**RM**

# EMPLOYMENT TRIBUNALS

**Claimant:** **Miss T Surridge**

**Respondent:** **St Michael's Care Home**

**Heard at:** **East London Hearing Centre**

**On:** **14, 15, 16 October and (in chambers) 17 October 2019**

**Before:** **Employment Judge Russell**
**Members:** **Ms L Conwell-Tillotson**
**Mrs BK Saund**

**Representation**
**Claimant** **In person, assisted by Ms K Appleby (daughter-in-law)**
**Respondent:** **Ms C Lord (Counsel)**

# JUDGMENT

**The unanimous judgment of the Tribunal is that all claims fail and are dismissed.**

# REASONS

1 By a claim form presented to the Employment Tribunal on 15 October 2018, the Claimant brings complaints of failure to make reasonable adjustments, direct discrimination because of disability and discrimination arising from disability. The disabilities relied upon are the physical impairments of fibromyalgia and/or arthritis and the mental impairment of depression/anxiety. The Respondent resists all claims.

2 Following a Preliminary Hearing before Employment Judge Jones on 23 January 2019, the parties produced an agreed List of Issues. At the outset of this hearing we further clarified the issues to be decided. In particular, the agreed List did not refer to the Claimant's dismissal as an act of discrimination. Paragraph 14 of the Preliminary Hearing Summary records that it was the Claimant's case that her dismissal was unfair and that she was dismissed because of her disability. Following the Preliminary Hearing, the Respondent wrote to the Tribunal suggesting that the paragraph was an error and that the Claimant had said that she did not rely upon her dismissal as an act of discrimination. At this hearing, the Claimant maintained that she did advance such a claim and had not withdrawn it at the Preliminary Hearing.

3 Having heard the partiers submissions, the Tribunal decided to allow the Claimant

to rely upon her dismissal as an act of alleged discrimination arising in consequence of disability. Whilst the List of Issues is important, it is not to be regarded as a straight-jacket and the Claimant has been acting in person throughout and has been suffering from ill-health. Whilst there was some confusion following the Preliminary Hearing, the Claimant has not withdrawn the claim and it is pleaded in the original claim form. The prejudice to the Respondent is minimal in circumstances where the factual evidence will already be heard and the reason and fairness of dismissal is addressed in the Respondent's witness statements. The Respondent was permitted to recall the Claimant on the second day to address the issue of dismissal having had further time to prepare its case. The prejudice to the Claimant if the dismissal claim were not heard would be greater as she would be deprived of an effective remedy if her dismissal were because of something arising in consequence of disability.

4 The Tribunal heard evidence from the Claimant on her own behalf and from her daughter-in-law Ms Kitty Appleby. From the Respondent we heard evidence from Ms Sally Sansum (Financial Administrator), Ms Joanna Moulton (Cook), Ms Jayne Harding (previous Deputy Manager), Ms Angela Barton (former Home Manager) and Sister Philomena Bowers (Congregational Leader of the Sisters of Mercy). We were provided with an agreed bundle of documents to which were added further documents as the hearing progressed. This was unfortunate and disruptive to the hearing as time was spent almost every day dealing with new documents, but the Tribunal agreed to admit into the bundle such additional documents as were relevant to the issues. We read those pages to which we were taken during the hearing.

5 The Claimant was asked what adjustments to the hearing she needed in order fairly to participate. She requested additional breaks which were permitted. As the Claimant appeared fatigued at times, the Tribunal arranged for the clerk to make the medical room available so that she could lie down and rest. The Claimant was offered the option of finishing the first day of evidence early but chose to complete her evidence rather than go part-heard overnight. Similarly, when the evidence closed just after lunchtime on the third day, the Claimant was offered the opportunity of returning the following day for submissions if she wished to rest and have more time to gather her thoughts. The Claimant elected to proceed the same day which we agreed, contrary to the wishes of Ms Lord for the Respondent.

## Findings of Fact

6 The Claimant's GP records refer to problems with osteoarthritis from at least 30 April 2009 which required regular medication. In August 2015, the Claimant presented with ongoing problems with arthritic pain in her spine and was prescribed anti-inflammatory medication. The GP records also refer to an episode of depressed mood in May 2013 and regular appointments connected with depression and anxiety from 13 February 2018. The Claimant was diagnosed with fibromyalgia on 21 May 2018, following tests and referral to a rheumatologist. The rheumatologist's letter dated 5 June 2018 confirmed the diagnosis of fibromyalgia with early osteoarthritis to the right shoulder and right hip. The rheumatologist's letter does not refer to any effect upon the Claimant's eyesight caused by fibromyalgia.

7 In a disability impact statement dated 2 August 2019, the Claimant described the effect upon her day to day activities caused by her impairments, including reduced ability to do domestic chores, care for herself and socialise. This statement did not refer to any

problem with eyesight or night driving. In a further disability impact statement dated 7 August 2019 and in evidence, the Claimant referred to an incident in or about 2014 when she had to drive home in the dark after a social event, had been blinded by the bright lights of oncoming traffic and thereafter refused to drive at night. On 31 October 2017, the Claimant attended an optician's appointment as she was concerned about driving in the dark nights, the Claimant's evidence is that the optician told her that: "**it is common for people to be affected with their vision with night driving, but it could also be an underlying problem.**"

8 The Claimant also relied upon the report dated 30 October 2018 for the purposes of claiming Employment and Support Allowance. Under the heading of fibromyalgia, the report records "**fatigue, joint pains, muscle pains, headache, sensitivity to light, sensitivity to noise, sleep problems, poor concentration, poor memory and swallowing difficulty, poor motivation**". The Claimant requires significant help with day to day domestic chores, such as housework and shopping, struggles to sit, stand or walk for prolonged periods. The medical examination findings record no problems with vision, nor is there any reference to problems with driving at night.

9 A Blue Badge assessment report dated 14 September 2018 confirmed problems with the hip joint following a road accident in 1987 which had deteriorated over the past five years and caused pain in the spine affecting the Claimant's ability to walk for over 40 metres without excessive pain and a need to rest.

