



# EMPLOYMENT TRIBUNALS

## Claimant

Miss S Barker

## Respondent

Marks and Spencer Plc

v

**Heard at:** Bury St Edmunds

**On:** 10, 11 and 12 September 2019  
13 September 2019 (In chambers – no parties in attendance)

**Before:** Employment Judge M Warren

Members: Mr RW White and Mr T Liburd

## Appearances

**For the Claimant:** Mrs D Barker (Claimant's mother)

**For the Respondent:** Mr J Crozier (Counsel)

## RESERVED JUDGMENT

1. The claimant's claim of disability discrimination fails and is dismissed.
2. The claimant's complaint of constructive unfair dismissal succeeds. The remedy to which the claimant is entitled will be determined at a remedy hearing, arrangements for which will be made by the Tribunal administration in due course.

## REASONS

### Background

1. By a claim form received on 15 August 2018, Miss Barker brings claims of unfair constructive dismissal and disability discrimination arising out of her employment with the respondent as a customer assistant at its store in Bury St Edmunds between 28 April 2013 and her resignation on 17 July 2018.

**The issues**

2. The matter came before me at a closed preliminary hearing on 19 March 2019. At that hearing, we discussed the issues, making use of a draft list of issues which had been prepared by the respondent's solicitors. Although Miss Barker was not legally represented, (her mother spoke for her on that occasion as well as during this hearing) her claim form and the particulars of claim attached had been professionally drafted by a solicitor. It is perhaps worth making the point that it is apparent from the draft particulars of claim that the solicitor who drafted the same knew what he or she was doing; it is well drafted. However, at the preliminary hearing Mrs Barker said that her daughter's case had been misrepresented in the particulars of claim. At the centre of this case is the fact that Miss Barker has a serious medical condition and she protests that as a consequence, a change to her hours of work should not have been imposed upon her. Mrs Barker said that Miss Barker's complaint was not about lack of breaks but was simply that she was unable to work after 3pm because she became too tired. With this in mind, we discussed the draft list of issues and I noted in my preliminary hearing summary the changes which were to be made, at the request of the claimant. I also noted further details with regard to the allegations of harassment and necessary amendments to the particulars of claim, to which the respondent very sensibly did not object.

3. The list of issues was re-drafted and changes made in accordance with Mrs Barker's requests. A final agreed list of issues was prepared which I set out below in my cutting and pasting from the original:

[EJ Warren to insert the final agreed list of issues here as mentioned above.]

4. For ease of reference point out the following deviations in the list of issues from the claimants pleaded claim which are, I emphasise, at the request of Mrs Barker in the preliminary hearing:

4.1 The allegation of a requirement to work beyond 3pm on Fridays was added as an allegation of direct discrimination.

4.2 The pleaded case of discrimination arising from disability was that the claimant could not work the new hours because of her need to work set times with set breaks. This was changed to her being unable to carry out the changed hours working beyond 3pm.

4.3 The PCP as pleaded was the requirement to accept changed hours. That was changed to the requirement to work beyond 3pm on Fridays.

4.4 The proposed adjustment was changed from allowing the claimant to continue with her original hours with an adjustment that she not have to work beyond 3pm.

- 4.5 The original harassment allegation regarding Becky Woodley was changed from an allegation that Ms Colk had said “there was nothing wrong with the claimant” to an allegation that Ms Woodley had said to Ms Colk “that there was nothing wrong with the claimant and that she should change her hours like everybody else”.

### **Evidence**

5. We had before us witness statements from:
  - 5.1 Miss Stephanie Barker (claimant);
  - 5.2 Mrs Diane Barker (claimant’s mother);
  - 5.3 Ms Woodley (Customer Assistant and person against whom allegations are made);
  - 5.4 Ms Colk (Commercial Manager);
  - 5.5 Ms Hurrell (Ladieswear Section Manager and claimant’s line manager at the relevant time); and
  - 5.6 Ms Saunders (Clothing and Home Commercial Manager, heard appeal against grievance outcome).

We heard evidence from each of those witnesses.

6. It was unhelpful and rather surprising that the respondent’s witnesses did not refer to documents in the bundle by page number.
7. We had before us a bundle of documents prepared by the respondent’s solicitors. It was surprising and irksome contrary to my express directions, (order number 8 from my preliminary hearing summary) the bundle was not assembled in chronological order. This is unhelpful to the tribunal in trying to quickly come to grips with the facts of the case. It is also particularly unhelpful for a litigant in person trying to find his or her way around the documents in the bundle. I also expressed to Mr Crozier the tribunal’s disappointment that we were not provided with an index to the bundle.
8. I should also note that Ms Woodley attended under a witness order issued at the request of the claimant, after the respondent reported that Ms Woodley had told it that she would not attend as she did not feel that she would be able to cope with giving evidence because she was upset following a recent bereavement.

### **The Law**

9. [EJ Warren will cut and paste that in.]

