EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr W Woodfall	**- V -**	Garnash Ltd

Heard at: London Central **On**: 18 - 23 September 2019

Before: Employment Judge Baty
Mr D Schofield
Ms HT Edwards

Representation:

For the Claimant: In person
For the Respondent: Mr P Gardner (director)

JUDGMENT

The claimant's complaints of automatically unfair dismissal, disability discrimination (reasonable adjustments), direct sex discrimination, indirect religion or belief discrimination, breach of contract (notice pay) and non-payment of holiday pay all fail.

REASONS

The Complaints

1. By a claim form presented to the employment tribunal on 30 May 2018, the claimant brought complaints of automatically unfair dismissal, disability discrimination, sex discrimination, religion or belief discrimination, breach of contract (notice pay) and non-payment of holiday pay. The respondent defended the complaints.

2. The claimant does not have the requisite two years complete continuous service to bring an "ordinary" unfair dismissal complaint.

The Issues

3. The issues were clarified at a preliminary hearing on 24 September 2018 before EJ Glennie and were set out in his note of that hearing. Those issues are as set out below.

Unfair dismissal:

The Claimant relies on s. 100 of the Employment Rights Act and says that his dismissal was automatically unfair because the reason, or principal reason, for his dismissal was that he brought to the Respondent's attention circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety, namely that employees (in particular, male employees) were expected to help deal with dangerous customers. The Respondent disputes that there was such an expectation, and says that the Claimant's dismissal was in any event for other reasons.

Disability discrimination:

The complaint is of failure to make reasonable adjustments.

1. Disability is not admitted. The Claimant relies on the conditions of PTSD, a possible traumatic brain injury, anxiety and depression.

2. The provision, criterion or practice (PCP) is that of working on tills. The Claimant's case is that his disability involves difficulty with numbers and maths, that the operation of the tills was quite complex, and that his contract of employment said that he would be held liable for any till shortages.

3. The proposed adjustments are further training on till operation and/or being given other duties (e.g. warehousing) until he had received further training.

Sex discrimination:

The Claimant's complaint is of direct discrimination in that male staff (including himself) were expected to intervene with difficult customers, whereas female staff were not. The Respondent denies any gender-specific requirement, and say that all staff were invited, but not required, to assist to the degree they felt comfortable with, while managers and security staff were required to intervene.

Religion or belief discrimination:

The complaint is of indirect discrimination.

1. The Claimant is a Christian.
2. The PCP is that he might be required to be available for work on Sundays, being the day of the week on which he attends worship.

3. The Respondent's case is that it was willing to be mindful of the Claimant's needs, but could not "carve out" part of the contract for him.

4. If this was otherwise discriminatory, the Respondent will rely on justification under section 19(2) (d) of the Equality Act.

Notice pay and holiday pay:

The Respondent accepts that some money was due to the Claimant and has paid £290. If there is any remaining issue about these claims, it will be whether the correct amount has been claimed.

4. At the start of this hearing, the judge asked the parties if the issues remained the same and they each confirmed that they did.

5. There was only one adjustment to this, relating to the notice pay/holiday pay complaints. Mr Gardner made clear that the respondent's case was that the claimant, who worked three part-time shifts per week whilst he was employed by the respondent, had been paid in respect of three shifts which he had not worked and was not, therefore, entitled to be paid for and that the amount paid was equivalent therefore to his one week's notice pay such that any notice pay had been paid; furthermore, the respondent had realised that it had not paid the claimant's accrued but untaken holiday pay (totalling £166.84) but that this sum had since been paid to the claimant. The claimant, without being able to say what he thought was due to him in respect of these complaints, was unable to agree that he had been paid his notice pay and holiday pay in full, so the complaints remained in issue. However, the figure of £290 set out in the issues above is incorrect; the figure should be £166.84.

6. As we heard the evidence, it also became clear that the claimant was arguing that he was entitled to 2 weeks' notice pay rather than, as the respondent contended, to one week's notice pay.

The Evidence

7. Witness evidence was heard from the following:

For the claimant:

The claimant himself (two witness statements)

For the respondent:

Mr Paul Gardner, the director of the respondent (two witness statements); and

Mr Sk Ashiqur Rahman, the Store Manager of the respondent's Budgens store in Islington ("the Store").

8. In addition, signed witness statements were provided by the respondent from Mr "JUR" (a manager at the Store); and from three employees at the store (Ms "MJ", Mr "JH" and Mr "ND"). The respondent did not call JUR as he was away on holiday; did not call MJ, as she was engaged elsewhere; and chose not to call JH and ND to give evidence at the tribunal, but to rely on their written statements only. The judge explained at the start of the hearing that the tribunal would read these statements but may be able to give less weight to the evidence in them if the witnesses did not attend the tribunal to confirm the truth of their statements and to be cross-examined.

