark contrast to the position Mrs Cockles portrayed in the Grievance and we are left wondering if they had been in the same meeting:

*“21/1 - Had supervision. Asked about laptop again. Expressed my concerns for the last 2 months and how I didn't know what I should really be doing. I told her I had made the job my own and I had not done anything that was in my job description as no one has told me what I should be doing. I told her I was trying to set up a weekly drop in group but I was finding it hard as I had no training so didn't know how to approach patients about their mental health. I designed 2 posters and showed her and she said it was not down to her it was up to the ward manager so I need to ask them. We spoke about patient feedback and she asked if I had phoned any community patients yet? I explained to her I had received the email about the patients survey (see 13/1). I told her I had been doing my own feedback which was proving to be a success from discharged patients from the wards and she said it is not my job to do that. EE apologised as she thought RC had been in touch with me to set me up on the community system. EE said she would sort this out and send me patients to call to gain feedback for the following week.”*

46. From 25 to 28 January 2020 Mrs Cockles was away from work for a prearranged medical procedure.

47. Mrs Cockles' Grievance records this for 3 to 4 February 2020:

*“3/2 Laptop arrived. I didn't really know what I was supposed to be doing. I got In touch with Devon Carers myself and asked if I could spend some time with them and do they have any ideas on how I can do my job as they have peer support officers. I met with a women who runs groups in Dawlish so I spent time with her. I was looking at running*

*carers groups as I thought that was what I was supposed to be doing.*

*4/2 Had another group meeting at Langdon with other peer support workers. MB had now left so now JF” [Ms Friend] “had taken his place. I told her all about the struggles I am constantly having and she said leave it with her, because she was brand new into post she needs to talk to her boss KD” [Ms Dale] “and NG” [Ms Naomi Gilbert, Peer Support Coordinator] “and she was meeting them later that week.”*

48. That the “disconnect” continued is further demonstrated by the next event in February 2020. On 10 February 2020 Ms Elston sent an email to Mrs Cockles and Ms S (130-131). The email is very clear. It was a request that Ms Elston and Ms S promote the use of the “Together” Scheme in suitable cases where patients showed an interest in further contact. Notwithstanding that clarity, Mrs Cockles obviously spoke to Mr Powell (who by this time appears to have become Mrs Cockles’ mentor). On 13 February Mr Powell sent an email to Ms Elston on the subject including this (129):

*“Zena has approached me today about the email below and she is a bit confused as she hasn’t really been given any direction about it. My understanding is that the PSWs will be doing calls to former patients now discharged from CMHT caseload – is that correct? However, Zena has not been given lists of names of people to contact so this has all come out of the blue and she would much rather do face to face contact as she is able to drive and get around and about. She was also confused about the claim forms as she felt it related to her employment but I have reassured her I do not think this was the case.*

*I think it may be worthwhile having a chat to her as we have a clear plan for her supporting us on Rougemont and she is happy with this. Beech appear to be asking her to do some activities on the ward, which is fine, however I think this is because there is a current lack of OT resources and activities for patients there at present (although this will change very soon when new OTAs start). My sense is her role is to gain valuable feedback to then help us improve our services.”*

49. Mrs Cockles’ Grievance records what happened next:

*“EE phoned me and explained that her and KD had sat down and talked and that my job role and I will now be phoning*

*patients to gain feedback and to see if they would like to be part of the Together Project. I said to her again, I had not phoned anyone. No one has been in touch with me to explain that this would now be my job role and this is the first I am hearing about it I said to her it has changed so much and that I had no idea what I was supposed to be doing anymore. I told her it was starting to stress me out and I just wanted a job role. EE again apologised as she said she had spoken to RC who told her she had sorted this out for me and I was up and running, when this was not the case, as I had heard nothing from anyone. Again EE said leave it with her and she will sort out about getting me on the system and I will receive emails of patients details of who I will need to phone and get feedback from. I said to her about the carers group and is this what I should be setting up and she said no, that's not my job role. I said but I don't have a job role. I was supposed to be seeing patients and talking to them on peer level of someone who has that understanding of what they are going through and so far I've not seen 1 patient in 3 months."*