**Findings of fact**

10. The claimant has a serious medical condition called Long-Chain 3-HydroxyAcyl-CoA Dehydrogenase (LCHAD) deficiency. It is a rare metabolic disease which put simply means that she is missing an enzyme that converts fat to an energy which means that she has to drink and eat regularly and there are serious consequences if she does not.
11. It will be helpful for an understanding of the facts of this case if we review the medical evidence before us at the outset.
  - 11.1 At page 128 a document which describes itself as guidelines intended for immediate emergency management in respect of a patient with LCHAD. The serious nature of this medical condition is apparent from the document. Its primary contents are guidance to medical professionals. A copy of this document was retained by the respondent in its first aid box so that reference could be made to it in the event that Miss Barker became unwell and required emergency medical treatment at work. The document would be made available to medical practitioners attending.
  - 11.2 At page 131 is a letter from Addenbrookes Hospital Metabolic Medicine Service dated 6 January 2017 addressed "To whom it may concern" explaining that Miss Barker had a rare metabolic condition as a result of which she is particularly vulnerable during periods of physical stress such as prolonged fasting, major trauma and prolonged exposure to the cold. This letter was provided to the respondent in support of Miss Barker's request that she not be required to work on the ground floor of the respondent's Bury St Edmunds premises, which are cold. The request was acceded to.
  - 11.3 At page 41 is a letter from Addenbrookes Hospital Metabolic Medicine Service dated 11 February 2019, (i.e. post Miss Barker's employment) which provides more information regarding her LCHAD condition. It explains the hazards of long fasting or physical stress and the need for regular food intake. It explains that her vision has become impaired, as of September 2018 she was no longer able to drive and had to surrender her driving licence. Her vision deterioration had been reported since 2016. There was nerve injury to her feet in January 2016. Her heart function was satisfactory but there were early and subtle changes to heart tracing. Her prognosis was described as poor.
  - 11.4 Lastly, at page 355 there is a further letter from Addenbrookes Hospital, this time from the Department of Nutrition and Dietetics undated but noted as having been received on 5 April 2019. This repeats the earlier explanation of the condition under a heading "Dietary implications of LCHAD deficiency" claims that it is imperative Miss Barker has frequent breaks to ensure she eats regularly and avoids periods of fasting. It (claims?) that a job with a

set routine makes dietary management easier. It says, “unsurprisingly, a physical job can have a significant impact on energy levels meaning a person with LCHAD may find a full day of physical work with inadequate breaks to exhausting to manage”.

12. Miss Barker lives at home with her mother, Mrs Barker. Her employment with the respondent commenced on 28 April 2013. She was employed as a customer assistant working at the respondent’s Bury St Edmunds store. Bury St Edmunds is approximately 20 miles from her home in Stowmarket. The two towns are connected by a dual carriageway.
13. We note that in her job application, Miss Barker informed the respondent of her medical condition and that she required regular drinks and breaks.
14. The claimant signed a number of contracts of employment throughout her time with the respondent, her hours of work changing from time to time. The standard terms and condition of employment provided the respondent with a right to change the employees working pattern to meet its operational needs, see for example the latest version of the contract signed by Miss Barker at page 111. Miss Barker’s original hours when she first started are as noted at page 122; Mondays 1700-2000 hours, Tuesdays 1600-1900 hours, Wednesdays 1700-2000 hours, Fridays 1700-2000 hours and Saturdays 1200-1800 hours.
15. In 2014 new hours were agreed in consultation with Miss Barker’s then line manager, a Ms Stone which were; Mondays 0800-1500 hours and Thursday/Fridays/Saturdays 0800-1400 hours with a break each day set at 1030-1115 hours.
16. In January 2017, as a result of the letter from Addenbrookes Hospital dated 6 January 2017 referred to above, arrangements were made so that Miss Barker would no longer have to work on the ground floor of the respondent’s premises, which was a cold environment.
17. Sometime during February 2018 Miss Barker was informed that her hours would change to accommodate new delivery arrangements which meant that there was a need to re-organise people’s shifts. There was no dispute that this was necessary.
18. Subsequent to the initial conversation, Miss Barker’s line manager Ms Hurrell met with her to discuss the proposed change of hours on 19 February 2018. Miss Barker had been provided with a form, (as had her colleagues) on which she was asked to firstly set out her current working pattern and then secondly set out times and days that she would be available for a re-arrangement of shifts. She had completed that so as to show that she was available only for exactly the same shifts that she was currently working. On the form she noted in handwriting that these were the hours she had agreed with her previous line managers because of her condition. She wrote that she did not mind the odd extra hour but she did not want to change her contract. During this conversation,

Miss Barker explained to Ms Hurrell that she could not work late because she could not see in the dark and her condition had affected her eyesight. Miss Barker says that Ms Hurrell laughed at her when she said that she could not see in the dark. Miss Hurrell accepts that as she put it “chuckled and commented words to the effect that none of us can see in the dark”. We accept that this was as we would describe it, a jocular rejoinder and not intended in any way maliciously or to cause offence or to indicate in any way that she did not regard Miss Barker’s condition as a serious one.

19. On 23 March 2018 Ms Hurrell and Miss Barker met again. On this occasion Miss Barker recorded the conversation without Ms Hurrell’s knowledge. A transcript of that recording appears at page 136. They discussed the proposed change in hours. Ms Hurrell indicates that she would like Miss Barker to work from 9am-4pm on Monday. Miss Barker was reluctant to agree to anything. Ms Hurrell said she needed to hear as soon as possible. She made the point that if she was working until 4pm, that would become a problem in winter because it would be dark and she could not drive, she would need to rely upon lifts. She acknowledged that she relied upon her mother and there was an element of reluctance on her mother’s part for that arrangement to continue. The suggestion that Miss Barker would start at ten in the morning and she indicated she did not want to do that. It was left that she would think about the proposal, talk to her mother, consider whether there were any other proposals she could put forward and they would discuss the matter further.
20. The respondent says that there was a further discussion on 2 April. Miss Barker cannot recall such a discussion, although she has made a reference to it in her pleaded claim. From the transcript of a subsequent discussion on 5 April which we will come to shortly, we can see that there probably was a further discussion between Ms Hurrell and Miss Barker between 23 March and 5 April, because the discussion on 5 April begins with a reference to a discussion about dietary requirements, which we know from the transcript of 23 March conversation, was not discussed on that occasion.
21. As we have just indicated, there was a further meeting between Miss Barker and Ms Hurrell on 5 April 2018 which Miss Barker again secretly recorded, the transcript is at page 144. Ms Hurrell told Miss Barker that she had spoken to Human Resources, (referred to as PPS which stands for People Policy Specialists) she said that she had been told that dietary requirements of the claimant were not substantial enough to prevent her from doing the new proposed hours. However, because she has a health issues, they were going to arrange another meeting in order to make an occupational health referral, to which Miss Barker agrees. In the meantime, Miss Barker was asked to sign to agree to the new hours. Miss Barker responded that she was not happy starting at 10am and declined to do so. Ms Hurrell informed her that this was not negotiable, pointing out to Miss Barker that she had not come back to her with any alternative proposals. Miss Barker commented that in the winter she is, “stuffed”. She explains that her mother would drive her

into work in the morning when it is dark, leave the car and get a train back to Stowmarket. Leaving off earlier in the day would mean that the claimant could then drive her car home whereas if she was leaving after 4pm, she would not be able to. Miss Barker suggests that the respondent obtain an occupational health report before she is required to sign agreement to the new hours. Ms Hurrell says that is not possible because of the time that it will take to obtain an occupational health report. She also told Miss Barker that she does not have to sign the document to agree to the new hours, but that they were going to be imposed upon her anyway.