9. An agreed bundle of documents was provided to the hearing.

10. The tribunal read in advance the witness statements and the documents in that bundle.

11. A timetable for cross-examination and submissions was agreed between the tribunal and the parties at the start of the hearing and was broadly adhered to.

12. Both parties made oral submissions.

13. The tribunal gave its decision orally at the hearing. After the judge had given the tribunal's reasons orally, he asked whether either party wished to request written reasons, explaining also that any written reasons produced would be published online (which is a legal requirement). The claimant then requested written reasons.

The Law

Automatically unfair dismissal

14. Section 100(1) of the Employment Rights Act 1996 ("ERA") provides that:

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

(c) … he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety".

Direct sex discrimination

15. Under section 13(1) of the Equality Act 2010 (the Act), a person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. This is commonly referred to as direct discrimination.

16. Sex is a protected characteristic in relation to direct discrimination.

17. For the purposes of the comparison required in relation to direct discrimination between B and an actual or hypothetical comparator, there must be no material difference between the circumstances relating to B and the comparator.

Disability discrimination (reasonable adjustments)

Disabled person

18. In order to make any complaint of disability discrimination, an employee must first prove on the balance of probabilities that he was at the time the alleged discrimination took place a disabled person within the meaning of the Act.

19. Under section 6(1) of the Act, a person has a disability if that person has a physical or mental impairment which has a substantial and long-term adverse effect on that person's ability to carry out normal day-to-day activities.

20. The effect of an impairment is long-term if it has lasted for at least 12 months, it is likely to last for at least 12 months or it is likely to last for the rest of the life of the person affected.

Reasonable adjustments

21. The law relating to the duty to make reasonable adjustments is set out principally in the Act at s.20-22 and Schedule 8. The Act imposes a duty on employers to make reasonable adjustments in certain circumstances in connection with any of three requirements. The requirement relevant in this case is the requirement, where a provision criterion or practice of an employer 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.

22. A failure to comply with such a requirement is a failure to comply with the duty to make reasonable adjustments. If the employer fails to comply with that duty in relation to a disabled person, the employer discriminates against that person. However, the employer is not subject to a duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know, that the disabled person has a disability and is likely to be placed at the disadvantage referred to.

<u>Indirect religion or belief discrimination</u>

23. Under section 19(1) of the Act, a person (A) discriminates against another (B) if A applies to B a provision, criterion or practice (PCP) which is discriminatory to a relevant protected characteristic of B's. Religion or belief is a relevant protected characteristic.

24. Section 19(2) provides that a PCP is discriminatory in relation to a relevant protected characteristic of B's if:

1. A applies, or would apply, it to persons with whom B does not share the characteristic;

2. It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it;

3. It puts, or would put, B at that disadvantage; and

4. A cannot show it to be a proportionate means of achieving a legitimate aim.

Breach of contract (notice pay)

25. In order to found a successful complaint of breach of contract in relation to notice pay, an employee must show on the balance of probabilities what the relevant contractual term in relation to notice was; that that term was breached by the employer; and that the employee has as a result suffered loss. It follows that, even if the term as to notice was breached, the employee will not be able to found a successful complaint if he has been paid in lieu of all monies that he would have received during the notice period, as there will be no loss to him.

Findings of Fact

26. We make the following findings of fact. In doing so, we do not repeat all of the evidence, even where it is disputed, but confine our findings to those necessary to determine the agreed issues.

Background

27. Mr Gardner is the director of the respondent, which was established in March 2008. The respondent is an independent business which has one convenience store in Islington and trades under the name Budgens Fascia. The business employs around 45 employees with around a 50/50 split of full and part-time staff.

28. The respondent prides itself on having a very low staff turnover. In March 2018 the respondent won "Community Retailer of the Year" at the Convenience Retail Awards. Prior to that, it won "Best Employer in the London Borough of Islington". Both these rewards were in recognition of the work which the respondent does to actively recruit from the local community and work with organisations to take on former offenders, people with disabilities and people from a disadvantaged background. The respondent puts in a great deal of effort behind training, support and mentoring staff throughout their time with the respondent.

29. At the time of the claimant's employment, Mr Gardner was the Store Manager and worked six days per week, including all of the claimant's shifts. Mr Gardner has a management team made up of three managers who work almost entirely on the shop floor training and supporting the team members. They are a diverse group of managers from various backgrounds but each one of them has been with the respondent from 2008 and they are very experienced. They have all had additional diversity training.