50. By this stage, Ms Elston was getting the impression that Mrs Cockles was avoiding her. On 10 February 2020 Ms Elston sent Mrs Cockles an email asking how she was (179). There is no recorded response. Meetings planned for 24 February and 3 March did not take place because of Mrs Cockles' annual leave on 24 February and sickness absence between 25 February and 9 March and Ms Elston went off on maternity leave on 5 March 2020.
51. Summarising the fourteen weeks that Ms Elston managed Mrs Cockles, we would say this. It was very noticeable during Mrs Cockles' questioning of Ms Elston that there was no animosity on either side, although Ms Elston was understandably somewhat defensive. This is because both seem to feel that there was no deliberate "wrongdoing" by Ms Elston. In that sense, there was no fault in what Ms Elston did or didn't do, although she must take responsibility for it. Very early on there were signs of the problems Mrs Cockles was having with the job. Ms Elston's response was to approach the problems by attempting to clarify the PSW brief. What Ms Elston did not do was tackle the "disconnect" identified by Ms Dale between Mrs Cockles' lived experience (to borrow a term from the workplace) of the job and the brief delivered by Ms Elston and Mr Bridgeman of the PSW's job. In that respect, Ms Elston's support of Mrs Cockles was inadequate. We will return to this in our conclusions.
52. When Ms Elston went on maternity leave on 5 March 2020, she handed over line management of Mrs Cockles and Ms S to Mr

Gordon Back (Community Team Manager for North Devon). This was an interim measure whilst someone was recruited for Ms Elston's post. The hand over is recorded in e-mail exchanges (185, 188 and 192-193). There is no record of Ms Elston briefing Mr Back on the recommended adjustments for Mrs Cockles' disability. In fact, after Ms Elston went on maternity leave, there is no record that anyone in the Trust was aware of the occupational health report.

53. No doubt there were reasons why Mr Back was never able to engage with Mrs Cockles as her line manager. That is what appears to have happened. Mrs Cockles Grievance records this:

*"10/3 – had another group meeting at Langdon with JF and other peer support workers from other areas. Told JF again, seriously what is going on? I have been asking multiple times and am getting nowhere. I asked JF who GB" [Mr Back] "was and she didn't know. I asked if he was my new line manager? She couldn't be sure as he runs a ward up in Barnstaple so highly unlikely but again JF said leave it with her and she sort out and get back to me.*

*16/3 – GB rang my personal phone and left a message asking to call him back. I called back and he did not answer. I emailed saying please can we arrange a time to call otherwise we will spend the day missing each other's call. He never replied."*

54. At this point Mrs Cockles applied for a more senior post as a Senior Peer Support Worker. For that purpose, Mrs Cockles attended an interview with Ms Dale, Ms Gilbert and Ms Friend on 17 March 2020. The Grievance records:

*"I had to do a presentation as part of the interview. I made a story of my journey since starting DPT and the struggles I have faced but how I have turned it around on my own,"*

55. Mrs Cockles' performance at interview and her follow up email of the same date (247-248) did not find favour with Ms Gilbert, who set out her thoughts in an email on 18 March 2020 (247). Ms Gilbert had obviously been stung by Mrs Cockles' account that she had been left on her own in the PSW job. Ms Gilbert described Mrs Cockles as *"unboundaried and confrontational"* and did not believe *"that she has the self-awareness, insight and diplomacy required for this key role."*

56. Presumably unintentionally, Ms Gilbert copied Mrs Cockles in on the e-mail. It may be that the criticisms were well founded but Mrs Cockles' reaction was predictable. Ms Gilbert subsequently made

substantial efforts to recover the position but the damage had been done.

57. As part of trying to recover the position Ms Gilbert spoke to Mrs Cockles on the telephone on 18 March 2020. Ms Gilbert's note is at 230-231 and includes this:

*"Zena was tearful and expressed how completely alone she felt in the B3 PSW role with lack of management, lack of understanding of the role from staff at Franklyn and OPMH community team." ....*

*"I stated that I fully acknowledged that the OPMH PSW role had been poorly defined, teams had been poorly prepared under Mark Bridgman (previous PSW coordinator) and that her induction was completely unsatisfactory in my view, particularly arriving at a site (Knightshayes) where nobody spoke to her and did not know who she was.*

*I acknowledged and apologised that this was a failing on the part of the whole leadership team in not having good communication to ensure that adequate team preparation was being undertaken." ....*

*"Zena remained tearful saying that she felt she had nobody, and despite meeting with Mark and subsequently Jo she had continually expressed her concerns and felt that no leadership action had been taken."*

58. Ms Gilbert then turned to trying to agree a plan for the next four weeks with Mrs Cockles but did not press in the circumstances.

