EMPLOYMENT TRIBUNALS

Claimant: Miss L Hughes

Respondent: Progressive Support Limited

Heard at: Liverpool **On:** 14-16 October 2019

Before: Employment Judge Buzzard
Dr L Roberts
Mr P Gates

REPRESENTATION:

Claimant: Mr J Halson, Solicitor
Respondent: Mr R Johns of Counsel

JUDGMENT having been sent to the parties on 18 October 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The Claims

1. The claimant in this case pursued two claims as follows:

1.1. that she had been victimised by the respondent when they gave her a written warning in early January 2019; and

1.2. that the respondent had indirectly discriminated against her from 12 December 2018;

The Issues & The Law

2. Part 5 of the Equality Act 2010 ("EqA") applies to employees prohibits discrimination and victimisation of employees in the workplace.

3. In relation to discrimination, s39 EQA states:

> *39 Employees and applicants*
>
> *(2) An employer (A) must not discriminate against an employee of A's (B)—*
>
> *(a) as to B's terms of employment;*
>
> *(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;*
>
> *(c) by dismissing B;*
>
> *(d) by subjecting B to any other detriment.*

4. This prohibits discrimination in the terms of employment or by subjecting an employee to any other detriment.

5. In relation to victimisation s39(4) EqA states:

> *39 Employees and applicants*
>
> *(4) An employer (A) must not victimise an employee of A's (B)—*
>
> *(a) as to B's terms of employment;*
>
> *(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;*
>
> *(c) by dismissing B;*
>
> *(d) by subjecting B to any other detriment.*

6. The right to make a claim in an Employment Tribunal in relation to a breach of these provisions of Part 5 comes from Chapter 3 of Part 8 of the Equality Act 2010. Specifically, s120 states:

> *120(1) An employment tribunal has, subject to section 121, jurisdiction to determine a complaint relating to—*
>
> *(a) a contravention of Part 5 (work);*

7. Under this a Tribunal has the jurisdiction to determine if prohibited discrimination and / or victimisation has occurred.

8. The definitions of discrimination and victimisation come from Part 2 of the EqA. This firstly creates the concept of protected characteristics, the relevant one here being sex. Part 2 Chapter 2 goes on to define what discrimination and victimisation are.

Indirect Discrimination

9. There is more than one form of discrimination based on sex. The relevant form of discrimination to this claim is Indirect Discrimination. This is defined by s19 of the Equality Act as when:

> *19 Indirect discrimination(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
>
> *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*
>
> *(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*
>
> *(b) 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,*
>
> *(c) it puts, or would put, B at that disadvantage, and*
>
> *(d) A cannot show it to be a proportionate means of achieving a legitimate aim.*

10. The question of the provision, criterion or practice ("PCP") that the claimant relied on this case was confirmed by the claimant and her representative. This was initially done in the claimant's ET1, which was drafted with the assistance of her legal representative. The claimant's ET1 was presented on 18 Febraury 2019. At this time the PCP the claimant alleged the Respondent had applied was:

> *"Requiring her to work whatever hours were allocated to her instead of set hours from 12 December 2018."*

11. The claimant attended a case management discussion where she was again represented by her lawyers. This was before Judge Ryan on 24 May 2019. At this point the PCP the claimant alleged the respondent had applied to her, and which she relied on for the purposes of her indirect discrimination claim was:

"Having to be available to work at any time."

12. At the commencement of the final hearing of her claims, on 14 October 2019 the claimant, again represented by her lawyers, set out the PCP she alleged had been applied by the respondent which she relied on in her indirect discrimination claim. At this point the PCP was stated to be:

> *"Requiring her to work whatever hours were allocated to her at short notice instead of set hours from 12 December 2018."*

13. This is the same as had been stated in her ET1, save for the addition that the hours required to be worked were allocated at short notice.

14. Within the written submissions the claimant's representative produced at the end of the hearing, the PCP had reverted back to being exactly as pleaded in the claimant's ET1, citing the paragraph of the ET1 where this was set out.