30. The claimant was employed by the respondent from 3 November 2017 until 16 February 2018 as a "General Assistant".

31. The claimant's role was predominantly working on the shop floor filling shelves, assisting customers and helping out on the checkouts during particularly busy periods or covering cashier breaks.

32. On Friday, 3 November 2017, Mr Gardner conducted the claimant's induction training along with three other new members of staff. Three of these new staff members were male and one was female; all were given the same induction training.

Religion

33. The respondent makes every effort to offer employment to new staff that fits around their personal lives, including taking into account their religious beliefs, childcare issues and even hobbies or sporting activities. The question of their availability is addressed at the interview stage. Mr Gardner recognises that offering employment to a new member of staff which they are unable to do or are unhappy about is a pointless exercise.

34. For example, Mr Rahman gave evidence, which we have no reason to doubt and therefore accept, that he is a Moslem and that his day of prayer is a Friday; that he has worked for the respondent for more than 11 years and has only worked one Friday; that he did this while they refitted the Store and volunteered to do so; that he asked Mr Gardner if he would mind him attending Friday prayers that day and that he would be away for around two hours; that without hesitation Mr Gardner agreed; and that Mr Gardner has always respected his religious beliefs especially around Friday worship, Ramadan and Eid.

35. The claimant is a Christian. Mr Gardner became aware that the claimant was a Christian and his dedication to it both from reading his CV and during the interview he held with the claimant prior to starting employment. The claimant's CV states that most early mornings are spent in prayer, worship and Bible study. Mr Gardner took this into account when offering the claimant the shift pattern which he offered him (which does not include morning shifts); consequently it was agreed that the claimant's shift patterns would be three shifts: on Monday (3 PM to 9 PM); Tuesday (3 PM to 9 PM); and Saturday (3 PM to 10 PM).

36. The claimant has maintained at this tribunal that, when he was interviewed, he told Mr Gardner that he couldn't work on Sundays due to church commitments; Mr Gardner maintains that this was not the case and that he based his offer of shifts for the claimant on what he had learned in his CV regarding his religious commitments in the mornings. Mr Gardner was consistent in his evidence before the tribunal; by contrast, the claimant was often inconsistent in a number of areas, particularly in terms of recalling when certain conversations which he alleged he had with Mr Gardner were said to have taken place. For these reasons, we prefer Mr Gardner's evidence and find on the balance of probabilities that the claimant did not tell him at interview that he could not work on Sundays.

37. Notwithstanding this, Mr Gardner did not in any case offer the claimant shifts on Sundays (but, rather, offered him the shift pattern outlined above).

38. In his evidence before the tribunal, the claimant stated that, had he been asked to do a Sunday evening shift on an ad hoc basis, he could have done that (as that would not have prevented him from attending church earlier in the day),

although he would not have wanted to have done even Sunday evening shifts on a regular basis. None of this was, however, communicated to the respondent during the claimant's employment.

39. However, in any event, at no point during his employment with the respondent did the claimant work any Sunday shift, nor was he ever requested to work any Sunday shift.

40. The claimant was issued with a contract of employment, which was a standard contract of employment used by the respondent for all of its employees. However, at no point did the claimant sign that contract of employment despite being chased for it by the respondent's managers on several occasions.

41. The contract contains the following provision at clause 8:

"It is a condition of your continued employment that you work additional hours as required to meet business needs and are flexible in accordance with the working rota, including working Sundays and bank holidays as reasonably required."

42. The main purpose of including this clause in contracts is to help the respondent with seasonal variations which are well known in retail. The best example of this and, as Mr Gardner said, in the past 10 years the only time of the year where flexible working has been required, is in the last week approaching Christmas and the week between Christmas and New Year's Day; in other words, it is not a clause that the respondent has taken advantage of in relation to Sunday working. Furthermore, the clause has rarely been used by Mr Gardner at all and, if he were to use it, he would always seek to take into account individual employees' preferences and other commitments.

43. Mr Garner and Mr Rahman gave evidence that: as indicated above, the respondent in any case made adjustments in relation to people's different religious beliefs in terms of the hours and days on which they worked; the respondent had an abundance of cover for Sunday shifts, particularly because there were a lot of students who were available and who wanted those Sunday shifts, so the respondent never had to change people's hours in order to request them to work on Sundays; and that they did not ask anyone to do a shift that that person did not want to do, as people would just go off sick or not turn up to work if they tried to do so. We have no reason to doubt this evidence and therefore accept it.

44. Therefore, despite the wide terms of clause 8 of the claimant's proposed contract and regardless of whatever the claimant may or may not have assumed, there was in fact no demand, practice, expectation or even possibility that the claimant might be required to work on Sundays.