59. On 19 March 2020 Ms Friend expressed the following view in an email to Ms Gilbert and Ms Dale (240):

*"I actually agree that she hasn't had enough guidance and support on the ground as she should have done (not at all pointing the finger but we know Mark was perhaps not a detail person!) and I think we need to acknowledge that alongside the directorate itself and apologise for it. I think all PSWs would say that starting out is incredibly hard even if you do have all the support in the world actually in the setting."*

60. It is pretty clear, therefore, that both Ms Gilbert and Ms Friend felt that communication, guidance and support on the ground had been lacking. The connection between that and Ms Dale's "disconnect" is clear.

61. Both Ms Gilbert and Ms Friend now made offers to supervise Mrs Cockles but it appears that matters went in a different direction. Around March/April 2020 Mrs Cockles turned to her trade union, UNISON, for advice. The Coronavirus pandemic was now taking hold, lockdown was starting and the effects were being felt in the NHS. On 19 March 2020 Mr Powell, with whom Mrs Cockles was in sympathy, agreed with Mr Back that he would take over as Mrs Cockles' line manager, as Mrs Cockles had requested (238). Mrs Cockles had told Mr Powell that she no longer wanted to be a PSW and he mooted a role on a ward.
62. From around 25 March 2020 Mrs Cockles moved to working on the wards and subsequently applied to join the Interim Isolation Unit established in response to the Coronavirus pandemic. Exactly what she was doing at this time is somewhat confused. Mr Powell's departure on 30 April would not have helped. Until that time we suspect that Mr Bridgeman more or less kept Mrs Cockles under his wing. It would certainly fit with what happened after Mr Bridgeman left. Mrs Cockles went off sick on 2 May, returning on 9 June 2020.
63. Around 7 May 2020 (see 272) Mrs Cockles started to deal with Ms Helen Hooper (Deputy Directorate Manager) and thereafter does not complain of any discriminatory treatment. Mrs Hooper seems to have become involved as it became clear that Mrs Cockles intended to lodge a grievance. Mrs Cockles sees Ms Hooper as the person who finally sorted things out for her.
64. When Mrs Cockles returned to work on 9 June 2020, she resumed her role as a PSW. Ms Eslick's evidence is that she assumed line management for Mrs Cockles in June 2020. Thereafter they "met" on a weekly basis to discuss work either on Microsoft Teams or using the telephone.
65. Mrs Cockles' Grievance records this for 10 June 2020 (although Ms Eslick does not recall the event – WS 15). It neatly summarises how Mrs Cockles saw and continues to see things:
- "Video call supervision with KE. I explained to KE the problems I have faced and how hard I am finding things. I said to her it is NOT her or HH fault and they have been fantastic with supporting me but this goes on for 7 months and now they have sorted out the job I was supposed to be doing, why did I spend 6 months doing a job I was never employed to do."*
66. What happened thereafter was coloured by, amongst other things, Mrs Cockles' dislike for what the clarified job of a PSW in the

Directorate was. It was not the job Mrs Cockles had wanted. An important part of the job became contacting patients by telephone to gather feedback. This was something Mrs Cockles was reluctant to do.

67. On 25 June 2020 Mrs Cockles lodged the informal Grievance referred to above (284-295).

68. On 2 July 2020 Mrs Cockles contacted TALKWORKS. This is a part of the Trust which, at the time, was providing support to NHS keyworkers and others. After telephone appointments, Mrs Cockles was discharged on 17 August 2020 so she could be transferred to the Community Mental Health Team, as her mental health was deteriorating. A letter from TALKWORKS dated 24 September 2020 includes (365):

*“From the first meeting with Ms. Cockles, it was evident that the external stress and pressures of her work situation and served to destabilize her mental health. It was evident that prior to the difficulties at work Ms Cockles mental health had been stable and well managed for some time.”*

69. On 9 July 2020 the informal grievance process was put on hold to allow Mrs Cockles to discuss the resolution she wanted with her union representative, Ms Caroline Amery (296). Possible resolutions were set out in an email from Mrs Cockles to Ms Hooper on 13 July 2020 (297). In essence, as Mrs Cockles could not do the job she believed she had been employed to do and she didn't want the job she was doing, her only option might be to leave.