22. Miss Barker was told that she had until 15 April 2018 to agree to work the new proposed hours.
23. Miss Barker says that after this meeting, someone had told her that one of her colleagues, Ms Woodley, had been telling people that she should be made to change her hours, that there was nothing wrong with her and that she was also working at another store, Asda. Having heard evidence from Ms Woodley, noting her demeanour, noting her willingness to report Miss Barker later for working at Asda whilst signed off sick from work with the respondent, (notwithstanding that she purported to claim to be Miss Barker's friend) accept the evidence of Miss Barker.
24. On the same day, 5 April 2018, Ms Hurrell wrote a letter to Miss Barker (page 152) which states that she is required to work the new proposed hours, 0800-1500 hours on Monday and Thursday, 1000-1600 hours on Friday, 0800-1400 hours on Saturday. It refers to Miss Barker having objected because of dietary requirements and responds that they have no knowledge of health requirements that would affect these changes. Miss Barker was required to commence the new pattern of work from 6 May 2018 (not 15 April 2018) the letter's penultimate paragraph states:

“As discussed at our meeting, if you do not accept and start the new working pattern by 06/05/18, this will be investigated and could lead to disciplinary action which ultimately may result in your dismissal.”

25. The respondent has an in-house organisation of employee representatives referred to as BIG, which stands for Business Involvement Group. Ms Richards is a BIG representative at the Bury St Edmunds premises. Miss Barker wrote to Ms Richards (page 153) saying she has been asked to change her working hours but she cannot because of her medical condition. In this letter she states that she is so upset that she wants to leave and that she is fed up with being questioned as though she is lying about her night vision and her dietary needs. She attached to that letter a further letter explaining her health condition. She explained how she had been becoming tired in the afternoons and that Addenbrookes had therefore prescribed a drink to boost her energy which seems to work. She explained that her eyes have been damaged and so she has poor night vision and cannot drive in the dark, relying on family members for lifts in the winter. She referred to her mother changing her working days and

hours to assist. She makes the point that she has never had a day off work because of her condition.

26. Ms Richards then spoke to Miss Barker, she made some handwritten notes which are at pages 155-156. We note at page 156 Ms Richards has noted, "8-3 requires lift home as too tired to drive".
27. On 19 April 2018 Ms Richards spoke to Ms Colk, Commercial Manager. There is no note of this conversation. Ms Richards explained to Ms Colk Miss Barkers medical condition. Ms Colk said that no decision would be made that would lead to an adverse effect on her medical condition. Her hours would not be changed if they had an adverse effect on her medical condition. If she needed breaks at specific times that would of course be accommodated. Ms Richards reported back to Miss Barker on the conversation, what Miss Barker was told she has noted at page 157, (not a contemporaneous note, but a note that she has written after these proceedings were commenced) and this includes that explanation she had not been put forward for an occupational health assessment because she had not triggered one by being absent from work, suggestions were made about being provided with extra breaks, there was an assurance that hours would not be changed if they had an adverse effect on her health and it was suggested that she (Miss Barker) chase up Ms Hurrell about the occupational health referral.
28. Also on 19 April Miss Barker sent an email to Ms Richards saying that she had decided not to accept the change in her hours and that she would await a meeting with occupational health. She comments that if the respondent won't accommodate her it will have to fire her and that she has been feeling sick because of the stress.
29. Miss Barker is then absent from work on leave, 23-28 April and 2-7 May 2018. Prior to her return to work, she logged into the respondent's system and saw that she was scheduled to work the new hours upon her return.
30. On 9 May 2018 she was certified by her doctor as being unfit to work due to work related stress. She commenced a period of absence due to ill health from which she never returned.
31. Miss Barker sent her fit note with a letter, which are at pages 179 and 180. She refers to her medical condition and states that it had been implied that she is making up the severity of her condition because she has never been off ill as a result of it. She complained of being deeply upset to be laughed at when she said she could not see in the dark and her vision is deteriorating all of the time. She refers to being told to catch a train, which is just as bad. She refers to being threatened with dismissal if she does not change her hours. The respondent treated this as a grievance. Miss Barker commented that over the last two months she had become ill worrying about the situation, she felt she could not cope and said that at times of stress or fasting her body starts to break down muscle.