<u>Till work</u>

45. As noted, one of the duties of the claimant's role as "General Assistant" was helping out on the checkouts during particularly busy periods or covering cashier breaks. Those employees of the respondent who are to work on the checkouts are checkout trained. They receive one-to-one training with an

experienced cashier for a minimum of four hours. Only if the trainer and the trainee consider that the trainee is confident enough to work between two experienced cashiers but on their own till does this happen after those four hours; if not, the one-to-one training simply continues until that joint confidence is reached. (Mr Gardner outlined this practice in his evidence, which was also corroborated in JUR's witness statement. Although JUR did not attend the tribunal to give evidence, his account is consistent with that of Mr Gardner and we accept it.)

46. The till systems at the respondent are simple to operate and even employees who have had no background using computers at all have quickly learned to operate them.

47. At his interview, the claimant had come across to Mr Gardner as confident and self-assured and he claimed to be computer literate. The claimant was duly expected to work on the tills, albeit having had the training referred to above.

48. In these proceedings, the claimant has maintained that he was a disabled person during his employment by reason of PTSD, a possible traumatic brain injury, anxiety and depression. The claimant has produced in order to evidence this his GP medical records, which are extensive and date back many years. There is, however, no evidence in those records of a diagnosis of any of the above four conditions in relation to the period when he was employed by the respondent; rather, the medical issues from which he was suffering in and around this period were predominantly because of the claimant's cannabis dependency. There is evidence in the records that, in the distant past, long before his employment with the respondent, the claimant suffered from anxiety and depression; but that was not in respect of the period of time when he was employed by the respondent.

49. The claimant has maintained for the purposes of his claim that his alleged disabilities have an impact upon his abilities in relation to maths and numbers and that that meant that working on the tills was difficult for him. However, when questioned about this in evidence, he admitted that this was speculation on his behalf and that he did not know whether his alleged disabilities were the cause of his difficulties with maths and numbers or whether he was just someone who struggled generally with maths and numbers. There is certainly no medical evidence, in the medical records or otherwise, which suggests that any health problems impact upon the claimant's ability with maths and numbers. We therefore find that the claimant has not proved that any problems which he may (or may not) have with maths and numbers were caused by any medical issues.

50. It is common ground that the claimant said nothing prior to early February 2018 to Mr Gardner or anyone else at the respondent to the effect that he alleged that he had a disability. The claimant maintains that he told Mr Gardner that he had a disability at a meeting with him on 4 February 2018. Mr Gardner's evidence was that he could not recall any such meeting; that he certainly didn't have any formal sit down meeting with the claimant; that he could not recall the claimant mentioning a disability to him; but that it is possible that

the claimant could have mentioned things to him in passing on the shop floor (albeit he could not remember any specifics).

51. The claimant sent Mr Gardner an email on 5 February 2018, which Mr Gardner accepts that he received and read. The email makes various references to "following our discussion" (or similar phrases) which implies that there was some sort of discussion between Mr Gardner and the claimant not long before the email was written. The email is lengthy and goes through various clauses in the proposed employment contract, with which the claimant is not happy. At one point, the claimant writes:

"I'd like to clarify the above particularly with regards to my mental health condition and some of the backup security responsibilities we have. I feel there is a potential health and safety problem with one of the practices in place for shoplifters."

Later in the email there is a reference to "my mental health condition" and, later on still, a reference to "in light of our discussion on my informing you of my disability…".

52. In the light of these references, we find on the balance of probabilities that the claimant did have a conversation with Mr Gardner in or around 4 February 2018; that in that conversation he did make mention of a disability or mental health condition to Mr Gardner, but with little or no detail of it (there is no detail even in the lengthy email of 5 February 2018 which followed the conversation and, had he given any detail to Mr Gardner, we consider that Mr Gardner would have remembered the conversation).

53. Although there are, in the email of 5 February 2018, three references to "mental health condition" or "disability", not only are no specifics of the conditions given but none of these three instances are in the context of any concerns regarding the tills, the claimant working on the tills or any link between an alleged disability and the claimant's ability to do maths or work with numbers. Furthermore, Mr Gardner gave evidence that, at some point during the claimant's employment, the claimant told him that he was not happy about working on the tills but that at no stage did he suggest that this was anything to do with a disability or with difficulty with maths or numbers.