10 Finally, the Claimant relied upon a page printed from the internet which sets out the effects of fibromyalgia. This printed extract did not indicate its source and was not specific to the Claimant. The internet page says that vision problems can often accompany fibromyalgia as it impacts the nervous system and can lead to heightened sensitivity. Under the heading "common symptoms", the internet extract says that when a person develops fibromyalgia, usually harmless objects can produce pain and sensitivity, however, symptoms are not homogenous and they can range from mild to severe. Fibromyalgia sufferers can, for example, develop sensitivity to stimulus such as florescent lights or to the light produced by a television set. The internet extract also states that night driving can be dangerous for those with fibromyalgia as they often have trouble seeing the lights of oncoming cars.

11 In evidence, the Claimant said that before January 2018, neither her fibromyalgia or her arthritis affected her work as a kitchen assistant and she was able to remain on her feet during her whole shift. Until that time, the Claimant was able to peel and chop vegetables, cook, load/unload the dishwasher, put items away, mop the floor and take out rubbish. Ms Moulton or the other kitchen assistant would help her to lift heavy items or to reach above a certain height and she would sometimes use a trolley to move things.

12 The Respondent conceded that the Claimant was disabled by reason of each of the three impairments from May 2018 and that it had knowledge from this date. Before May 2018, however, its case is that there was insufficient adverse impact upon normal day to day activities and/or that it could not reasonably have known that the Claimant was disabled. The Respondent also denies that difficulties with eyesight and/or night driving arose in consequence of any disability.

13 The Respondent is one of two care homes operated on behalf of the Union of the Sisters of Mercy. It extends over three floors of one building, with the floors named Macaulay, St Mary's and St Joseph's respectively. There is also a further unit attached to

the Convent which was used for the care of twelve nuns, nine of whom lived independently.

14 The Respondent care home is small, employing approximately 26 people divided into three teams: kitchen, housekeeping and laundry. The kitchen was staffed by a cook, normally Ms Moulton, and a kitchen assistant. There was one housekeeping shift per day for each of the three floors and the Convent. The Respondent operated three shifts: 7.30am to 1.30pm, 9.00am to 2.00pm and 2.30pm to 6.30pm. An employee allocated to the early shift would work as a kitchen assistant until service of breakfast with the remainder of the shift spent on housekeeping duties, such as cleaning or laundry.

15 The Claimant had previously worked with Ms Moulton at another care home. When Ms Moulton left that care home, the Claimant took over her duties as weekend cook. The Claimant had initially worked as a cleaner but due to health difficulties, in particular her arthritis, she was transferred to office work although she continued to do the weekend cooking.

16 In or around May 2017, the Claimant contacted Ms Moulton asking whether there were any jobs going at the Respondent. Ms Moulton replied that *"***there might be a little job in the kitchen 9 till 2 and some shifts 2.30 to 6.30 and maybe some shifts doing breakfast on a unit that's easy. ring the manager Angela and ask for application form.***"* In the same Facebook exchange, Ms Moulton later confirmed that the Claimant would be working with her on Sundays and that she would probably have to work every other weekend, probably 2.30pm to 6.30pm.

17 The Claimant contacted the Respondent. Initially, she was sent an application form for a housekeeper's job which she queried. The Claimant was then sent another application form for the position of "Kitchen Assistant" which she completed and returned. In her application, the Claimant made clear her desire to work in the kitchen.

18 On 14 June 2017, the Claimant was interviewed by Ms Sansum and Ms Barton. Notes were made on an interview form which identified the post as "Kitchen Assistant/Cook". The Claimant was surprised that there were two sets of interview notes in the Tribunal bundle as only the notes prepared by Ms Sansum were provided in response to an earlier Data Subject Access request; in the circumstances, she questioned whether the other notes were genuine. Ms Barton and Ms Sansum's evidence was that each took notes during the interview and the second set of notes were those taken by Ms Barton. Having read the second set of notes, their content is consistent with being taken contemporaneously during the interview and, whilst not identical to those of Ms Sansum, the differences are consistent with each interviewer taking their own notes of what they consider important in the same answer to a question. In the circumstances, we accepted the evidence of Ms Barton that these were her contemporaneous notes of the interview despite their unfortunate omission from the response to the DSAR. They are not a fabrication and are a reliable record of Ms Barton's contemporaneous understanding of what was said in the interview.

19 There is a dispute about what was discussed at interview about shift patterns and the Claimant's ability to drive at night.

20 The Claimant's evidence was that at interview there was no discussion about a varied shift pattern or about being regularly put on the rota for housekeeping duties.

Rather, she was enthusiastic about the job and so had said the she was prepared to provide occasional cover for other work but did not want them as permanent shifts because of the pain caused by her arthritis. The only shifts discussed were in the kitchen from 9am to 2pm and every other weekend shift. In cross-examination, the Claimant complained that she had been initially sent the housekeeping job description and that she had felt pressured into taking the job which had been offered to her at the end of the interview. The Claimant says that she explained to Ms Sansum and Ms Barton that she could not drive at night due to glare from oncoming car headlights. In cross-examination, the Claimant accepted that it was not discussed further, beyond Ms Barton and Ms Sansum saying that they did not like it either, as she thought Ms Moulton knew and that she would not have to do the teatime shift in the winter months.

21 Ms Barton's evidence was that there was an extensive discussion at the interview about the shift pattern. When told that the only permanent kitchen shifts would be the 2.30 to 6.30pm shift as there were insufficient other hours available, Ms Barton's evidence was that the Claimant said that she did not mind what work she did and would, for example, do housekeeping to make up the hours. Ms Barton further gave evidence that it was made clear that the Claimant was not being employed only as a kitchen assistant. Ms Sansum confirmed that they had explained during the interview that there would only be three permanent 2.30 to 6.30pm shifts in the kitchen, with some 9am to 2pm shifts covering another member of staff, but that the Respondent was not able to guarantee 20 hours a week in the kitchen. Both Ms Barton and Ms Sansum gave evidence that the Claimant had said that she did not like to drive at night and they had agreed that they did not like to do so either.

22 The notes of the interview confirm that the early questions related entirely to kitchen work and cooking. The sixth question of eight asked whether the Claimant would be flexible in working when required? Ms Sansum notes of the Claimant's answer are "**"20 hrs + a week flexible**"; Ms Barton's are "**flexible willing to do admin, cook, kitchen assistant, housekeeper, escort to trips out etc.**" In her notes under any other questions, Ms Barton recorded "**Very keen. Willing to undertake any roles on offer.**" There are no notes of any discussion about driving at night.