70. On 22 July 2020 Mrs Cockles went off work on sick leave. In an email on 23 July to Ms Hooper and Ms Eslick Mrs Cockles gives some insight into why she was going sick:

*“I have tried to continue for as long as I could. I sought help from my Doctor a few weeks ago due to not sleeping and I have a telephone app today with him. I am having weekly sessions back with TALKWORKS and I am going back to BA. I feel I am losing control and this has been my trigger for so long and if I do not do something now I am going to end up very poorly. I have been here before and it takes over and will ruin everything I spent 2 years doing to become stable.”*

71. There was a Microsoft Teams meeting on 10 August 2020. The focus was changing to try to find alternative role for Mrs Cockles. Ms Hooper wrote to Mrs Cockles on 14 August 2020 offering two options

(313-314). Mrs Cockles rejected both on 20 August (314). It is relevant to note that Mrs Cockles' reasons for doing so were not only her sense of grievance about what had happened and the effect it had on her, but also the lack of definition of the jobs on offer (312). It is clear that Mrs Cockles had a particular need for detailed structure in the jobs she did.

72. On 14 September 2020 Mrs Cockles turned her informal grievance into a formal grievance (335-351).

73. On 25 September 2020 Ms Hooper wrote to Mrs Cockles explaining that Mr Whitehead would take the grievance forward (367-368).

74. Mr Whitehead wrote to Mrs Cockles on 5 October 2020 (375). Mr Whitehead asked for an informal meeting to once again explore if an informal resolution might be possible. An informal meeting using Microsoft Teams was set up for 20 October 2020. Mrs Cockles was accompanied by Ms Emery and Ms Hooper was also present.

75. Mrs Cockles contacted ACAS for early conciliation on 8 October 2020.

76. Understandably, Mr Whitehead's objective was to move things forward and enable the Trust to make use of Mrs Cockles' abilities. As Mr Whitehead says (WS 41):

*"I wanted to see if it was possible to get Mrs Cockles doing some meaningful work for DPT. I was also mindful of the importance for DPT to acknowledge and apologise for any failings, where necessary, in order to try to help everyone move on."*

77. Mr Whitehead's impression of the meeting was that it had been successful. Mr Whitehead says (WS 43) *"I put my hand up, so to speak, about the areas where we had not been perfect and I apologised profusely"*. Having done that, Mr Whitehead moved on to his other objectives. He encouraged Mrs Cockles to stay and put forward two possible job options. Further, Mr Whitehead agreed to extend Mrs Cockles' fixed term contract until 24 February 2021.

78. Mr Whitehead confirmed the outcome in a letter to Mrs Cockles on 22 October 2020 (380-381). It included this:

*"I agree that your experience since employment, has been less than acceptable and, as a Peer Support Worker, you should have received more support, guidance and support from your managers and colleagues."*

79. Whilst the Tribunal makes some allowance for the apology being a necessary precursor to moving things forward successfully, we work on the assumption that it was made advisedly. As such, it reflects the lack of support both Ms Gilbert and Ms Friend had also identified and Ms Dale's "*disconnect*".
80. Mr Whitehead's intervention appeared to have succeeded when Mrs Cockles accepted one of the two posts offered on 4 November 2020 (390). Mrs Cockles' email, however expressed two reservations. Mrs Cockles wanted to know how Mr Whitehead was going to share "learning" from her experience to ensure there was no repeat and she also wanted something done about Ms Gilbert's "*inappropriate*" email (see, also, 304 and 362 on the part this played). Presumably it was those two reservations that caused Mrs Cockles to withdraw her acceptance of the post. Mrs Cockles reluctantly changed her position again, however, when it was explained to her that the extension of her contract was conditional on the acceptance of a post.
81. ACAS issued an Early Conciliation Certificate on 6 November 2020.
82. On 12 November 2020 Mrs Cockles sent an email to Ms Hooper and Mr Whitehead explaining why she was pursuing her claim through the employment tribunals (393-395). This includes a description of the distress and upset she felt, partly attributable to the email issue with Ms Gilbert. This is supplemented in Mrs Cockles' Schedule of Loss (455-456)
83. Mrs Cockles lodged her claim with the Bristol Office of the employment tribunals on 17 November 2020.
84. On 25 November 2020 Ms Hooper was sent a further occupational health report (398). Although the report does not say so, Mrs Cockles recorded that the occupational health adviser and she had agreed that a return to work would be good for Mrs Cockles (416). It appears that Mrs Cockles returned to work on or around 26 November 2020.
85. Mrs Cockles' employment with the Trust ended on the expiry of the fixed term of her contract, on 24 February 2021.
86. There is evidence that Mrs Cockles received adequate training. See, for example, Mrs Cockles' training record at 249. There were understandable cancellations because of the onset of the Coronavirus pandemic and also Mrs Cockles' own sickness absence.