32. On 13 May 2018 Rebecca Woodley saw Miss Barker working at the till in Asda. Ms Woodley spoke to a section co-ordinator called Ms Ellis about what she had seen, she was encouraged to speak to Ms Hurrell, which she did. Ms Hurrell took advice from HR who informed her that Miss Barker's absence from work was due to work related stress, i.e. in relation to her work at the respondent not at Asda and that therefore there was nothing inappropriate in her continuing to work at Asda no further action should be taken.
33. Miss Barker wrote to Mr Easter to complain about Ms Woodley on 15 May 2018 (page 183). She referred to Ms Woodley as having bullied her relentlessly since 2015. She referred to an incident on 25 March when Ms Woodley had seen her working in Asda and had told everybody at Marks and Spencer that she was working at Asda. She then referred to the incident on 13 May and reported that someone had told her that Ms Woodley was telling everybody that she was off sick but working somewhere else. During the course of the hearing Miss Barker produced a print out from Facebook messenger, a message from a Ms Leadbitter which she refers to Ms Woodley as grassing her up for being off sick and working on another job.
34. On 16 May 2018 Miss Barker was invited to attend a grievance meeting, both letters to Mr Easter being treated as a grievance.
35. The grievance meeting took place before commercial manager Ms Ballard on 21 May 2018. Miss Barker was accompanied by Ms Richards of BIG. She provided Ms Richards with a set of notes which are at pages 194-197 in which she said she did not want to talk about what could be done for her to return to work, she does not want to talk about her condition. She referred to waiting for an urgent referral from Addenbrookes and wants to find out what is going on before making a decision. She said her grievance was about the way the change to her hours was handled. She had asked on numerous occasions for an occupational health referral. Page 196 she wrote that hours had previously been agreed so that she could keep to a routine with her diet regime and to allow her to get a lift into work because she could not see in the dark. She referred to Ms Hurrell as having said that there was nothing on file about her condition and that she would have to give and take like everybody else. She quoted Ms Hurrell as telling her that HR had said she was not special case and she would have to change her hours.
36. The notes of the grievance hearing start at page 201. Ms Ballard noted that although Miss Barker had not raised a formal grievance correspondence had been treated as a grievance. When asked how she was feeling, she said she was stressed and anxious. When asked whether she had told Ms Hurrell of her condition she said that she had. She said that her hours had previously been agreed because of her condition because she was not managing the previous hours she was on. Because she had not had any time off work she had never been referred to occupational health. She said she had made the respondent aware of

her illness when she first started working for them and that the team were aware of her condition because she has notes on file. She said she asked for an occupational health referral on 22 March. That is not strictly speaking correct, the transcript of the meeting on 23 March, (assuming that is what she is referring to) does not record Miss Barker asking for an occupational health referral. She goes on to say in respect of 5 April meeting, she had asked for an occupational health referral again, this is not strictly correct as the transcript shows that the reference to occupational health was instigated by Ms Hurrell. She explained that she was asked to sign an agreement to work the new hours and that she declined to do so and incorrectly stating that she had asked for an occupational health referral.

37. She refers here to the meeting or a discussion on 2 April 2018 in which she complains that Ms Hurrell had suggested she was doing her a favour by not making her work downstairs. She explains that she cannot see in the dark, that driving is unsafe in the dark. She explains that she has a lift from her parents from October onwards but her mother had changed her work patterns to fit in with her hours prior to the change. She said that she had told Ms Hurrell she could not work late because she cannot see in the dark to drive. She complains Ms Hurrell laughed at her. Ms Ballard spoke to Ms Richards in which she referred to the information she had been given by Miss Barker regarding her health as confidential. She explains that nevertheless she was concerned and therefore had spoken to Ms Colk. She had suggested discussions around fixed guaranteed breaks or other provisions to accommodate Miss Barker. She explains Miss Barker's position was that her original hours had been agreed to accommodate her needs and she would wish to wait until an occupational health assessment before agreeing to any variation. The conversation turned back to Miss Barker, she said that the change would affect her diet regime and that her meals of the day would be disruptive. This would adversely affect her health as a result because if she goes too long without food or drink her body will be affected and she also commented that she did not want to discuss her medical condition. She said that how she is affected are contained in the document in the first aid box.
38. With regard to bullying, she says that Ms Woodley had bullied her relentlessly since 2015. She refers to her having complained to management that there nothing wrong with her and that she should change her hours. She also at 215 explained how a friend had messaged her to say that Ms Woodley was telling everyone that she was working at Asda and she was signed off sick. Asked what her ideal outcome would be, she answered that should could not say, her intention is that she get checked over by the medical experts at Addenbrookes to see if there are any adverse effects caused by this stress she in undergoing. At the end of the meeting, Ms Ballard informed Miss Barker that she would be expected to return to work on her new contracted hours, (page 218).
39. On 23 May 2018 Ms Ballard spoke to Ms Hurrell, her notes begin at page 219. She said that Miss Barker had told her that she could not do

the new hours requested because of dietary requirements but that Miss Barker had refused to provide more detail. She said that she always gave Miss Barker breaks whenever she needed them. She said that her health had never been brought up as an issue before. She had been advised by PPS that there was no record of what they call an underlying issue. She acknowledged she was aware of the medical condition, having read the note in the first aid box when she was a first aider. She acknowledged, (page 221N) at the third meeting on 5 April she had been advised by Human Resources that they could arrange for an occupational health assessment if that is what Miss Barker wished. She candidly acknowledged that she could not remember whether Miss Barker had responded that she did or did not so wish by commenting that Miss Barker had never followed that up. She said that she had asked Miss Barker to come up with ideas, "that would suit" her dietary requirements but that Miss Barker had never come up with anything.

40. Ms Ballard provided a written outcome to the grievance in a letter dated 29 May 2018 which begins at page 226. She records asking Miss Barker how the change in hours would affect her health and Miss Barker's response was "It would affect her diet regime, her meals of the day would be disrupted and that this would adversely affect her health as a result if she went for a certain time without food or drink". She records that Miss Barker then said that she did not want to discuss her medical condition further. That she notes that Ms Richards had said that it had been agreed that she would be able to have breaks whenever she felt that it was appropriate. She confirmed that she had looked at the document in the first aid box which provides guidelines in respect of medical treatment but does not provide any assistance with reasons why working hours could not be changed. She acknowledged that Ms Hurrell was unaware of the impact an hours change could have on her dietary requirements but notes Miss Barker herself had not provided any information which would lead her to believe that a change in hours would have an adverse effect. She discussed the issue of night vision noting that Miss Barker had said that her mother would give her a lift commenting, "It is however your responsibility to ensure you can get to and from work". She acknowledged that Ms Hurrell had been unable to recall what Miss Barker's response had been to the suggestion of an occupational health referral, so noted that Miss Barker had never followed it up. She then commented, "From the information I have gathered, I can find no tangible link in conducting an occupational health referral as your main concern around your dietary requirements/breaks can be fully accommodated within store. Secondly, I fully appreciate your concerns around commuting to and from work during the winter months, however, you do have a responsibility to get to and from work."
41. With regard to the bullying allegations she noted that the complaint of Ms Woodley saying, "that there was nothing wrong with her, she should have to change her hours like everybody else" had not been raised with Ms Hurrell. With regard to other allegations she noted that the lack detail or the passage of time making investigation extremely difficult. She commented she did not doubt the genuineness of Miss Barker's concerns, but she needed substantial evidence if she was to investigate fully.