23 In resolving the conflict of evidence, the Tribunal took into account the fact that over two years have elapsed since the interview and the subsequent difficulties with the employment relationship. On balance, we find that none of the witnesses give an entirely reliable account of what was said. We consider it more likely than not that most of the interview discussed work in the kitchen but that housekeeping work was also discussed. The Claimant was keen to secure what appeared to be an attractive job working with a former colleague whom she regarded as a friend and did express willingness to do all types of work, including housekeeping, to a greater extent than she maintained in evidence. That is consistent with Ms Barton's note that the Claimant was very keen and willing to undertake any roles on offer. Similarly, Ms Barton and Ms Sansum were keen to secure an apparently strong candidate who could be flexible about the work undertaken but did not make it as clear to the Claimant as they did in evidence that her role would normally involve housekeeping. On balance, we find that the common intention of the parties was that the Claimant's role would be predominantly in the kitchen but that there was an expectation that she would also do some housekeeping shifts. That is consistent with the fact that the contemporaneous application form, interview notes and subsequent DBS certificate all referred to the Claimant's role as Kitchen Assistant but the offer letter and reference requests sent after the interview referred to the position as Support

Assistant.

24 On balance, we prefer the evidence of the Respondent and find that the interview did not discuss only the 9am to 2pm shift. There was a brief discussion about night driving which is consistent with discussion about the teatime shift. The Respondent's notes refer to flexibility and it is implausible therefore that only a single, kitchen shift was discussed. The discussion about night driving was brief and we find that the Claimant did not make it clear that she could not drive at night, only that she did not like doing so. Nor was there any discussion about the restrictions caused by the Claimant's arthritis. The Claimant was keen to secure this job and anticipated a positive working relationship, she did not make explicitly clear the extent of her health problems. Insofar as any witness has misremembered what was said at the interview, this was caused by the frailty of human memory and the benefit of hindsight given what subsequently transpired which has led them to misremember what was said and the degree of clarity with which it was said.

25 The Claimant was sent a contract of employment with the job title Support member of staff, reporting to the home manager. The bundle of documents contained two versions of the contract, one signed only by the Claimant and one signed by both the Claimant and the Respondent. The contract signed only by the Claimant contains a clause 9.4 which says that an employee who wishes to raise a grievance may do so in writing to the Home Manager in accordance with the grievance procedure. The contract signed by both does not include clause 9.4. The Respondent is unable to explain why there are two versions of the contract of employment. The Claimant is adamant that the contract which she received was the one with the grievance clause. The Tribunal did not consider it necessary to decide this matter as the sole difference between the contracts is not relevant to the issues before us.

26 The Respondent issues its shift rotas on a four-weekly basis. There is a master document setting out the hours to be worked by all members of staff and each member of staff is given their own shift pattern for the same four-week period. The bundle contained all of the rotas issued during the Claimant's employment and details of her clocking in and clocking out times for each shift worked.

27 The Claimant commenced employment on 17 July 2017. Her first three shifts were an induction as a Kitchen Assistant and she did two weekend kitchen shifts. The following week, the Claimant worked two shifts as induction in housekeeping and a kitchen shift. In an induction shift, the new employee worked alongside an existing member of staff and was shown how to perform the work to the required standard. The Claimant worked in the kitchen for the entirety of the week commencing 31 July 2017 and on 7, 8 and 9 August 2017. She worked a mixture of the three shift times.

28 On 10 August 2017, the Claimant worked an induction shift doing laundry on St Mary's. She was scheduled to work in housekeeping again the following day but messaged Ms Moulton to say that she had been signed off for a week due to possible urinary tract or chest infection and aches and pains and that she could only walk with her stick. The sickness certificate confirmed the possible infections and generalised aches and pains. On 19 August 2017, the Claimant messaged Ms Moulton confirming that she was recovering from possible viruses and would return to work on 21 August 2017.

29 On her return to work, the Claimant was scheduled to work two 2.30 to 6.30pm kitchen shifts, followed by two 7.30am to 1.30pm breakfast/housekeeping shifts. Shortly

thereafter, the Claimant told Ms Moulton that she did not want to do the breakfast/housekeeping shifts as they were too much for her. On balance, we accept that the Claimant said that it was because of pain arising from her arthritis. The Respondent agreed to take her off the breakfast/housekeeping shifts and make up her hours on the remaining two shifts, either in the kitchen or housekeeping. In total, the Claimant worked the breakfast/housekeeping shift on six occasions between 17 July and 25 August 2017.

30 The working relationship between the Claimant and Ms Moulton was progressing well; contemporaneous messages suggest an amicable working relationship with a degree of flexibility on both sides. Their messages to each other were signed off "xx", which the Tribunal understands to be commonly indicative of friendship.

31 The Claimant worked the 2.30pm to 6.30pm teatime shift during the summer and into autumn. Her evidence was that as the nights drew in, she began to express concern to Ms Moulton about driving home in the dark at the end of the teatime shift but that Ms Moulton reassured her that she should not worry and that everything would be okay. In her evidence, Ms Moulton accepted that the Claimant had raised concern about the driving in the dark after teatime shifts but that she did not know that the Claimant could not do it (rather than not liking to). In any event, Ms Moulton's evidence was that she did not think that it was a problem as there were only three teatime shifts a month and she knew that there was a bus that the Claimant could take. The bus stop was about five minutes' walk from the care home and the bus would drop the Claimant at the top of her road. Timetables in the bundle show that there was a bus leaving at 6.33pm which would get the Claimant home at 7.08pm but that the next bus was not until 8.32pm.

32 As October progressed, and she continued to be scheduled to work the teatime shift, the Claimant became increasingly concerned about driving in the dark. She attended an optician's appointment on 31 October 2017. At 8.11am on 1 November 2017, the Claimant sent Ms Moulton a Facebook message to say that she would not be able to attend her shift due to start at 2.30pm as she definitely could not drive in the dark. She said that she was in tears just thinking about it and was going to see whether she could go down to 16 hours a week. The Claimant was asked to put her request in writing.