**APPLICABLE LAW**

87. Sections 20 and 21 of the EA, so far as they are relevant, provide as follows:

***“20 Duty to make adjustments***

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

*(2) The duty comprises the following three requirements.*

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

***“21 Failure to comply with duty***

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

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

88. Section 212(1) of the EA, so far as it is relevant, provides:

***“212 General interpretation***

*(1) In this Act-”....*

*““substantial means more than minor or trivial;”*

89. Paragraph 5 of schedule 8 to the EA specifies that, in the case of an employer, a “*relevant matter*” is any matter concerning employment by the employer.

90. Paragraph 20 of Schedule 8 to the EA, so far as it is relevant, provides as follows:

***“20 Lack of knowledge of disability, etc***

*(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know-” ....*

*“(b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.”*

91. Section 39 of the EA, so far as it is relevant, provides as follows:

**“39 Employees and applicants**

“(5) A duty to make reasonable adjustments applies to an employer.”

92. Section 123 of the EA, so far as it is relevant, provides:

**“123 Time limits**

(1) Subject to section 140B, proceedings on a complaint within section 120” [the Tribunal has not set out the relevant part of section 120 but it includes the complaints of discrimination that the Claimant brings in these proceedings] “may not be brought after the end of-”

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.”

93. There are statutory provisions that will extend the time limits applicable to bringing claims for discrimination in the employment tribunals where there has been a period of early conciliation under the auspices of ACAS. The relevant provision here is section 140B EA.

94. A recent Court of Appeal decision (Adedeji v University Hospital Birmingham NHS Trust [2021] EWCA Civ 23) cautions against using the traditional Keeble approach of going through the factors in section 33 of the Limitation Act 1980 when applying the “just and equitable” test. In his leading Judgment, Lord Justice Underhill made it clear that the focus in applying the test, should be on the factors behind the delay. Further, Lord Justice Underhill pointed out that the employment tribunals have a wide discretion in this area.

95. Lord Justice Auld made it clear in Robertson v Bexley Community Centre [2003] IRLR 434 (another case dealing with the “just and equitable” test) that there is no presumption that a tribunal should exercise its discretion to extend time, that time limits are exercised strictly in employment cases and the onus is on the claimant to justify the claimant’s failure. Lord Justice Auld was supported in this approach in Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 (again, a case dealing with the “just and equitable” test).

96. Sedley LJ said this in Caston (paragraphs 31 and 32):

“31. In particular, there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. That has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing ET proceedings, and Auld LJ is not to be read as having said in Robertson that it either had or should. He was

*drawing attention to the fact that limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them.*

*32. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law: it is a question of fact and judgement, to be answered case by case by the tribunal of first instance which is empowered to answer it.”*

97. Section 119 of the EA, so far as it is relevant, provides:

**“119 Remedies” ....**

*“(2) The county court has power to grant any remedy which could be granted by the High Court-*

*(a) in proceedings in tort;”*

98. Section 124 of the EA, so far as it is relevant, provides:

**“124 Remedies: general**

*(1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).*

*(2) The tribunal may-*

*(a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;*

*(b) order the respondent to pay compensation to the complainant;*

*(c) make an appropriate recommendation.*

*(3) An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate”. ....*

*“(6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court or the sheriff under section 119.”*

99. Section 136 of the EA, so far as it is relevant, provides:

**“136 Burden of proof**

*(1) This section applies to any proceedings relating to a contravention of this Act.*

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

(3) *But subsection (2) does not apply if A shows that A did not contravene the provision.*"

100. The Tribunal was referred to *British Coal Corporation v Keeble* 1997 IRLR 336.

## **CONCLUSIONS**

### 101. **The jurisdiction issue**

102. This case comes down to Mrs Cockles alleging that the Trust discriminated against her by not providing "*regular structured support under the form of weekly discussions*" "*for the first month of her starting the job and regularly thereafter*". On Mrs Cockles evidence, this state of affairs started on 25 November 2019 and continued until on or around 7 May 2020. At that point Ms Hooper became involved and, together with Ms Eslick, put things right. The three month primary time limit therefore expired on 6 August 2020. Mrs Cockles does not enjoy any extension of time under the ACAS Early Conciliation provisions because the Early Conciliation process was not commenced until after the normal limitation period had expired (it was commenced on 8 October 2020). These proceedings were lodged on 17 November 2020. They were therefore over three months out of time.