54. We therefore find that, on the balance of probabilities, the claimant did mention to Mr Gardner, in completely unspecific terms, that he had a disability/mental health condition; that he did not at any stage identify PTSD, a possible traumatic brain injury, anxiety or depression; that he told Mr Gardner that he was not happy working on the tills; but that he never told him that he was not happy working on the tills because of a disability or because of problems with maths and numbers and certainly not because of any link between alleged problems with maths and numbers and an alleged disability.

<u>Policy in relation to potential shoplifters</u>

55. The respondent has a policy that, in situations such as where there is a potential shoplifter in the Store, a coded call is put out over the tannoy by a member of staff/security or management that there is an incident happening or

immediately expected to occur at the entrance/exit door. There is a security officer on duty from midday until closing time and the security officer and management are expected to deal with the incident. However, when the call goes out over the tannoy, it is hoped that any staff who are available will attend the front door, stand back from the incident and not get involved but be seen as a presence there; this is often enough to help reduce the risk of a violent incident occurring simply due to the presence of a number of staff members who would outnumber the perpetrator; this procedures has been effective for several years and has been found to be successful in reducing aggressive or violent behaviour. Nobody is expected to attend the front door during such an incident unless they are happy to do so and they are explicitly told not to involve themselves with the incident but rather let the security guard or management team control it.

56. This procedure is outlined at the induction for new staff and was outlined by Mr Gardner to the claimant at his induction (which was with three other new staff, one of whom was female). The same induction is given to all new staff, whether they are male or female.

57. The claimant has alleged at this tribunal that, at his induction, Mr Gardner had said that "lads" should attend. Mr Gardner denies that he said this; he maintains that it is not the type of language that he uses; furthermore he was clear that the policy applied in respect of both sexes. Mr Rahman confirmed in evidence that, at the inductions, it was clear that the policy applied to everyone, not just male or female staff. Again, given the corroboration of this evidence and the fact that Mr Gardner's evidence was more consistent than that of the claimant generally, we prefer Mr Gardner's evidence and find that Mr Gardner did not use the words "lads" at the induction or make the induction gender specific in relation to this policy. We suspect that the claimant's account of what he says Mr Gardner said at the induction was coloured by what was written on the staff notice which he subsequently discovered and which we refer to below.

58. The evidence of Mr Gardner and of Mr Rahman was that, in practice, both sexes attend the entrance/exit door when this call goes out over the tannoy, and that who attends depends on who is in the store at the time. Mr Rahman confirmed that female staff at the same level of seniority as the claimant attended and it was not just female managers who attended. We have no reason to doubt this evidence and therefore accept that this is what happened in practice.

59. The claimant drew our attention to a notice that had been posted on one of the staff notice boards at the respondent's store. The claimant took a photograph of this notice on 6 February 2018 and a copy of it was in the tribunal bundle. The notice includes the following:

"I would ask that unless you are serving a customer a few lads make your way to the front doors of the store to await instructions from a manager or the person, who has made the announcement."

60. Elsewhere, the notice is misspelt. It is not known who drafted this notice. However, it was not Mr Gardner and it was not Mr Rahman. It is assumed by them that another manager or supervisor at the respondent must have put it up and we accept that that is the most likely explanation.

61. Mr Gardner accepts that the language in the notice of "a few lads" is clumsy but maintains that it does not reflect the policy or how it operates in practice. Mr Rahman was asked about this and he said that, on looking at the notice, he had not even taken the language as meaning that it applied to men and not to women; this was also the view of MJ in her statement.

62. In the light of the evidence of what did actually happen in practice, we accept on the balance of probabilities that this was merely clumsy language in a notice but that it does not reflect how the policy was either intended or operated in practice; the policy applied to both men and women.

Termination of the claimant's employment

63. The claimant attended work on his shift on Saturday, 10 February 2018. However, the claimant did not turn up for work on his shifts on either Monday 12 or Tuesday, 13 February 2018.

64. On 13 February 2018, the claimant sent Mr Gardner an email. In it, he referenced an alleged incident on Saturday, 10 February 2018 at work. He suggested that MJ may have informed PG of this incident because it took place during his shift on Saturday whilst he was working at the checkout serving customers. He states that he has an old friend who has of late been behaving very strangely, harassing and somewhat stalking him, being quite verbally abusive and threatening and that this individual had an encounter with him in the Store in which the claimant stated that this individual "was quite threatening and abusive leaving much of the nearby staff and customers quite shocked and uncomfortable". Mr Gardner subsequently asked MJ about this and MJ, despite being on duty in the store at the time, had no idea that an incident had taken place (MJ confirmed this in her statement to the tribunal). It is strange that she witnessed nothing, given that the claimant described the incident in his email of 13 February 2018 as being so significant and having such an effect on nearby staff and customers.