33 The Claimant attended her 9am to 2pm shift on 3 November 2017 and confirmed to Ms Moulton that she would be unable to work the teatime shifts scheduled for 4, 5 and 7 November 2017 as she could not drive in the dark. This caused significant problems for Ms Moulton in finding cover at short notice and the effect was that residents were not provided with a hot meal for two nights. Unknown to the Claimant, Ms Moulton was suffering from her own health difficulties at this time and was under significant pressure at work as she did not have sufficient hours available for paperwork and administrative duties (she was later given additional hours for administrative work). As a result, Ms Moulton was less "chatty" in the kitchen generally and had not had time to hold a probationary meeting with the Claimant. Nor had there been any formal discussion about whether or how the Claimant might be able to work the teatime shift once it became dark by 6.30pm. The combined effect of the pressure upon Ms Moulton in part caused by the Claimant's inability to work all shifts and the Claimant's genuine concern about her own health caused a cooling of the working relationship although their messages remained amicable.

34 The Claimant met Ms Barton on 8 November 2017 to request a reduction in her working hours. This was not an easy meeting. There was a disagreement as to whether

or not the Claimant had made clear at interview that she was unable to work the teatime shift because she could not drive at night. For the reasons set out above, the Tribunal find that both the Claimant and Ms Barton misremembered what had been said at the interview. Ms Barton's initial position was that if the Claimant was unable to work the late kitchen shift, she could not be guaranteed 16 hours a week and would only be offered bank hours as a Kitchen Assistant/Cook or as and when required as a housekeeper. There was no discussion about whether the Claimant could get the bus to and from work in order to continue to work the teatime shift.

35 In a letter dated 7 November 2017, but marked as received on 10 November 2017, the Claimant asked Ms Barton if she could retain her 16 hours a week, saying that she could continue to work the teatime shift and would travel to work by bus. In evidence, the Claimant maintained that she could not have taken the bus as she would have missed the 6.33pm and the next bus was two hours later. At no stage did the Claimant ask to leave work a few minutes early in order to catch the bus and her clocking records show that during September she finished the teatime shift up to 15 minutes early on several occasions. If the Claimant could not easily have got the bus as a way of working the teatime shift without needing to drive in the dark, we do not consider that she would have made the offer in her letter dated 7 November 2017.

36 Ms Barton replied on 14 November 2017, pointing out that the Claimant's letter had been received after their meeting and that the Claimant had not offered then to get a bus, as a result it was no longer possible for her to retain the teatime shifts as they had been offered to another member of staff on a permanent basis. The Tribunal considers it unlikely that Ms Barton called the Claimant a "liar" in the meeting on 8 November 2017, but the tone of Ms Barton's letter on 14 November 2017 displays a degree of irritation and a sense that she felt misled by the Claimant, saying that she would not have offered her the job if the Claimant had said that she was physically unable to drive at night. The Tribunal accepts that receipt of a letter in such terms caused the Claimant worry and upset.

37 At 8.30am on 16 November 2017, the Claimant sent Ms Moulton a Facebook message to say that she would not be attending her 9am shift that day as:

> **"I cannot come in to work with a silent atmosphere as though I have committed a crime, I feel isolated and pushed into a corner. I am being discriminated because I can't see in the dark. I wanted to come in today to work but I can't deal with all this stress. I feel I have had no support during this time. I will be responding to Angela's letter today when I get the right advice."**

38 Ms Moulton's response was that she had not received the message until after the shift started, meaning that there was no cover in the kitchen.

39 On 20 November 2017, Ms Barton and the Claimant agreed that she could reduce her contracted hours to 16 per week. These were guaranteed hours and not, as Ms Barton had initially suggested, bank work only. There was no further discussion about the possibility of the Claimant getting a bus. We find that this is indicative of the deteriorating working relationship. Whereas the Respondent had thought that they were getting an enthusiastic and flexible worker, Ms Barton now perceived the Claimant to be somebody who was very restricted in the work that she was prepared to undertake and causing practical problems at short notice for Ms Moulton. For her part, the Claimant had anticipated enjoyable work in the kitchen working with someone with whom she got on

well and instead perceived the Respondent's response to her eyesight difficulties as being uncaring and suggesting that she was not wanted. As she noted in a handwritten note on her four-weekly rota from 20 November 2017, this is when the Claimant believed that Ms Moulton had become more distant. None of this was discussed at the Claimant's supervision meeting with Ms Moulton on 9 December 2017 (the only supervision meeting during her employment).

40 In December 2017, there were other difficulties. The Claimant was scheduled to work as the sole cook on 15 December 2017. This should have been a positive development as up to that point she had largely cooked alongside another member of staff. The Claimant asked Ms Moulton to find cover for her as she no longer felt able to cook on her own following what she perceived as criticism from a colleague, Ms Basson, on previous occasions about a lumpy sauce and whether a cake was undercooked. Ms Moulton cancelled some of her own annual leave to cover the Claimant's shift. Around this time, the Claimant had become upset as she felt that one of the housekeepers was not speaking to her following a disagreement about who was working on Christmas day. Ms Harding met her in the corridor and they had an informal conversation. Ms Harding was supportive and asked the Claimant whether she wanted her to speak to the housekeeper. The Claimant accepted in evidence that she told Ms Harding to leave it as it would only make matters worse. The Tribunal accepted as truthful Ms Harding's evidence that she told the Claimant that if there were any future difficulties, to tell her and she would deal with the matter formally. The Claimant did not raise any further issue with Ms Harding.

41 The Claimant was scheduled to work with the same housekeeper on 15 and 16 January 2018. The rota had been arranged by Ms Sansum who was unaware of the problem. The Claimant raised her concern with Ms Moulton, offering to take annual leave instead. Ms Moulton rearranged the rota so that the Claimant and the housekeeper did not need to work together without her needing to use annual leave. The Claimant thanked Ms Moulton for sorting out the problem.

42 In mid-January 2018, the Claimant told Ms Moulton that she did not want to do anymore housekeeping shifts and only wanted to work in the kitchen. Ms Moulton explained that it would not be possible to accommodate the request as there would be insufficient shifts available, given the Claimant could not work the breakfast/housekeeping and teatime shifts which were now permanently covered by other staff.

43 The Claimant and Ms Moulton were due to attend a hen party for a mutual friend on 10 February 2018. The Claimant was unhappy that she had been scheduled to work from 9am until 2pm when they were going out later. Ms Moulton rearranged the shift so that the Claimant could work on another day. The Claimant relied upon the two weeks that this had taken as evidence of Ms Moulton's hostility towards her. Whilst the Tribunal accepts that the Claimant genuinely believes this to be the case, objectively it is inconsistent with the efforts made by Ms Moulton to accommodate the Claimant throughout her employment and even arranging her time off to prepare for a social event.