103. The issue, therefore, is did Mrs Cockles bring her proceedings in respect of the alleged act of discrimination after the end of such other period as we think just and equitable.

104. We must apply the legal tests. Whilst *Adediji* suggests the focus should be on the factors behind the delay, it remains customary to have regard to the *Keeble* approach. In making our decision, *Keeble* directs us to consider the prejudice that each party would suffer as a result of the decision. In doing so we are to have regard to all the circumstances of the case and in particular the factors in section 33 of the Limitation Act 1980.

### 105. **General prejudice to the parties**

106. As far as general prejudice to the parties is concerned, the position is familiar and relatively straightforward. If time is not extended, Mrs Cockles will not succeed in her claim. However, if time is extended, the Trust will suffer the prejudice of the claim being permitted to be brought against it, the Trust having a legitimate expectation that the possibility of a claim was closed by the expiry of the primary time limit. However, any reliance the Trust placed upon the time limit must be qualified by section 123(b) EA.

107. We turn to each of the factors in section 33 of the Limitation Act 1980.
108. The length of and reasons for the delay
109. The delay was over 3 months. We asked Mrs Cockles why there was a delay and we think the plain fact is that she had not thought about it nor did she really understand the significance of the question. We must turn to the clear evidence of what was happening on the ground. Here, we are following Adediji and focussing on the real factors behind the delay. When Ms Hooper's involvement started on or around 7 May 2020, Mrs Cockles was on sick leave. Mrs Cockles returned to work on 9 June 2020 and lodged her informal grievance on 25 June 2020. That, of course, was inside the primary limitation period. Mrs Cockles was not lodging a claim with the employment tribunals but she was doing something to pursue it with her employer. Thereafter Mrs Cockles was engaged in a process that continued until 4 November 2020. That process was to seek, from Mrs Cockles' perspective, a satisfactory outcome to her grievance. In the meantime, on 8 October 2020, Mrs Cockles contacted ACAS for early conciliation.
110. The Trust, rightly in our view, does not suggest any bad faith on Mrs Cockles' part in pursuing that process, nor that the process was bound to fail. To the contrary, we know that the Trust worked hard to salvage the employment relationship.
111. We consider this factor, that Mrs Cockles sought to resolve her grievance through the Trust's processes, to be plainly made out and to be of considerable relevance, whilst accepting that it cannot be determinative. There is no general principle that it will be just and equitable to extend time where a claimant has been going through an internal process to try to obtain a satisfactory result from their point of view, rather than lodging a claim. It is only one factor to be taken into account.
112. We note that Mrs Cockles was on sick leave from 22 July until 26 November 2020. We do not, however, consider this to be a factor in the delay. Mrs Cockles did not say it was, nor does it appear to have affected her ability to deal with the grievance, the conciliation process or the lodging of her claim.
113. The extent to which the cogency of the evidence is likely to be affected by the delay
114. As Mr Challacombe rightly pointed out, the cogency of evidence deteriorates over time. In this case the delay in bringing the case to

trial has more to do with the Coronavirus pandemic and the case overload in the employment tribunals than with the three month extension of time Mrs Cockles seeks. Having heard the evidence we are satisfied that the Trust has got its case across and we do not see the cogency of the evidence as an issue.

115. The extent to which the party sued has cooperated with any requests for information

116. This is not a relevant factor in this case.

117. The promptness with which Mrs Cockles acted once she knew of the facts giving rise to the cause of action

118. If Mrs Cockles even thought about it, she did not act promptly to lodge a claim once she had decided she had been treated badly. Rather, Mrs Cockles engaged in the process we have described. What Mrs Cockles did subsequently do was act promptly once she knew the grievance process was drawing to a close. Mrs Cockles entered into ACAS conciliation on 8 October 2020. The evidence is that Mrs Cockles was becoming frustrated by the slow progress the process was making.