15. The respondent did not accept that this PCP had, in fact, been applied to the claimant. If the claimant cannot establish that the PCP she alleges was discriminatory was applied to her, then there can be no finding of discrimination contrary to s19 EqA, as the legal test under s19(1) will not be satisfied.

16. The respondent did not accept that the PCP alleged would put female employees at a disadvantage, or that such a PCP could not have been justified in any event. Given it was found that the PCP was not applied to the claimant, these further arguments did not fall to be determined.

Victimisation

17. The definition of victimisation is found is s27 EqA, the relevant parts of which state:

> *27 Victimisation(1) A person (A) victimises another person (B) if A subjects B to a detriment because—*
>
> *(a) B does a protected act, ….*
>
> *(2) Each of the following is a protected act—*
>
> *(d) making an allegation (whether or not express) that A or another person has contravened this Act*

18. Accordingly, the first requirement is that the claimant did a protected act. The claimant relied on three potential protected acts, which can be summarised as follows:

18.1. On 13 November 2018 the Claimant alleges she informed Stuart Keouski and Natalie Sefton of the respondent that changes to her hours were

discriminatory, and she had spoken to a solicitor about them and would report them to ACAS;

18.2. On 10 December 2018 the claimant's solicitor wrote to the Respondent and highlighted that the respondent's actions may amount to indirect sex discrimination; and

18.3. On 4 January 2019 the claimant repeated the allegation that she was being discriminated against to Mark Rennoldson of the respondent.

19. The Respondent did not dispute the claimant had done the alleged protected acts on 10 December 2018 and 4 January 2019. The alleged protected act on 13 November 2018 was not accepted.

20. In addition, the evidence was unclear regarding whether the protected act on 4 January 2019 was prior to the issuing of the written warning, which is the only alleged act of victimisation the claimant relies on.

21. The substance of the protected acts, that the respondent was discriminating against the claimant in relation to her hours was the same in all three instances. As the alleged act of victimisation occurred after at least accepted instance when the claimant alleged discrimination, on that occasion with the formality of a letter from solicitors on her behalf, the Tribunal did not consider that it was a critical finding of fact to determine whether the other protected acts either occurred or predated the alleged act of victimisation.

22. The issue in this case was whether the written warning issued to the claimant was "*because*" of the claimant's allegations of discrimination. The respondent argued the written warning was given for completely different reasons, related to the claimant's conduct, and in no sense whatsoever related to the allegations made by the claimant.

The Burden of Proof

23. When considering the claimant's claims for discrimination and victimisation the burden of proof which must be applied is determined by s136 EqA. The relevant parts of this section state:

> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*

24. This in effect reverses the traditional burden of proof so that the claimant does not have to prove discrimination has occurred which can be very difficult.

Section 136(1) EqA expressly provides that this reversal of the burden applies to *'any proceedings relating to a contravention of this [Equality] Act'*. Accordingly, it applies to both the claimant's discrimination and her victimisation claims.

25. This is commonly referred to as the reversed burden of proof, and has two stages.

26. Firstly, has the claimant proved facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent committed an unlawful act of discrimination? This is more than simply showing the respondent could have committed an act of discrimination.

27. If the claimant passes the first stage then the respondent has to show that they have not discriminated against the claimant. This is often by explanation of the reason for the conduct alleged to be discriminatory, and that the reason is not connected to the relevant protected characteristic. If the respondent fails to establish this then the Tribunal must find in favour of the claimant. With reference to the respondent's explanation, the Tribunal can take into account evidence of an unsatisfactory explanation by the respondent, to support the claimant's case.

28. It is not necessary for the Tribunal to approach these two elements of the burden of proof as distinct stages. The court of Appeal in **Madarassy v Nomura International plc** [2007] EWCA Civ 33 gave useful guidance that despite the tow stages of the test all evidence should be heard at once before a two-stage analysis of that is applied.

The Evidence Presented

29. The Tribunal heard evidence from the claimant herself. The Tribunal also heard evidence from Mr Reynoldson, a director of the respondent, and Ms Sefton the HR Finance Manager for the respondent.