44 In her evidence, the Claimant described the period from November 2017 as being particularly difficult in the kitchen as the atmosphere had changed and she was regarded as a nuisance because she was unable to drive at night. She describes a sense of hostility; nothing verbal, no rowing, simply pots being banged about and silence, with Ms Moulton being "offish" and sulking. On 29 January 2018, the Claimant attended work and

was seen to be in a store cupboard in tears talking with a colleague. Ms Moulton observed them but did not want to interrupt. The Claimant left without finishing the shift.

45 On 30 January 2018, the Claimant wrote to Ms Barton in the following terms:

> **"I am sorry for walking out of work yesterday but I had enough of being ignored and to be made to feel I am not being treated equally or fairly.**
>
> **I do not come to work to get the "silent treatment" or ignored and to be classed as an extra which I find to be very derogatory.**
>
> **I work to my best ability but I am seeing that I am often left out of things and this makes me question why?"**

The Claimant said that she felt left out as she was not on the kitchen rota list, the clocking list or the work pension scheme. The Claimant went on to say that she was stressed and, rather than resigning, she had been signed off work for two weeks.

46 Ms Barton replied on 31 January 2018. She was sorry that the Claimant had not spoken to her before walking out, which she described as unacceptable behaviour. As for the points raised by the Claimant, Ms Barton said that she was on the kitchen rota and, whilst not on the clocking in list or work pension scheme, nor were other employees due to administrative oversight. Ms Barton said that she was not aware of any problems as the Claimant had told her on several occasions over recent weeks that she was okay. This saddened her as they would have been able to sort things out sooner and the Claimant may not have become so stressed. The letter was sympathetic in tone and Ms Barton said that she would speak to the Claimant upon her return to work on 14 February 2018. In fact, the Claimant was continuously absent from work by reason of her mental health until the termination of her employment.

47 Ms Barton enclosed the Claimant's rota for February 2018 which the Tribunal accepts is consistent with Ms Barton's desire for the Claimant to return to work and any problems to be resolved. The Claimant was scheduled to work 12 shifts, of which eight were 9am to 2pm in the kitchen, two were 9am to 2pm housekeeping and two breakfast/housekeeping shifts in the Convent. From 20 November 2017, the Claimant had been scheduled to work 16 hours a week, with a total of 13 housekeeping shifts until 10 February 2018. In evidence, the Claimant was taken to each of the rotas for this period and asked which shifts were inappropriate. The Claimant identified two shifts, on 15 and 16 January 2018 each in housekeeping, because they were with the housekeeper with whom she had a problem. The Claimant also identified the two Convent shifts on the February 2018 rota. Ms Sansum's evidence was that she needed to find additional shifts to make up the Claimant's contracted 16 hours per week and that the Convent shift was regarded as suitable because nine of the twelve nuns would make their own breakfast and beds. In other words, they were light duties. The Claimant did not object to the proposed rota at the time.

48 Although the Claimant remained off work and declined to attend a meeting, Ms Barton began to investigate the Claimant's complaint that she had been ignored and given the silent treatment. She interviewed the other members of the kitchen staff. Notes of those interviews are included in the bundle.

- Ms Basson described some friction between the Claimant and Ms Moulton but

said that this was because the Claimant had come to work with a generally negative attitude and was raising the same gripes in the manner which became quite tiresome.

- Ms Moulton said that she had tried to accommodate the Claimant, changing her own hours and annual leave to do so, but despite being given more support than other staff, she did not feel confident that the Claimant would cope on her own. Ms Moulton denied ever being told that the Claimant could not drive at night. She was disappointed and upset as she bent over backwards to support the Claimant. Ms Moulton said that she had been undergoing hospital tests and had been a bit quieter than usual and that everybody had noticed that she had not been her usual self.

- Ms McMullen confirmed that the Claimant believed that she was being bullied and ignored, with Ms Moulton not talking to her and Ms Basson criticising her cooking. Ms McMullen said that she had been supportive and that Ms Moulton was not talking to anyone as she was busy.

- Ms Morgan said that the Claimant felt hard done by with the shift pattern and that there was some friction in the kitchen atmosphere, not animosity just silence, with the Claimant and Ms Moulton being as bad as each other.

49 During February, the Claimant was reluctant to attend medical review meetings due to her mental health or to answer Ms Barton's telephone calls. She believed it sufficient to submit fit certificates. The Claimant complained about the tone and content of the Respondent's letters. The Respondent replied that the letters were necessary and appropriate to enable them to understand the Claimant's health condition with a view to securing her return to work.

50 Ms Appleby contacted Ms Barton on 12 March 2018 advising that the Claimant was unable to speak due to her mental health. Ms Barton explained the need for a meeting in order to move on and help the Claimant to return to work. She confirmed this position in writing in a letter of 20 March 2018, expressing support for the Claimant and a sincere hope that she would be able to return to her duties. However, Ms Barton also said that it had been difficult to manage the Claimant's absence and the Respondent needed to ensure that colleagues were not placed under pressure by an increased workload. Ms Barton proposed a meeting to discuss the Claimant's health and any adjustments required as well as to obtain more detail about the Claimant's concerns that her colleagues were giving her the silent treatment.

51 The Claimant initially refused to attend a meeting, saying that she needed support not pressure to return to work before she was ready to do so and that Ms Barton's manner of communication was very cold and unsympathetic. She did not complain that letters had been hand delivered to her home address. By letter dated 4 April 2018, Ms Barton assured the Claimant that the meeting was not an attempt to pressure the Claimant to return to work before she was ready but again explained why a meeting was necessary, saying that as a small home they did not have enough resources to keep jobs open indefinitely. Ms Barton agreed to allow Ms Appleby to attend the meeting proposed for 1 May 2018 and offered to meet the Claimant at her home if more convenient.

52 In a telephone conversation on 26 April 2018, the Claimant told Ms Harding that

she could not see herself coming back to work due to the way that she had been treated by Ms Barton and Ms Moulton. In a letter dated 1 May 2018, Ms Barton said that she was at a loss as to why the Claimant was saying this now and she had not raised any of these problems with her prior to the sickness absence. Ms Barton wrote that as an employee, the Claimant had a responsibility and legal duty to meet with her employer and persistent refusal was neither helpful nor reasonable on her part. Ms Barton repeated that the Respondent was a small home, they could not keep the Claimant's role open indefinitely and, as the Claimant had said she was not intending to return, she could not see any justification in keeping the job open indefinitely. Ms Barton proposed a final rearranged meeting for 15 May 2018 as she wanted to hear the Claimant's comments. The Claimant could be accompanied by Ms Appleby and the meeting could take place at her home if more convenient. Ms Barton made clear that if the Claimant refused to attend or to enter into dialogue, the meeting would progress in her absence.