65. In addition, the claimant had not yet signed his employment contract, despite being chased for it repeatedly by various managers at the respondent. In addition, the claimant had not yet had his probationary review, which was due.

66. Mr Gardner therefore suggested that they meet on Friday, 16 February 2018, which they duly did. The meeting lasted nearly 2 hours. There was little time to address the claimant's concerns on the contract (although the claimant refused to agree the contract), as the claimant spent most of the time talking about the personal issue with the neighbour of his who was a customer of the Store (as referenced in his email of 13 February 2018). He gave this reason for not attending work. He would not, however, explain what the problem was between the neighbour and him and stated that it was a personal issue. He asked Mr Gardner's advice as to what he should do if the neighbour came into the Store and Mr Gardner told him that there was security present during all his shifts as well as a manager who could assist at that given time but that with only the small amount of information which the claimant was willing to divulge to him,

he could not advise the best course of action for every possible situation of the neighbour coming into the store. Mr Gardner felt that they were going round and round in circles to no effect.

67. Therefore, on the basis that Mr Gardner considered that the claimant had not yet passed his probationary period; that the claimant was unwilling to agree the standard contract being offered; and that he seemed unwilling to work at present due to the issues with his neighbour, Mr Gardner decided not to pass the claimant's probationary period and to dismiss him summarily, which he did. The claimant's employment therefore terminated with effect from 16 February 2018.

68. The claimant did not say anything at all to Mr Gardner in either his email of 13 February 2018 or at the 16 February 2018 meeting about the respondent's policy in relation to shoplifters, let alone make any suggestion that this policy applied to men but not women and that there were health and safety implications in this policy being followed.

Notice pay

69. As noted, the claimant did not attend work for his Monday, 12 February 2018 or Tuesday, 13 February 2018 shifts in the week leading up to the termination of his employment on Friday, 16 February 2018. He was not therefore entitled to be paid for those shifts. However, the claimant was in fact paid for the whole of the week up to Sunday, 18 February 2018 (which period included the Monday and Tuesday shifts which he did not attend and the Saturday, 17 February 2018 shift which he did not work because, by that stage, his employment had terminated). He had, therefore, been paid a week's pay when he did not in fact work that week and for which he was not therefore entitled to be paid.

70. As noted, the claimant never signed the contract of employment which was provided to him by the respondent. The contract provided was a standard contract used for all of the respondent's employees. That contract provided that, prior to the "satisfactory completion" of the employee's probationary period, an employee is entitled to one week's notice of termination of employment; and that, "upon satisfactory completion of the probationary period", the employee is entitled to 2 weeks' notice of termination of employment. An offer letter dated 3 November 2017 had also been produced in respect of the claimant, which made reference to a probationary period of 12 weeks and provided that the respondent reserved the right to extend the probationary period should it be deemed necessary. The respondent's employee handbook also makes reference to a 12 week probationary period and to the fact that the company reserves the right to extend the probationary period at any time.

71. The HR documentation completed by the respondent at the start of the claimant's employment noted 3 February 2018 as the claimant's "Probationary Period End" (although the difference is marginal, that date is in fact three months from the start of the claimant's employment rather than 12 weeks).

72. In addition, the contractual documents contain a "probationary review form" document which envisages a review between employer and employee at which it is confirmed whether or not an employee has passed the probationary review; failed the probationary review; or whether the probationary period is being extended for a further prescribed number of weeks.

73. The respondent was not bound by the contractual documentation, as the claimant had not signed it and had indicated that he had issues with various clauses in it; there was therefore no agreement on these terms between the parties. It is, therefore, also necessary to look at the custom and practice at the respondent in relation to probationary periods.

74. The evidence of Mr Gardner and Mr Rahman was that employees at the respondent remained on their probationary periods until a review meeting took place in accordance with the procedure outlined above, notwithstanding that a provisional date for the expected end of the probationary period was set out in the HR documentation. They gave evidence that sometimes it was not practicable to hold this review within the 12 week period and that such a review sometimes happened after the 12 week period but that, until the review took place, with a decision that the employee in question had passed his probationary period, that employee remained on his probationary period. The passing of the probationary period was then evidenced by the probationary review form, signed by both employer and employee, confirming that the probationary review had been passed. We have no reason to doubt their evidence and therefore accept it and find that these were the practices which the respondent operated in relation to probationary periods. Therefore, for an employee to pass the probationary period, there must have been "satisfactory completion" of that probationary period which involved a probationary review meeting taking place at which the respondent indicated in writing that the probationary period was passed.

75. Furthermore, Mr Rahman normally conducts the review meetings in cases where it is highly likely that the employee in question will pass their probationary period. Where it is possible that the probationary period will need to be extended (or even failed), Mr Gardner conducts the review meeting.