30. In addition, the Tribunal were presented with a partial bundle of documents. The bundle did not include all the documents the claimant intended to refer to. These had to be added to the bundle. The need for this addition arose because the parties had not, in advance of the hearing, properly complied with any of the Case Management Orders that had been made with the purpose of ensuring that the parties were properly prepared for the hearing.

Case Management

31. The first day of the hearing dealt with case management. The Tribunal sought to ensure the following:

31.1. that there was clarity about precisely what was being claimed;

31.2. that the issues in dispute between the parties were properly identified and understood;

31.3. the documents that both parties were intending to rely on during the hearing were available and had been disclosed; and

31.4. that copies witness statements, which had not been disclosed by the parties in accordance with the Case Management Orders, were available.

32. The respondent's representative requested time to prepare for the hearing given the case management orders intended to assist the parties in preparation had not been complied with. Both parties had legal representation. Both parties agreed that they were in a position to proceed with the hearing, no application to postpone the hearing to a later date was made. The parties were in agreement that the hearing of evidence should commence at the outset of the second listed day. Given the listed hearing and the issues as they appeared to be disputed, the Tribunal was content that a deferring the start of evidence to the start of the second day was unlikely to create a risk that the claimant's claims would be part heard. The Tribunal used the balance of the first day to read the statements and documents referred to in those statements.

Relevant Findings of Fact

33. Based on the evidence presented to the hearing, the relevant findings of fact set out below were made. Where there was a dispute over a material fact the reasons for the decision reached in relation to that dispute are explained below.

33.1. The claimant had worked for the respondent for a number of years. The respondent is an organisation that provides 24 hour a day seven day a week services to service users. The Tribunal was not given much information in the evidence about the detail of the type of service provided, but it appeared to be for individuals in need of extensive and regular care and/or assistance.

33.2. The claimant was part of a workforce, of around about 13 staff. Some of these staff were on contracts that guaranteed they would be offered a minimum number of hours, others were engaged on zero-hour contracts.

33.3. The respondent had a policy of attempting to fairly allocate what are seen as the "*antisocial shifts*" between their staff. This was to ensure such shifts were fairly distributed between staff. There was no suggestion that this is not a legitimate and reasonable approach for the purposes of good employer/employee relations.

33.4. To ensure that cover was provided to service users the respondent had a policy requiring staff engaged on contracts that guaranteed them hours (rather than zero-hour contract staff) to not work elsewhere, without written consent from the respondent. The respondent's evidence was that this rule was aimed at ensuring their staff did not have restricted availability to work.

The claimant was, at the relevant time, engaged by the respondent on a contract that guaranteed hours.

33.5. The claimant took a period of maternity leave for the birth of her daughter., When the claimant returned to work following her maternity the respondent agreed to allocate the claimant shifts on a basis of what they called in evidence "*considerate hours*".

33.6. The considerate hours offered to the claimant were granted as an exception to the normal rule where everyone has got to "*muck in and do everything*". The reason for this exception was because the claimant told the respondent she had limited childcare available. The considerate hours were intended to ensure that the claimant would not encounter problems working the hours she was offered as a result of childcare difficulties.

33.7. Part of the claimant's considerate hours were, at the relevant time, that she did not have to work for the respondent beyond 9.00am on a Thursday. These hours had been changed at twice at the claimant's request, the last change being agreed by the respondent on 19 October 2018.

33.8. It was not in dispute that in or around October 2018 the respondent was told that the claimant was working at a hair salon on Thursdays. This was the same salon where the claimant had previously been employed by on Thursdays. The claimant's considerate hours avoided Thursdays because she had told them she had no childcare available. The claimant had not informed the respondent she was working at the salon, or obtained permission to work there.

33.9. On 9 November 2018, by which time the Mr Rennoldson's evidence was he had made a point of looking out for, and had observed on three Thursdays, the claimant's car being parked outside the salon, the respondent had met with the claimant. The Tribunal were presented with notes of that meeting and heard oral evidence about what occurred in that discussion. The notes of this meeting describe it as a significant discussion.