53 On 1 May 2018 the Claimant sent a Facebook message to Ms Moulton in emotional terms, suggesting that she had "**sat back and let me take all the flack at work**", caused an atmosphere and sulked causing the Claimant to have many tearful breakdowns witnessed by other members of staff. The Claimant again maintained that Ms Moulton had been fully aware that she could not drive in the dark but had not dealt with her concerns or relayed them to Ms Barton. It is clear from the tone of the email that the Claimant blamed Ms Moulton almost entirely for the position in which she found herself.

54 Ms Moulton forwarded the Facebook message to Ms Barton. By letter dated 2 May 2018, Ms Barton informed the Claimant that it would be treated as a grievance and that the Respondent had engaged their external HR advisers to hear it in order to ensure independence. Ms Barton interviewed Ms Moulton again on 2 May 2018, notes of the interview are in the bundle. As before, Ms Moulton said that she felt that she had done all she could to support the Claimant and was disappointed that the Claimant did not agree. As for driving at night, Ms Moulton said that Claimant had told her that she was going to get her eyes tested to get some glasses for night driving but had not been aware that she could not drive at night until she received the Facebook message on 1 November 2017.

55 By letter dated 8 May 2018, the Claimant was provided with copies of the statements from her kitchen colleagues obtained by Ms Barton.

56 The grievance meeting took place on 18 May 2018 with the external HR Manager, Sharon, and Ms Harding present; the Claimant attended and was accompanied by Ms Appleby. The Claimant stated that her colleagues' statements contained untruths and she would like to confront the witnesses. The Tribunal understood this to be a request to have the colleagues attend the meeting to question them rather than a confrontation in the aggressive sense. Sharon did not consider this appropriate. The Tribunal agrees. If the Claimant had returned to work, mediation or some other step to re-establish the working relationship would have been required. To permit the Claimant effectively to cross-examine her colleagues in a grievance meeting would not have helped to re-establish that working relationship and would be more likely to cause it further harm. This was not a disciplinary hearing, where attendance of witnesses may sometimes be required in the interests of fairness, but a meeting to discuss the Claimant's perception of events and sense of grievance. It was appropriate at this stage for the Respondent to refuse the attendance of her kitchen colleagues.

57 In the grievance meeting, the Claimant set out fully her concerns with regards to

shift patterns, driving in the dark, her sense of being left out and what she regarded as inappropriate contact from Ms Barton whilst absent with mental health problems. The Claimant maintained that her colleagues had lied about her and said that she could not work with liars. Sharon asked if the Claimant wanted mediation; the Claimant did not answer. Following the meeting, Ms Barton undertook further interviews with Ms Basson and Ms Moulton, who again said that she did not know that the Claimant could not drive at night simply that she did not like to do so. Ms Barton produced an investigation report dated 22 May 2018.

58 By a five-page letter dated 25 May 2018, the Claimant was informed that her grievance was not upheld and the reasons for that decision. The Claimant appealed against the decision. The appeal hearing was held on 20 June 2018, chaired by a different external HR manager, Peter. Ultimately the appeal was not successful.

59 In the meantime, the Claimant had been referred by the Respondent to Occupational Health. The Occupational Health report dated 14 June 2018 describes a history of gradually worsening generalised back and shoulder pains since summer of 2017, brain fog, fatigue, difficulty sleeping, low mood, loss of appetite and weight loss. It records the Claimant saying that she had a long-standing problem with driving at night due to glare from lights of other road users and that her decline in mental health was caused by increased stress at work. The report records the Claimant as saying that she was asked to do frequent evening shifts throughout the winter and despite asking to reduce her hours to reduce night time driving, she was still given frequent shifts to work in the evening. She complained of being asked to do housekeeping work which exacerbated her pain and discomfort and, despite raising the issues with management, did not feel supported. The Occupational Health doctor advised that the Claimant was unfit to return to work but was fit to attend meetings. A return to work may be possible within three months but only if there was a resolution to the issues which had triggered her stress and exacerbated the musculoskeletal problem. Specific recommendations were: a stress risk assessment, removing evening work during winter months and housekeeping duties be restricted to lighter activities with no repetitive bending or lifting items of over 5 kilograms in weight.

60 The Tribunal pauses to note that despite what she told the Occupational Health doctor, the Claimant did not undertake any teatime shifts after 15 October 2017, before the clocks went back for winter, and before she told Ms Moulton on 1 November 2017 that she was considering a request to reduce her hours. The Tribunal does not find that the Claimant was deliberately seeking to mislead the Occupational Health doctor, rather that the Claimant's evidence is unreliable because of her subjective perception that she has been poorly treated and her consequent misrecollection of events.

61 A medical review meeting took place on 28 June 2018 chaired by a different external HR manager, Jamie. The Claimant was accompanied by her aunty. Notes of that meeting record the Claimant saying she felt that everyone was against her and that her colleagues had told lies in their statements. The Claimant complained that Ms Moulton had not acted on her statements that she could not drive at night, simply telling her that everything would be fine. The Claimant said that she did not think that she could return to work in the kitchen which she described as like going into a lion's den. There was a discussion about the difficulty of finding lighter duties as all roles required some degree of manual handling and there were no administrative roles available. When Jamie noted that the Claimant had already been off work for six months and there could be

another three months before she could return, the Claimant said that a year ago she felt fine but the effect of stress and now with a diagnosis of fibromyalgia, she could not work or do her original job. The Claimant said that she had no confidence in the Respondent.