42. On the question of her working at Asda and Ms Woodley's interference, she said that they could not stop somebody from shopping at Asda or dictate which checkout they chose to use. It is suggested that if she feels she is being harassed or bullied by a member of the public whilst at Asda, she should complain to the Asda team.
43. She notes that Miss Barker had not been specific in the outcome that she sought, she said there was a lack of clarity regarding the effect of dietary requirements on the new hours, she felt that correct process had been followed by Ms Hurrell regarding the change of hours, she took the view that it was fair to require her to commence her new working hours on her return to work. She said that there would be no requirement for her to travel in the dark at that particular time of year, should this become an issue in winter months the respondent would look at offering further support. Her conclusion is there is no case to answer.
44. We note at this stage Miss Barker's evidence is in accordance with her witness statement paragraph 35, that she wanted to go back to work.
45. By an undated letter which is at page 165 of the bundle, Miss Barker was invited to an absence management meeting to take place on 15 June 2018.
46. On 31 May 2018, Miss Barker wrote a letter to the respondent's Human Resources director, page 231 in which she sets out the matters that she has raised. In this letter she makes reference to her underlying health condition, LCHAD. She attached to that letter an explanation about her condition, (page 236) which includes the effect of not drinking or eating regularly, the effect of stress or cold, poor night vision, neuropathy to her hands and feet and heart muscle damage. The response to this, (page 237) is to inform her that these matters have already been raised, investigated and dealt with.
47. On 13 June 2018, Miss Barker appealed the grievance outcome using a prescribed form which begins at page 244. The section in which she is asked to explain what she is appealing against, she sets out that she has four times asked to meet with occupational health, asked to change her hours, she wants to fully explain her condition and her needs which she said, would help everybody understand. She also complained that a person had been bullying and harassing her was giving false information. The section in which she is asked for the reasons for her appeal she has ticked boxes to say the hearing manager's decision was not logical and reasonable, additional evidence had come to light, company policy had not been followed and then she adds her own narrative she was appealing the outcome of her grievance as she felt that the respondent was discriminating against her because of her disability. She makes reference to having asked ACAS to start the early conciliation process. The outcome she says she is looking for was a meeting with occupational health. In the section for additional information she states that she is

suffering from stress and that her medical advisors have advised her not to drive for the foreseeable future.

48. Also on 13 June 2018, Miss Barker wrote to Ms Hurrell to say that she would not be able to attend the absence management meeting, she is not coping, she is not able to drive, she is undergoing counselling and having blood tests.
49. At about this time, Miss Barker commenced early conciliation with ACAS.
50. On 15 June 2018, Miss Barker was informed that a different manager, a Ms Ellis, would “support” her during her absence, (page 167).
51. On 18 June 2018, Miss Barker wrote to Ms Ellis to say that she was attending an urgent appointment at Addenbrookes regarding her restricted vision and reported that she had been told that she will not be able to drive again.
52. On 19 June 2018, Ms Ellis wrote to invite Miss Barker to attend a meeting on 26 June to discuss her health problems. On 21 June, page 250, Miss Barker wrote to decline.
53. A Ms Saunders, Clothing and Home Commercial Manager was appointed to hear Miss Barker’s appeal. Email correspondence ensued, the result of which it was agreed that the appeal hearing would be conducted by telephone. Astonishingly, Ms Saunders was not provided with any documentation relating to the grievance, other than the appeal form itself. She appeared to regard this as normal.
54. The appeal hearing by telephone took place on 3 July 2018. Ms Saunders notes of this begin at page 265. Miss Barker had prepared some written notes for use at the appeal. She says that she read those notes to Ms Saunders at the beginning of the telephone hearing. Ms Saunders says that is not correct, she had the notes in front of her and she read them after the telephone conversation was terminated but before discussions resumed by email. It really does not matter which is correct, the key point is that Ms Saunders knew of the content of those notes.
55. Turning to Ms Saunders’ notes of the telephone conversation, she asked Miss Barker what her grievance was as she had no paperwork and Miss Barker’s response is recorded as being that her grievance was about the change of hours and bullying, but her main grievance is against the hours. Asked why she thought the outcome was not logical or reasonable, she replied that she didn’t feel that the points that she raised had been looked at, in other words that Ms Ballard had not looked into the occupational health referral nor into her complaint of bullying. She said that her line manager was aware of her medical condition because she used to be a first aider and had seen the document in the first aid box. She was asked how changing her hours impacted on her medical condition and her answer was that she had a set routine with meals

currently her work fits in with her meal routine. She was asked what her meal routine was and Miss Barker explains. Confirms her current hours of work were 0800-1400 hours and the new proposed hours were 1000-1600 hours. Asked how this affected her meal pattern, she answered that it prevented her midday meal. She confirmed that she has lunch and a snack between 1030-1100 hours currently. She was asked if break times were provided that kept with those times that support a change in hours to which her answer was she would need a later break after 1600 hours. Ms Saunders recorded suggesting that break times would not need to be affected by the change in hours, she then notes that the phone call cut out. They resumed their connection and Miss Barker said that she felt that she would need more breaks in the afternoon. There was a discussion about breaks at 1630-1700 hours and Miss Barker commented that she would not be at work at that time. She was asked whether she would need additional breaks which she responded she did not want to talk about her routine, the eating isn't the same. Asked in what way she responded the times of eating. The note then reads that Miss Barker informed Ms Saunders that she was going to hang up.