76. The claimant's employment ended on 16 February 2018. Whilst he was due a probationary review around 3 February 2018, this did not take place for a number of reasons; first, the claimant had submitted his email setting out his various queries in relation to the contract and his contract had not been signed and this needed to be addressed; and, secondly, as noted, the claimant then subsequently did not attend work for some of his shifts in the week prior to 16 February 2018. Mr Gardner was to carry out the probationary review. The earliest practicable time to do this was on 16 February 2018, albeit that meeting needed to deal with other matters too (including the contract queries and the issues raised by the claimant in relation to the former acquaintance of his whom he said had come into the store and harassed him) and Mr Gardner did not tell the claimant that the meeting of 16 February 2018 was a probationary review meeting.

77. However, by the time Mr Gardner dismissed the claimant at that meeting on 16 February 2018, no confirmation of the claimant passing his probationary review had been given. Therefore, the claimant remained on his probationary period when he was dismissed. Therefore, in accordance with the respondent's practices and the totality of the documentation which we have seen (albeit it was unsigned), the claimant was entitled to one week's notice of termination of employment only.

78. That would have been the position had the claimant signed up to the contractual documentation and had there been a binding contract between the parties based on that documentation; or even if it was possible to imply terms as to notice from the practices of the respondent in general. However, the claimant did not sign his contract and, in the absence of contractual provisions as to notice either in the express terms of an agreement or through the custom and practice of the respondent, one reverts to the position at law in terms of minimum notice requirements prescribed by statute (section 86 of the ERA). The position at law, in the absence of a contract, is that the minimum notice required to be given to an employee with less than two years' service is one week. The claimant had less than two years' service. The claimant was therefore entitled under statute to one week's notice of termination of employment only.

79. Therefore, whether one implies a contractual notice term as a result of the respondent's custom and practice or simply relies on the statutory provisions, the claimant was entitled to one week's notice only.

80. The claimant was dismissed summarily without notice. However, as he had been paid a week's pay over and above the pay to which he was entitled, he was effectively paid a sum in lieu of his one week's notice. He therefore has no further entitlement to notice pay.

Holiday pay

81. The claimant was not paid any holiday pay at the point when his employment terminated. The respondent uses an external payroll company. Mr Gardner asked them to check the position and the payroll company confirmed that the claimant had 29 hours of accrued but unpaid holiday, which in monetary terms totalled £166.84. This money was duly transferred to the claimant.

82. The claimant is unable to say whether or not he has been properly paid or to suggest to us what, if anything, is due. In the light of the fact that the respondent says that this is what is due by way of holiday pay; that it uses an external company which specialises in such matters and has confirmed that the money paid was what was due; and that this amount was paid to the claimant, we find on the balance of probabilities that the figures supplied by the payroll company were correct and that any liability for payment of holiday pay to the claimant has been discharged by the respondent.

Conclusions on the issues

83. We make the following conclusions, applying the law to the facts found in relation to the agreed issues.

Disability discrimination (reasonable adjustments)

84. As noted, the claimant has not proved that he had any of the impairments of PTSD, a possible traumatic brain injury, anxiety or depression over the period of his employment when the alleged discrimination was said to have taken place. The burden of proof is on him to do so. The claimant has not therefore proved that he was a disabled person for the purposes of the Act. His reasonable adjustments complaint therefore fails at the first stage.

85. It is not, therefore, technically necessary for us to go any further in relation to this complaint; however, we do so for completeness' sake.

86. The respondent did apply a PCP to the claimant of expecting him to work on the tills when necessary.

87. However, even if the claimant had established that he had a mental health disability by reason of one of the four conditions relied on, he has not established that this put him at a substantial disadvantage in relation to his ability to deal with maths and numbers and therefore to work on the tills. As he indicated in evidence, it was merely speculation on his part that any difficulties which he had with maths and numbers were due to his alleged disabilities as opposed to such alleged difficulties being because he struggled generally with maths and numbers. The complaint would therefore fail for this reason too.

88. In any case, the main adjustment which the claimant suggests was reasonable was in fact made. The claimant was given a minimum four hours training and, if he was not happy, more training was available until such time as he was happy; the adjustment of more training was therefore made. The second suggested adjustment, that the claimant should be given other duties such as warehousing, would not be a reasonable adjustment, given that the training on the tills was available at any time and it was necessary for him to work on the tills, being trained as he worked, in order to alleviate the alleged disadvantage, so being put in the warehouse would not have assisted in this respect. The complaint fails for these reasons too.