62 After a short adjournment, Jamie told the Claimant that she was going to be dismissed on capability grounds as she was unable to undertake her role and no adjustment could be made reasonable or otherwise. Dismissal was confirmed in a letter dated 3 July 2018. The Claimant appealed against her dismissal on grounds that the conduct of the Respondent had caused her illness, she did not appear to dispute that she was unfit for work or suggest that she could return in the foreseeable future. In the final paragraph, the Claimant writes:

> "**Can I just say, that I never wanted all this to happen the way it has. I thought I would have had a good happy career at St Michaels and would have been part of a team. I was hard working and caring. How you saw me at my interview Angela, was me, happy, cheerful and eager to work, it's just a shame that by putting trust in people that you think are your friends has taught me a hard lesson.**"

63 The appeal hearing was chaired by Sister Philomena on 17 July 2018 and the grounds of appeal were discussed in detail. During the appeal hearing, the Claimant accepted that at the initial job interview it had been explained to her that the role was a combination of kitchen and housekeeping but she had decided to take the joint role offered having explained that she could do housekeeping but did not want to cover it permanently. The Tribunal considers this consistent with our finding that at the interview the Claimant was keen to get the job and, as she put it in her appeal letter, eager to work. As a result, she did express at the interview willingness to do all types of work, including housekeeping, to a greater extent than she maintained in evidence. When asked at the appeal hearing about a possible return to work, the Claimant said that she wanted justice rather than a return to work. Although the Claimant did say that her stress may go if she could sit down with her four kitchen colleagues and resolve the issues, later in the appeal she suggested that she had felt stressed and vulnerable at the thought of bumping into them when attending the appeal hearing.

64 By letter dated 25 July 2018, Sister Philomena told the Claimant that she was unable to uphold the appeal. There was no likely return to work in the short or medium term and that adjustments would give little or no benefit as the Claimant would not be able to complete a substantial part of either the kitchen assistant or housekeeping role. The Claimant has since been assessed by the Department for Work and Pensions as having limited capability for work due to severe functional disability.

## Law

*Discrimination*

65 Section 6(1) of the Equality Act 2010 provides that a person has a disability for the purposes of the Act if they have a physical or mental impairment which has a *substantial* and long term *adverse effect* on that person's ability to carry out *normal day-to-day activities*. The burden of proof is on the Claimant to prove each of these matters.

66 Section 13 of the Equality Act 2010 provides that a person discriminates against another if, because of a protected characteristic, he treats that other less favourably than

he treats or would treat others. Disability is a protected characteristic. Conscious motivation is not a requirement for direct discrimination, it being enough that the protected characteristic had a significant influence on the outcome. The crucial question is why the complainant was treated in the way in which they were, particularly in cases where there are no actual comparators identified, **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285.

67 Section 15 of the Equality Act 2010 provides:

> **"(1) A person (A) discriminates against a disabled person (B) if –**
> **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**
>
> **(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."**

68 There is no need for the Claimant to show less favourable treatment than a non-disabled comparator, simply 'unfavourable' treatment caused by something which arises in consequence of the disability. It is necessary to identify the "something" and establish that it arose in consequence of the disability.

69 At paragraph 33 of her Judgment in **Pnaiser v NHS England and another** UKEAT/0137/15, Simler J (then President of the EAT) reviewed the earlier authorities and set out the proper approach as follows:

(1) Identify any unfavourable treatment and by whom.

(2) Determine what was the reason for that treatment, focusing on the conscious and subconscious motivation of the alleged discriminator. As with direct discrimination, the "something" need not be the sole or principal reason but must be an effective reason. Motive is irrelevant.

(3) Was such effective reason or cause "something arising in consequence of disability"? This may involve more than one link and therefore more than one relevant consequence of disability may require consideration. Whether something can properly be said to arise in consequence of disability is a question of fact to be assessed robustly in each case. The more links in the chain between disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(4) This stage of the causation test is an objective question. It does not depend on the subjective thought processes of the alleged discriminator.

(5) The knowledge required is of the disability and does not extend to a requirement of knowledge that the "something" is a consequence of that disability.

(6) It does not matter precisely in which order these questions are addressed.

70 Objective justification requires the employer to establish a legitimate aim and then for the Tribunal to balance the proportionality of the steps taken and the discriminatory impact upon the employee. This will include consideration of the appropriateness and (reasonable) necessity of the means chosen, **Homer v Chief Constable West Yorkshire Police** [2012] ICR 704, SC. The employer does not have to show that no other steps were possible and the tribunal must have regard to its business needs.

71 Section 20 of the Equality Act 2010 provides that:

> **"20 Duty to make adjustments**
>
> **(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.**
>
> **(2) The duty comprises the following three requirements.**
>
> **(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."**

72 Where, as here, the employer is alleged to be in breach of the duty to make reasonable adjustments imposed by section 20(3) of the 2010 Act, the Tribunal should identify (1) the PCP(s) applied, (2) the identity of the persons who are not disabled in comparison with whom comparison is made, and (3) the nature and extent of the substantial disadvantage suffered by the employee, **Environment Agency v Rowan** [2008] IRLR 20 at paragraphs 26-27 (Judge Serota QC).

73 Having done so, the Tribunal must consider and identify what (if any) step it is objectively reasonable for the employer to have to take to avoid the disadvantage. The aim of the duty is to remove or at least ameliorate the substantial disadvantage so that the disabled person may remain in the workplace. The potential adjustment need only have *a* prospect of alleviating disadvantage and there is no need to show that it would have been completely effective or even that there was a good or real prospect of it being so.

74 An employer is not under a duty to make reasonable adjustments unless it knows (actually or ought reasonably to have known) both that the employee was disabled and that the employee was likely to be placed at a substantial disadvantage by a PCP because of that disability.

75 In considering the burden of proof, we referred to s.136 Equality Act 2010 and the guidance set out in the case of **Igen Ltd v Wong** [2005] IRLR 258, CA as approved in **Madarassy v Nomura International Plc** [2007] IRLR 246, CA. This guidance reminds us that it is for the Claimant to prove facts from which the Tribunal could conclude, in the absence of adequate explanation, that the employer has committed an act of unlawful discrimination. The outcome at this stage of the analysis will usually depend upon what inferences it is proper to draw from the primary facts found by the Tribunal. Where the Claimant has proved such facts, the burden of proof moves and it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the prohibited ground.

*Time limits in discrimination claims*

76 Section 123 of the Equality Act 2010 provides that no complaint may be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the employment tribunal thinks just and equitable. For the purposes of this section conduct extending over a period is to be treated as done at the end of that period and failure to do something is to be treated as occurring when the person in question decided on it.

77 An act will be regarded as extending over a period if an employer maintains and keeps in force a discriminatory regime, rule, practice or principle which has had a clear and adverse effect on the complainant. The concepts of 'policy, rule, practice, scheme or regime' should not be applied too literally, particularly in the context of an alleged continuing act consisting of numerous incidents occurring over a lengthy period, **Hendricks v Metropolitan Police Comr.** [2003] IRLR 96, CA at paras 51-52.