56. The discussion then continued by email. We note firstly Miss Barker's notes, which Ms Saunders told us she read during the email correspondence. The notes are at pages 271-272. In these notes she refers to Ms Hurrell laughing at her when she said that she could not see in the dark. To making it clear that she was not willing to agree to a change in hours until she had spoken to occupational health. To Ms Woodley's suggesting there was nothing wrong with her. Explained that she had a life-long genetic metabolic disease. She would like to know who made the decision that this did not warrant an occupational health assessment. She explained she did not want to explain her condition at her grievance because she thought she was waiting an occupational health assessment.
57. A summary of the email exchanges is as follows:
  - 57.1 Miss Barker to Ms Saunders 14:34 – she will send a copy of the grievance, she can't cope emotionally with the pressures that Ms Saunders has put her under that day. She says Ms Saunders is trying to make her say things about her diet and she wishes to raise points about the way things have been handled. That if at any stage she had been seen by occupational health, medical people would understand. She finds it difficult to talk about her condition, that the pressure she has been put under that day is not acceptable.
  - 57.2 Ms Saunders to Miss Barker 14:50 – apologises if Miss Barker has found the phone call stressful and seeks to re-assure her that she is not trying to get her to say anything, just trying to gather detail in her capacity as an appeal manager. She notes that Miss Barker has raised an appeal against her new proposed working hours she says is due to her meal pattern and that therefore she needed to

understand what her meal pattern was. She summarises the conversation so far which Miss Barker has set out the timeframes of her meal routine and how she felt the new working hours would affect this. Current break times would not appear to need changing. Or she says, she needs to understand why there is a concern in changing her hours. With regard to the occupational health referral, she seeks to explain that she needs information from Miss Barker to establish the outcome of her appeal in this respect.

- 57.3 Miss Barker to Ms Saunders 15:04 – she explained she wanted to discuss her condition with occupational health as people who would be medically trained and would understand her condition. She says that messers Hurrell, Colk and Woodley had tried to push her into accepting hours that could be detrimental to her health. She said, “We are way past me explaining what time I eat during the day”. She says that she had said more than once that she did not wish to talk about her condition, unless it was with occupational health.
- 57.4 Ms Saunders to Miss Barker 15:28 – Ms Saunders stated that Miss Barker’s appeal had been against a change to her hours which she had said she could not do due to her meal pattern. She said if she does not have medical information, she cannot agree whether or not an occupational health referral is needed; she needs as much information as possible.
- 57.5 Miss Barker to Ms Saunders 15:45 – she agreed that she said her original grievance was about a change in hours. She argues that managers at Marks and Spencer are not medically qualified to understand her condition and that occupational health referrals have to come from line managers which is why Ms Hurrell had said she would put her forward for such a referral. She said she did not discuss feeding schedule at the meeting with Ms Ballard as she was expecting a referral to occupational health.
- 57.6 Ms Saunders sent Miss Barker a series of questions to answer at 16:10, which Miss Barker answered at 17:47. From this we can see that Miss Barker says that she had not during the grievance or appeal mentioned her meal pattern. She comments, “It’s not about the breaks with my condition it is about the whole day” and reiterates that she had not mentioned the meal routine previously because she was waiting for an occupational health assessment. She comments that no one had mentioned her eyesight problems which were also an issue with regard to the revised hours. She comments that she considers Ms Saunders had telephoned her that day with the express purpose of trying to trick her into saying that she can work amended hours with no problem. She said her condition and when she can eat and drink is very complicated. That as Ms Saunders does not understand her condition, she cannot possibly know what to ask about meal times.

- 57.7 Miss Barker to Ms Saunders, 4 July 2018, 9:47 – Miss Barker reiterated she does not want to talk about dietary requirements because her condition is about much more than just diet and that she had been promised a meeting with occupational health. That it was also about physical activity, times of day and host of other external factors. She points out that in discussing her meal times they had not discussed her prescription drinks, the extra intake that she has to take onboard during the day. She also said that they had not discussed adjustments needed to her regime for different circumstances regarding physical activity. Complains that she had become upset because she had thought that Ms Saunders was responding to the appeal and not going over the issues prior to the grievance.
- 57.8 Ms Saunders to Miss Barker, 5 July 2018, 16:13 – responded that Miss Barker’s grievance had been about her new hours and when asked why her medical condition would affect her changing hours the response was because of her set meal routine which is why that was discussed. She sought to explain that in her role as appeal manager she needed to gain as much detail and clarity as she could to understand. She asks for further information regards the references to the whole day and physical activity and a host of other factors. She also asks for more information about the eyesight problems. She asked for further explanation about Miss Barker’s reference to eating and drinking being very complicated.
- 57.9 Miss Barker to Ms Saunders, 5 July 2018, 17:32 – she says her appeal was against the decision to impose new hours after she had asked for and been promised an interview with occupational health. She thought Ms Saunders would investigate why she had been denied an occupational health assessment and does not see how adding further information to the original grievance is the correct thing to do as during the grievance she had made it clear she did not want to discuss her condition with anybody other than occupational health.
- 57.10 Ms Saunders to Miss Barker, 6 July 2018, 9:29 – she states that the occupational health referral issue is something that she can look into and asks for as much information as possible in the meantime, she requests that information be provided by 4pm that day.
- 57.11 Miss Barker to Ms Saunders 11:17 – she argues that Ms Hurrell had said in April that she would refer to occupational health and therefore as far as she is concerned the decision has already been made. She says her appeal is not about her hours, but about the way she has been treated. She says a little later in the day at 15:08 there is no more information she can give in connection with her appeal.