33.10. The claimant's account of this meeting in her written statement is that she said at that meeting that *it wasn't a job, I didn't have to go in and I didn't get paid."* In her oral evidence the claimant stated that she had insisted throughout that she was not working in the salon. She described what she was doing in the salon on Thursdays as "*not a proper job*", and that she was "*just helping out a bit when she could*".

33.11. In the notes taken at the meeting the claimant is recorded as saying she worked at the salon only when "*Nikita can have the baby*", "*I just work helping out when they are busy*" and "*that they text and ask can I work*". The claimant's statement records at paragraph 17 that the meeting notes do not include that she told the respondent that "*half the time I go into the salon I bring the baby with me*". It was noted that during cross examination the

claimant did not dispute that she had on 9 November 2018 described what she did in the salon as "*work*". The claimant denied she had described what she did at the salon as work.

33.12. The claimant was recorded to have stated later than day to a Mr Keouski of the respondent, "*I work at the shop for my hobby*". The claimant denied, in her statement, that she said this.

33.13. The decision to suspend the claimant pending investigation was made and communicated to the claimant on 9 November 2018.

33.14. A further meeting between the claimant and the respondent took place on 13 November 2018. This meeting was with Mr Keouski and Ms Sefton. At this meeting the claimant is recorded as saying she was paid in kind for working at the salon.

33.15. Following the meeting on 13 November the respondent decided that, because they did not believe the claimant had been honest with them about why she could not work on Thursdays and not working elsewhere, they would cease to offer her considerate hours. That cessation was due to take effect from 12 December 2018. This was communicated to the claimant by letter dated 14 November 2018, which also formally ended her suspension.

33.16. On 10 December 2018 the claimant's solicitor sent a letter to the respondent alleging that ceasing to offer her considerate hours from 12 December 2018 discriminatory.

33.17. From 12 December 2018 the respondent started to offer the claimant shifts not taking into account any prior agreement about considerate hours. The claimant's statement includes evidence about what occurred when she was offered shifts without taking into account her previously stated availability. The claimant states that she had to "*reject shifts that were offered*" and that she was "*unable to cover all the shifts offered*" and that she "*missed out*" on shifts. At no point did the claimant suggest, either in her written statement or in oral evidence, that she was actually required to the shifts offered. Her evidence was limited to the fact that she had been offered them and could not work them.

33.18. Five days after the claimant started being unable to work the offered shifts, on 17 December 2018, Mr Rennoldson met with the claimant to ascertain what the claimant intended to do about not fulfilling her contract hours. Both parties were agreed that the possibility of the claimant moving to a zero-hours contract was discussed. The evidence of Mr Rennoldson was the claimant was non-committal, and the meeting concluded with the claimant being asked to think about it.

33.19. At paragraph 40 of her written statement the claimant states that at this 17 December meeting she complained that "*was never given the opportunity to*

give up my work in the salon". When cross examined regarding this, and the apparent inference in her own words that she was in fact working in the salon, the claimant has unable to give a coherent answer in evidence.

33.20. There was no evidence presented to suggest that the claimant had been sanctioned for failing to work the shifts offered in the period following 12 December 2018. The evidence of Mr Rennoldson, which was not disputed, was that the respondent simply used bank staff to cover the shifts.

33.21. Following 17 December 2018, the claimant took some annual leave.

33.22. The claimant met the respondent again on 4 January 2019. Mr Rennoldson's evidence was that at that meeting the claimant alleged that Ms Sefton had previously (on 9 and 14 November 2018) threatened to take the claimant's contract off her. Mr Rennoldson called Ms Sefton into the meeting, and Ms Sefton disputed that this had been said. Ms Sefton's evidence was that the claimant had been advised that she had to adhere to the terms of her contract if she wanted to be on a contract that had guaranteed hours. Ms Sefton and Mr Rennoldson were clear in their evidence that the claimant informed them at this meeting that she had not worked at the salon for three weeks and had stopped working there.