89. As to the question of knowledge, we accepted that at some point in early February 2018, the claimant told Mr Gardner in passing and then set out in his 5 February 2018 email that he had a "mental health condition/disability", but without saying anything more than that. Mr Gardner was not told that the claimant considered that he had PTSD, a possible traumatic brain injury, anxiety or depression. We do not, therefore, consider that Mr Gardner knew or could be reasonably expected to know if the claimant had any of these four conditions. The reasonable adjustment complaint fails for this reason too.

90. In addition, neither Mr Gardner nor anyone else at the respondent was made aware of any alleged link of doing till work and the claimant's alleged disabilities; they were not aware of the claimant's contention that his alleged disabilities had an alleged impact on his abilities with maths and numbers and consequently an alleged impact on his ability to operate the till. Therefore, the respondent did not know and could not be reasonably expected to know that the claimant may be put at an alleged disadvantage by being asked to work on the tills. The reasonable adjustment complaint fails for this reason too.

Indirect religion or belief discrimination

91. As we have found, there was in fact no demand, practice, expectation or even possibility that the claimant might be required to work on Sundays. The respondent did not, therefore, apply a PCP that the claimant might be required to be available for work on Sundays. As the alleged PCP is not established, this complaint fails at the first stage.

92. As there was no PCP, it follows that neither the claimant nor other Christians were or would be put at a disadvantage.

93. Furthermore, even if the alleged PCP had been applied, we would have found that the respondent had established the justification defence such that the application of the PCP was not indirectly discriminatory (and the comments below are predicated on there having been such a PCP in operation, which we have of course found that there was not): the respondent clearly had a legitimate aim of operating its business efficiently with extended opening hours seven days a week and providing suitable staffing levels to do so; furthermore, the respondent's approach in pursuing this legitimate aim was proportionate in that it made adjustments to the days and hours of work for all employees (both for religious reasons, childcare reasons and other reasons) so as to be as fair as possible to everybody and avoided wherever possible anyone working on a day that they didn't want to do so; there would have been no other way of pursuing the legitimate aim which did not have a potentially disadvantageous effect on some employees from time to time; the respondent's application of the PCP was therefore proportionate.

Direct sex discrimination

94. As we have found, the policy in relation to shoplifters was not applied differently in relation to men and women; it applied to both. The claimant was not, therefore, treated less favourably because of his sex.

95. This complaint therefore fails.

Unfair dismissal

96. As we have found, the claimant did not bring to the respondent's attention that in his opinion employees (in particular, male employees) were expected to help deal with dangerous customers. The only reference which comes anywhere close is the paragraph quoted in our findings of fact from the

claimant's email of 5 February 2018 which is very general and is a one-off reference to "backup security responsibilities we have. I feel there is a potential health and safety problem with one of the practices in place for shoplifters"; there is nothing in there that suggests that the practice was applied only to male employees or that there was an expectation to help deal with dangerous customers.

97. As the claimant did not bring this to the respondent's attention, he could not have been dismissed for that reason and this complaint therefore fails.

98. As to the reason for dismissal itself, we have already found that Mr Gardner dismissed the claimant because he would not sign his contract; he had not turned up for work and seemed unwilling to work due to an issue with his former acquaintance; and that, despite a two-hour meeting, Mr Gardner felt that they were going round in circles and getting nowhere. These reasons are clearly nothing to do with an alleged disclosure of a health and safety issue. The complaint therefore fails for this reason too.

Breach of contract (notice pay) and holiday pay

99. As we have found that any sums due in respect of notice pay and holiday pay have been paid by the respondent, both of these complaints fail.

Concluding Remarks

100. The respondent is a small business; it is likely that it has relatively limited resources at its disposal; indeed, Mr Gardner represented the respondent himself alone throughout the hearing. However, it was clear to us, based on the evidence that we heard over the course of this hearing, that the respondent, and Mr Gardner in particular, is professional and accommodating in terms of its treatment of its staff. That much is evident from the thoroughness of its induction procedures and other processes and in particular its efforts to deal with the diverse needs of its workforce. Examples from our findings of fact above include how it accommodates those of different faiths, those with childcare responsibilities and those with other needs/interests in terms of allocating shifts; and its accommodation of employees with disabilities and those from a disadvantaged background (we also saw other evidence of this in the material before us which was not necessary for us to include in our findings of fact to determine the issues before us).

101. At the end of the hearing, the tribunal made a point of complimenting Mr Gardner on this and acknowledging the efforts which his business makes in this respect.

Employment Judge Baty

Dated: 23rd Sept 2019

Judgment and Reasons sent to the parties on:

24/09/2019

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For the Tribunal Office