119. The steps taken by Mrs Cockles to obtain appropriate advice once Mrs Cockles knew of the possibility of taking action

120. Here, there is a temptation to speculate in the absence of evidence. We do not know when Mrs Cockles knew of the possibility of taking action. All we know is that Mrs Cockles sought advice from her trade union, UNISON, around March/April of 2020. Ms Emery, a UNISON shop steward, was often involved and accompanied Mrs Cockles to meetings. UNISON is a trade union of considerable resource. We do not know what, if any, advice Mrs Cockles received from UNISON about possible employment tribunal claims and/or time limits. We can make no finding on that. All we can say is that Mrs Cockles had available the resource from which to obtain advice. If Mrs Cockles did know about time limits for employment tribunal proceedings, she must have chosen to put them second to engaging in the internal process. We observe that it is often suggested in such circumstances that employees can lodge tribunal proceedings in time, whilst continuing with an internal process. That is true, but it ignores the very real pressure on employees not to jeopardise an internal process with what, inevitably, is seen by an employer as a hostile act.

121. In this case, on the evidence before us and on the balance of probabilities, the delay was primarily due to Mrs Cockles wanting to engage in a process that might have delivered a satisfactory outcome

from her point of view. Towards the end of the process, Mrs Cockles became frustrated with it and then acted in a timely fashion to lodge her claim and enter into ACAS conciliation. There is no balance of prejudice favouring the Trust and, weighing the factors in the balance, we consider it just and equitable to extend time to allow Mrs Cockles to bring her claim in respect of the alleged act of discrimination.

122. **The allegation of a failure to make reasonable adjustments**

123. The duty to make reasonable adjustments imposed by the EA requires a degree of positive action from employers to alleviate the effects of PCPs on disabled employees.

124. Mrs Cockles bears the burden of establishing a prima facie case that the duty to make reasonable adjustments has arisen and that there are facts from which it could reasonably be inferred, absent an explanation, that the duty has been breached.

125. Section 20(3) EA sets out the requirement in point in this case. It is a requirement, where a PCP has been applied by the employer that puts a disabled person at a substantial disadvantage in relation to a relevant matter (anything concerning employment by the employer) in comparison with persons who are not disabled, to take such steps as it is reasonable to take to avoid the disadvantage.

126. In this instance, it is Mrs Cockles' case that there was a requirement to make a reasonable adjustment, the Trust failed to comply with that requirement and, in doing so, discriminated against her by reference to section 21 EA.

127. **The PCP**

128. It is to the credit of Mr Challacombe, on behalf of the Trust, that no issue was taken on this. The Trust accepted that there was a requirement to make a reasonable adjustment set out in the 14 October 2019 occupational health report and that was that. This fits with the PCPs identified in the CMO.

129. However, we will not leave it quite like that as it does not fit easily with the scheme of the legislation. It seems to us that the underlying PCP here was the Trust's requirement that PSWs do their jobs without regular structured support in the form of weekly discussions for the first month of employment and regularly thereafter.

130. **Did the PCP put Mrs Cockles at a substantial disadvantage in comparison with persons who are not disabled?**

131. The nature of the disadvantage is to be inferred from the occupational health report of 14 October 2019. It is that a person with the disability of Bi-polar Disorder will struggle without regular structured support in the form of weekly discussions for the first month of employment and regularly thereafter.
132. A person without Mrs Cockles' disability would not be at that disadvantage. Whilst such a person might benefit from structured support, they would be better able to cope without it.
133. In the Tribunal's view the disadvantage was substantial. The effects, as set out in the Tribunal's findings of fact, were self-evidently more than minor or trivial.
134. The reasonableness of the proposed adjustment
135. No issue has been taken that it would have been reasonable to implement the recommendations of the 14 October 2019 occupational health report. In short, the adjustment was to provide regular structured support in the form of weekly discussions for the first month of employment and regularly thereafter. We will further explore what this means below.
136. Did the Trust implement the adjustment recommended in the 14 October 2019 occupational health report?
137. This is the real area of difference between the parties. We remind ourselves again of the recommended adjustment. It was to provide regular structured support in the form of weekly discussions for the first month of employment and regularly thereafter.
138. There is no question that Ms Elston made regular contact with Mrs Cockles whilst Ms Elston was Mrs Cockles' line manager. However, although Ms Elston and Mrs Cockles discussed the subject of contact, as far as we can see Ms Elston did not specify a time for a weekly discussion for the first month of Mrs Cockles' employment or regularly thereafter, certainly not by reference to the occupational health report. The Tribunal, however, thinks that leaving it at that is to define the requirement too narrowly. Further, to do so neither does justice to Ms Elston's efforts at contact nor to the real issue behind Mrs Cockles' case. That issue goes to the phrase "*structured support*". The purpose of any regular discussions was to provide support. Otherwise, the only requirement was a mechanical one, to have discussions. Support should not only have picked up but also adequately addressed the realities that Mrs Cockles was facing in her workplace (as Ms Friend put it "*on the ground*") and the difficulties her disability was causing for her in addressing them. In turn, Ms Dale,