58. Ms Saunders provides an appeal outcome in a letter dated 10 July 2018 which starts at page 304. Miss Barker says that she received this letter on 17 July 2018. In the appeal outcome Ms Saunders says that they had identified that Miss Barker could keep her break times with the new contractual hours and that Miss Barker was unable to provide any information as to why new hours would affect her meals. She observes that there are no set breaks in place. With regard to the occupational health referral she said she had spoken to Ms Hurrell was aware of the information in the first aid box. She refers to Miss Barker as not providing more information regarding her medical circumstances and says that as a result of this an occupational health referral would have been hard to complete. She says that is why no referral has been submitted to date. She says that Miss Barker had from the start of the appeal said the main grievance was about the new hours but that Miss Barker had not been able to answer further questions which were asked about this. Her conclusion is that the new hours should be upheld, those are the hours that Miss Barker should work when she returns to work, on the basis that her line manager will allow her breaks as and when needed. She suggests that she and her line manager should get together to look at an occupational health referral. She says she does not have sufficient information herself to make an occupational health referral. This is something that can be discussed if it would support a return to work or in order to achieve that she will need to discuss the detail of her health condition with her line manager.
59. On 17 July 2018, Miss Barker resigned her employment, page 313. It is a very short letter, she is saying that she resigns with immediate effect. In evidence, Miss Barker told us that she could not remember whether she had read the appeal letter before resigning.

## **Conclusions**

### **Direct discrimination**

60. The respondent did not refer Miss Barker to occupational health.
61. We do not consider the criticism of the respondent as not having investigated the grievance thoroughly a fair or reasonable or justified criticism. A reasonable investigation was conducted.
62. The respondent did purport to require Miss Barker to work beyond 3pm on Fridays.
63. None of the four named comparators were in the same circumstances as Miss Barker. Ms Ladell's change in hours was enforced against her, despite the fact that she raised a grievance. Miss Cull also worked on the ground floor and therefore provided flexibility that Miss Barker and others did not. Ms Ellis was a new employee. Miss Jam suffered an underlying illhealth condition and was moved.

64. We therefore look to the hypothetical comparator; a person in the same circumstances as Miss Barker but not disabled. That is a person working the same hours she is currently working, objecting to the change in hours. Indicating that there were potential travel difficulties, but not difficulties that were connected to disability. Such a person would have been treated the same way as Miss Barker. There appear to be no facts from which we could conclude that the reason that Miss Barker was required to change her hours was her disability. The burden of proof is not shifted. Miss Barker's complaint of direct discrimination must fail.

Discrimination arising from disability

65. Miss Barker was subjected to threats of disciplinary action and potential dismissal, but the letter of 5 April 2018 clearly threatens her that if she does not start working to the new pattern by 6 May, this would be investigated and may lead to disciplinary action, which ultimately may result in dismissal. That is a threat of disciplinary action and potential dismissal.
66. That is plainly unfavourable treatment.
67. The key question is whether that treatment was done because of something arising in consequence of Miss Barker's disability. In the list of issues what she relies upon is her being unable to carry out the changed hours working beyond 3pm. The key point then is whether her being unable to work beyond 3pm is because of her disability. There was no medical evidence before us to support Miss Barker's contention that she could not work beyond 3pm because of her disability. The medical reports that she has obtained during the course of this litigation do not support that contention.
68. On the evidence, Miss Barker did not argue before the respondent that the reason she could not work the proposed hours i.e. beyond 3pm was because she was too tired. The evidence was that her line of argument was repeatedly impact of the change of hours on her dietary regime and her inability to drive in the dark because of her deteriorating vision. These are not matters which Miss Barker has argued before the tribunal, she has focused on not being able to work beyond 3pm because she is too tired.
69. Miss Barker's original particulars of claim did not refer to her being unable to work beyond 3pm because of her disability. This suggests that the instructions which she gave to her solicitor at the time were difficulty, the need to work set times with set breaks as originally pleaded and not tiredness after 3pm.
70. The only reference to tiredness is in Ms Richards' note, page 156, "8-3 requires lift home as too tired to drive". The context there the earlier start and a longer day, the hours at issue are 1000-1600 hours.

71. Further difficulty from Ms Richards in this regard is her acknowledgement that she worked those proposed hours at Asda. We acknowledge that Asda is closer to her home, but Stowmarket to Bury St Edmunds is not a great distance and in our own experience a very modest and un-taxing journey indeed. She worked at Asda 1000-1600 hours on Sundays.
72. The answer to the question posed by s.15 of the Equality Act 2010 is therefore that the threat of disciplinary action and dismissal was not because of something arising in consequence of her disability. If she was unable to work beyond 3pm, the reason for that was not her disability. Which inability, (if there was such an inability) did not arise in consequence of her disability.

### Harassment

73. Ms Hurrell did laugh, or chuckle, both descriptions might be apt, when Miss Barker mentioned in conversation that she could not see in the dark. It was a light-hearted response to the remark. Having regard to the circumstances, on its own, we do not consider that Miss Barker could reasonably regard that remark as violating her dignity or creating the proscribed environment.
74. The second allegation of harassment involves a conflict of evidence. The allegation is that Ms Woodley said to Ms Colk on 5 April that there was nothing wrong with Miss Barker and that she should change her hours like everybody else. Ms Woodley denied this. We did not regard Ms Woodley as a reliable witness. She sought to argue in her witness statement that she and Miss Barker were friends. We saw from the documents in the bundle that Miss Barker had been complaining about Ms Woodley bullying her for some time. What is more, we heard from Ms Woodley in evidence she had seen, "her friend" working in Asda when she was signed off as sick from her work at Marks and Spencer and immediately went to management to report her. That is not the action of a friend. However, Ms Colk's evidence was that no such conversation took place. We found Ms Colk a credible witness when there was no reason to doubt her honesty. Any evidence that we then have that such words were said is the hearsay evidence of Miss Barker, reporting what she was told by somebody else. Having regard to the voracity of the evidence from Miss Barker as compared to the evidence of Ms Colk, we conclude on the balance of probability that Ms Woodley did not on 5 April say to Ms Colk that there was nothing wrong with Miss Barker and that she should change her hours like everybody else.
75. The third allegation of harassment is the manner or the way that Ms Saunders treated Miss Barker during the appeal hearing on 3 July 2018. The questioning was to some degree, about Miss Barker's eating routine and it seemed to us entirely appropriate that it should be, given Miss Barker's case before the respondent that the change in hours would interfere with her daily dietary routine. It was plainly necessary and appropriate for Ms Saunders to explore this and ask questions. The

questions were not irrelevant. The line of questioning did not amount to harassment, it did not create the proscribed environment nor offend Miss Barker's dignity.