33.23. The claimant's statement states that at this meeting it was agreed that she would be given what she calls "*set shifts*". The respondent denies they ever offered "*set shifts*", to anyone including the claimant, as it was an unworkable arrangement for their business. The evidence from Mr Rennoldson was that they agreed to offer the claimant considerate hours again, given she was no longer working at the salon. The meeting concluded with an agreement that the claimant would provide the respondent with details of her actual availability to work. The claimant could then be offered shifts taking into account that availability.

33.24. The claimant's evidence was that an agreement to offer her considerate hours was only possible if there were "*precautions*", specifically that she accept a written warning for working elsewhere in breach of the respondent's moonlighting policy. The respondent agrees that the claimant agreed to accept a written warning for breaching the moonlighting policy. Mr Rennoldson's evidence under cross examination was that this was because there was a concern that a return to considerate hours should not be agreed unless the disciplinary process were continued. This appears to have been related to a concern that otherwise the claimant's misconduct in working elsewhere when she had told the respondent she was unable to work due to childcare would be condoned.

33.25. It was not disputed that following this meeting the claimant provided her availability. This was done in writing and dated 7 January 2019. The claimant's availability at this point no longer included a need to not work on Thursdays due to childcare difficulty. In this note the claimant stated, "*I have*

also received my written warning I have signed it and will get it back to you asap."

33.26. The claimant's written statement states that she "*agreed to accept a written warning for working in the salon*". The claimant's evidence was that she agreed. Her statement does not suggest that this was agreed to under duress, although in cross examination this was suggested by the claimant. The claimant was unable to provide any explanation of why this duress, or pressure to agree, was not suggested in her written statement. Duress is not suggested by any of the documentary produced by either party.

33.27. The parties were agreed that by early January, the claimant had met with the respondent, clarified her availability and from that point forward the shifts she was offered were offered taking into account her childcare needs.

34. Submissions and Conclusions regarding Victimisation

34.1. There was no direct evidence that the claimant's written warning was a response to her alleging that removing the considerate shifts was discriminatory. To have direct evidence to that effect would be unusual.

34.2. The claimant's representative went further and submitted that because there was a lack of a disciplinary process leading up to that written warning an inference should be drawn that the reason for the warning could not be a disciplinary reason and must be victimisation.

34.3. The respondent argued that the claimant had been suspended before the first protected act she alleges. She had been suspended on 9 November 2018 and the earliest possible protected act identified by the claimant was at some partway through a meeting on 13 November 2018. Of note, this protected act part way through a meeting occurred after the claimant was told she was being suspended.

34.4. Accordingly, the timing of the disciplinary action shows it was not commenced in response to any of the alleged protected acts, which does not support the claimant's assertion that an inference should be drawn that the issuing of the warning was a response to the protected act(s).

34.5. The further inference the claimant invites, that the lack of a proper disciplinary process prior to the issuing of the warning is also not justified in the circumstances. Just as the presence of a disciplinary process does not lead to a valid inference that there was no link to an alleged protected act, the absence of a proper process does itself not lead to a valid inference that there is a link.

34.6. The evidence of the respondent is persuasive. The claimant was given a written warning for working at the salon on a day she had told them she was unable to work and in breach of the moonlighting policy of the respondent.

The claimant's working hours had last been adjusted at her request, a matter of weeks prior to the work at the salon coming to the respondent's attention.

34.7. The claimant's evidence that she had not worked at the salon, and had always denied working at the salon, is not consistent with the contemporary notes of meetings and discussions, or with parts of the claimant's own statement of evidence. The evidence of the respondent's witnesses was clear and consistent. The claimant had given various accounts of what she was doing at the salon, including stating that she was working there at all, at times working unpaid and at times for payment in kind. Accordingly, the evidence suggests that the respondent's conclusion at the time of the written warning, that the claimant had been moonlighting was a reasonable conclusion supported by the available evidence.

34.8. The respondent is found to have held a genuine and reasonable belief that the claimant had misled them about the extent of her childcare needs. Further, the respondent concluded that they could only return to giving the claimant considerate hours, and overlook the conclusion that she had not been truthful about her childcare needs and availability. This is consistent with what the claimant says she was told at the time, namely that the warning was a precaution.