Ms Friend, Ms Gilbert and Mr Whitehead all appear to have recognised this failure. The failure was not so much in observing the letter of the occupational health report's requirement to have scheduled discussions but in the provision of structured support.

139. Even if our conclusion about Ms Elston implementing the adjustment was to be wrong, it cannot be said that it was implemented in the period between Mr Back taking over as Mrs Cockles' line manager on 5 March 2020 and Ms Hopper becoming involved on 7 May 2020. We cannot see any evidence of structured support in the form of regular discussions. To the contrary, as far as we can see from the evidence, none of the managers involved in this period were briefed on the adjustment recommended by the occupational report of 14 October 2019.

140. Our short conclusion is that the Trust did not implement the adjustment.

141. Would the proposed adjustment have avoided the disadvantage?

142. We do not understand the Trust to take a point on this. However, the success of Ms Hooper and Ms Eslick in turning things around points to the right kind of structured support eliminating the disadvantage.

143. Did the Trust know of Mrs Cockles' disability?

144. Again, we do not understand the Trust to take a point on this. Whilst it seems the Trust did not concede that Mrs Cockles had a disability until just prior to the case management hearing on 26 August 2021, the occupational health report highlighted the circumstances. Further, it was clear from Ms Elston's oral evidence that she was well aware of the nature of Mrs Cockles' disability.

145. Did the Trust know or could it reasonably have been expected to know that Mrs Cockles was likely to be placed at a substantial disadvantage by the PCP?

146. Again, we do not understand the Trust to take any point on this. It can be inferred from the occupational health report of 14 October 2019 that Mrs Cockles was likely to be placed at a disadvantage by the failure to make the adjustment (and thus, by the PCP).

147. Accordingly, Mrs Cockles complaint that the Trust failed to comply with a duty to make reasonable adjustments is well founded.

148. **Remedy**

149. *Declaration*

150. A declaration is made.

151. *Recommendation*

152. There is no appropriate recommendation to be made.

153. *Injury to feelings*

154. Mrs Cockles makes no claim for compensation other than in respect of personal injury and injury to feelings. We pointed out to Mrs Cockles that there is no medical evidence that we can see that supports an award for personal injury as such and that this should not be confused with an award for injury to feelings. Mrs Cockles accepted that.

155. An award made for injury to feelings is to compensate for anger, distress and upset caused to the claimant by the unlawful discrimination they have been subjected to. It is not a punitive award. The focus is on the injury caused to the claimant. It is awarded in bands. The upper band for the most serious cases is £27,400 - £46,500, the middle band for cases that do not merit an award in the upper band is £9,100 - £27,400 and the lower band for less serious cases is £900 - £9,100.

156. In this instance there is plenty of evidence on the subject of the anger, distress and upset caused to Mrs Cockles and we refer to this above (see paragraph 82). Broadly speaking, there were three causes of the anger, distress and upset. First, was the Trust's failure to make the required reasonable adjustment. Second, was Mrs Cockles' disappointment that the job was not what she expected it to be. Third, was Mrs Cockles' feelings about the email incident with Ms Gilbert. We can make an injury of feelings award in respect of the first of these. We cannot make an injury to feelings award in relation to the second and third because they are no part of the discrimination found.

157. In our view, an award at the top end of the lower band is appropriate and we put this at £9,000. Interest is payable on this award calculated as follows:

Days between 9 December 2019 (that being taken as an approximation of the date of the start of the discriminatory act, being two weeks after the employment started) and 8 March 2022 (the day of calculation): 818

Interest rate: 8%

$$818 \text{ (days)} \times 0.08 \times 1/365 \times \text{£}9,000 = \underline{\text{£}1,613.59}$$

Employment Judge Matthews  
Date: 18 March 2022

Judgment & reasons sent to parties: 31 March 2022

FOR THE TRIBUNAL OFFICE