Discrimination dismissal

76. We have found that the respondent has not discriminated against Miss Barker as alleged and therefore there is no such conduct that could be said to amount to discrimination which therefore warranted Miss Barker's resignation on which she could found a claim of constructive discriminatory dismissal.

Constructive dismissal

77. We consider each of the allegations in turn:-

77.1 There was meaningful consultation with Miss Barker regarding the change to her hours and consideration was given to the affect of her disability. However, see below.

77.2 Ms Hurrell did invite Miss Barker to come up with other proposals, consider moving departments, this was not something taken forward by Miss Barker. She did not come forward with further proposals. This was not something that Mrs Barker pursued with the respondent's witnesses.

77.3 The respondent did not deny knowledge of Miss Barker's disability. The managers acknowledged the existence of the disability and Ms Hurrell acknowledged that she knew about it, from having read the information that was kept in the first aid box. It was also acknowledged that in 2017 it had been advised that she ought not to work in the cold.

77.4 As we have already said, we do not think the grievance investigation can be criticised.

77.5 Ms Hurrell did laugh when Miss Barker said she could not see in the dark. It was appropriately described by Ms Hurrell as a chuckle.

77.6 Ms Saunders did not inappropriately or improperly put unreasonable pressure on Miss Barker during the grievance appeal hearing. She had reason and proper cause for the manner in which she conducted that hearing.

77.7 The respondent did fail to refer Miss Barker to occupational health prior to the change in hours, despite her requesting that it should do so. To be clear, there is no evidence that such a referral would have made any difference. This is why her claims of disability related discrimination and failure to make reasonable adjustments have failed.

78. Nevertheless, the tribunal found it very surprising indeed that the managers that dealt with Miss Barker failed to recognise that they were dealing with a person with a very serious medical condition, (there can be no doubt about that from the document in the first aid box) who was objecting to changes in her working conditions by reference to her disability and that in no circumstances it is good industrial relations practice, (and sensible Human Resources practice from an employer's perspective) to refer the individual to occupational health so that managers might be advised insofar as is appropriate, as to the nature of the disability, indeed if there be doubt, whether the impairment amounts to disability as defined in the Equality Act 2010, how that might impact on that individual's work, whether there are disadvantages because of working practices and therefore whether reasonable adjustments ought to be made to those working practices.
79. One would have thought that a properly trained manager in Ms Hurrell's position from the very start had recognised that a referral to occupational health was necessary and to make that referral.
80. One would have thought that Human Resources advisors hearing from a manager consulting them that they had an individual who has an illness who is objecting to a change of hours would immediately think that it was both appropriate from the perspective of the employee but also from the perspective of the employer, essential to make a referral to occupational health for advice.
81. In this case, Ms Hurrell actually told Miss Barker that she was going to make that occupational health referral. Not only did she thereafter fail to action that undertaking, but subsequently in a grievance hearing had to admit that she could not even remember the outcome of the conversation.
82. A manager senior to Ms Hurrell, Ms Ballard, is apprised of the situation herself was unable to recognise the importance of obtaining occupational health advice.
83. The matter then goes one step further to Ms Saunders and she too fails to recognise an occupational health report ought to be obtained. Pausing for a moment, it was astonishing that the appeal against the grievance was conducted by a manager who had not had sight of the grievance or of any documents relating to the investigation or the outcome. However, that is not part of Miss Barker's case advanced in her claim form or the list issues. Returning to the subject of the occupational health report, it was said for the respondent by Mr Crozier that in the appeal outcome letter Miss Barker gets what she was asking for. With respect, no she does not. Ms Saunders suggests that Miss Barker and her line manager should get together to look at an occupational health referral. She does not say you will be provided with an occupational health referral. What is more, Ms Saunders herself could have actioned an occupational health referral.

84. The tribunal was unimpressed by the excuses offered by Ms Hurrell, Ms Ballard and Ms Saunders they could not make an occupational health referral without Miss Barker providing them more detailed information about her illness. That struck us as complete nonsense. Those managers had enough information to make a meaningful occupational health referral. Furthermore, those three managers appeared to be obsessed with apparent requirement that before an occupational health referral might be made, for there to be periods of absence from work giving rise to situation defined by the respondent as, “underlying health issue” before an occupational health referral needs to be made. That is completely wrong. A person does not have to be absent from work before their illness might be regarded as having an adverse impact on their ability to work, requiring reasonable adjustment. Such a measure would be a discouragement to someone as admirably resilient as Miss Barker.
85. Throughout the process Miss Barker was calling for a referral to occupational health, she had been told that there would be one, but then it never happened. The respondent’s failings in these regards were without reasonable and proper cause and were of sufficient seriousness to undermine mutual trust and confidence amounting to a fundamental breach of contract. We find that Miss Barker’s resignation was in response to that breach, the failure to refer to occupational health was at the heart of her complaint. For those reasons, her complaint of constructive unfair dismissal succeeds.

---

Employment Judge M Warren

Date: 31 October 2019

Sent to the parties on: .....

.....  
For the Tribunal Office