34.9. Accordingly, the finding of the Tribunal is that the respondent has provided a cogent and persuasive reason why the claimant was given, and accepted, a written warning that is not connected to the fact she had alleged discrimination by the respondent. For this reason, the claimant's victimisation claim must fail and is dismissed.

35. Submissions and Conclusions regarding Indirect Discrimination

35.1. An indirect discrimination claim is predicated on a claimant establishing that a provision criterion or practice ("PCP") has been applied to them and to a wider workforce. Without a PCP there can be no successful claim of indirect discrimination.

35.2. The claimant's submissions state that the PCP relied on in her claim is that the respondent imposed a PCP on the claimant "*requiring her to work whatever hours were allocated to her, instead of set hours, from 12th December 2018*".

35.3. The claimant's written submissions suggest that this PCP has been accepted by the respondent to have been applied, that acceptance being set out in their ET3.

35.4. This submission is not wholly accurate, although the ET3 does appear at points to be contradictory. The respondent's ET3 does state that there was a contract term within the claimant's contract of employment, or the contract of employment of all persons of the claimant's status, which states that "*7 day*

work availability is expected". The respondent's written submissions state that it is accepted that the PCP is operated "*as a starting point".* The submissions are clear, however, that the *PCP* is operated in a flexible way. It is stated that the respondent did not "*dictate the hours of work to an employee without consultation*". The ET3 does not directly contradict this position, but does seek to argue that the underlying aim of work availability would be justified. It goes on to state "*The claimant did hand back some shifts she was unable to work. The respondent can only honour contracted hours when hours are not worked if it is due to a failure on their part to provide the required hours*".

35.5. The oral evidence presented was however clearer on this point, and supported the respondent's position that the hours of work of staff were not dictated without consultation. The evidence was that the claimant was guaranteed to be offered a certain number of hours each week, and the claimant was offered those hours. After 12 December 2018, the claimant was unable to work some of those hours, and handed them back to the respondent. The hours were then covered by other staff. The evidence does not suggest the respondent did anything which could be characterised as imposing any form of sanction for not working those hours, or asserting that the claimant was "*required*" to work those particular hours. The only concern was that the claimant was not working enough hours, a concern that was raised at a meeting which appears to have been aimed at finding ways to ensure the claimant could work more hours.

35.6. Within a matter of weeks, during which the respondent had not disciplined the claimant for working the hours offered, Mr Rennoldson met with the claimant to discuss with her how they could make sure the claimant was able to work more hours, to reach her guaranteed minimum hours.

35.7. The unanimous view of the Tribunal is that the claimant was not required to be available to work whatever hours were allocated to her, or indeed any specific hours. She did not work all the hours offered, and the respondents' response was merely to meet to discuss how to try to ensure she could work the minimum number of weekly hours her contract guaranteed.

35.8. For the above reasons, it is found that the PCP the claimant relies on was not applied to her.

35.9. The Tribunal panel actively considered whether it is within their power to realign the claimant's claim such that it relied on a differently worded PCP, to rely on a PCP which was potentially applied by the respondent to the claimant. The unanimous view of the Tribunal was that this would not be appropriate or proportionate at this point in proceedings. The claimant is legally represented and has been legally represented throughout. The respondent has presented their defence, evidence and submissions in relation to the specific PCP the claimant has relied on. This has been clarified on more than one occasion by the claimant's representatives, including in writing and before two Employment Judges. To change the PCP now would

be likely to require the re-opening of the hearing to hear new evidence and submissions, at least from the respondent, involving a further hearing at a later date. No request has been made by the claimant or her solicitor that the Tribunal should consider a different PCP to that relied on.

35.10. Given the claimant has not established in evidence that the PCP she relies upon was actually applied to her by the respondent, the claimant's indirect discrimination claim cannot succeed and is dismissed.

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Employment Judge Buzzard

Date 18 December 2019

REASONS SENT TO THE PARTIES ON

3 January 2020

FOR THE TRIBUNAL OFFICE

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