78 If the claim is presented outside the primary limitation period (that is, after the relevant three months), the tribunal may still have jurisdiction if, in all the circumstances, it is just and equitable to extend time.

## Conclusions

*Disability and Knowledge*

79 The GP records confirm that the physical impairment of arthritis has been present since at least 30 April 2009 and has required anti-inflammatory medication. The Claimant has established that it has had a substantial impact upon her ability to undertake normal day to day activities such as domestic chores. This is substantiated by the Blue Badge assessment report which evidences a deterioration since 2013 affecting the Claimant's ability to walk for over 40 metres without excessive pain and a need to rest. The ESA report also confirms longstanding problems with joint pains dating back to 2010. Although the Claimant was able to undertake some normal day to day activities at work until January 2018, she nevertheless required help with lifting heavy items, reaching above a certain height and required a trolley to move things. Without medication, the Tribunal considers that she would have been yet more substantially affected. We conclude that the Claimant has proved that her physical impairment of arthritis met the statutory definition of a disability throughout her entire employment with the Respondent.

80 In August 2017, the Claimant informed Ms Moulton that she was unable to work in part due to generalised aches and pains and was walking using a stick. Upon her return to work, she further told Ms Moulton that the housekeeping work was too much for her and said that the pain was due to her arthritis. Ms Moulton was aware that the Claimant required assistance with some of her duties in the kitchen. For these reasons, the Tribunal concludes that there was sufficient information available to Ms Moulton and the Respondent whereby they could reasonably be expected to know that the Claimant was disabled by reason of arthritis.

81 Although she was only diagnosed with fibromyalgia on 21 May 2018, the Claimant's case is that she suffered symptoms from an earlier date. Fibromyalgia is a complex condition which can manifest through a variety of symptoms including pain, fatigue, headaches, mental health issues and even potentially eyesight as it impacts the

nervous system. To a large extent, therefore, the Claimant's generalised aches and pains which were attributed to arthritis could also be symptoms of fibromyalgia, as confirmed in the ESA report which included joint and muscle pains under the heading of fibromyalgia. The Claimant's first disability impact statement describes the impact of fibromyalgia upon her ability to do domestic chores and care for herself. For the purposes of section 6, the precise diagnosis does not matter as it is sufficient to establish a physical impairment which has the necessary effect. Whether it is arthritis or fibromyalgia, the Claimant did have a physical impairment with the necessary effect.

82 The position with knowledge, however, is more complicated with fibromyalgia. The Claimant herself did not know that she had fibromyalgia until its diagnosis on 21 May 2018. The physical symptoms which were manifest to Ms Moulton were consistent with the other physical impairment of arthritis although they may in fact have been caused by fibromyalgia. The Claimant accepted that she had attributed her symptoms to arthritis until she received her diagnosis in May 2018 and it was arthritis which she disclosed to Ms Moulton when she returned to work in August 2017. When the Claimant went to see the optician, the only information was that problems with night driving were common but that there *could* be an underlying problem. There was no suggestion as to what that underlying problem could be. In her Facebook message to Ms Moulton the following day, the Claimant did not share even this information simply that she could not drive in the dark. On 8 November 2017, the Claimant did tell Ms Barton that she was 'physically unable to drive in the dark' but provided no further information. It is not clear on the medical evidence before the Tribunal even now which of the physical impairments caused which symptoms. Nor, for reasons set out more fully below in connection with the section 15 claim, have we accepted the Claimant's case that difficulties with night driving arose in consequence of fibromyalgia. In all the circumstances, the Tribunal does not consider that the Respondent ought reasonably to have known that the Claimant was disabled by reason of fibromyalgia at any time during her employment.

83 The Claimant's case is that she was disabled by reason of the mental impairment of depression/anxiety from November 2017. Other than a single episode in May 2013, the GP records confirm that there was no medical treatment before February 2018. The Claimant relies upon her Facebook messages on 1 and 16 November 2017 which refer to being in tears and feeling stressed, and subsequent episodes of being upset and tearful at work. Beyond this, there is no evidence before the Tribunal to show that the Claimant's mental health had a substantial impact on day to day activities at this time. Whilst the Tribunal does not dispute that the Claimant was on occasion upset, this is not the same as establishing an impact which goes beyond the normal differences which may exist among the population generally (having regard to Part 2, Section B of the Guidance issued pursuant to section 6(5) of the Equality Act 2010).

84 The evidence of mental health problems prior to January 2018 is scant. The Claimant's mental health deteriorated significantly from 30 January 2018 when she went on sickness absence by reason of her mental health. The Claimant's disability impact statements and ESA report which confirm that her ability to socialise were significantly impacted by her mental health both postdate by many months the Claimant's employment. The Respondent concedes disability from May 2018. Having regard to all of the evidence before us, the Tribunal does not accept that the Claimant was disabled by reason of a mental health impairment from November 2017. However, once the Claimant had been absent from work because of anxiety and depression for three months, we accept that it was likely that the impairment would last for more than twelve months and was having a

substantial impact upon the Claimant's ability to do normal day to day activities. For these reasons, we conclude that the Claimant was disabled by reason of depression/anxiety from 1 May 2018. From this date, given the reasons given in the fit certificates submitted, the Respondent knew or ought reasonably to have known that the Claimant was so disabled.

*Reasonable Adjustments*

85 The first provision, criterion or practice relied upon is that the Respondent expected the Claimant to do some housekeeping work. It is agreed that this PCP was applied. As we have found, in mid-January 2018 the Claimant told Ms Moulton that she no longer wanted to work the housekeeping shifts but her request could not be accommodated as there would be insufficient other shifts available. The PCP therefore continued to apply until March 2018, when the Claimant was no longer included on the rota due to her sickness absence.

86 The Claimant's case is that the substantial disadvantage was because housekeeping shifts involved heavy duties which she could not do because of her fibromyalgia or arthritis. When taken to the rotas for 20 November 2017 to 10 February 2018, the Claimant identified as inappropriate only two shifts. Both were in housekeeping but were said to be inappropriate because they were with the housekeeper with whom she had a problem. This disadvantage was not because of disability but the Claimant was not required to work either shift anyway as Ms Moulton changed the rota. The Claimant has not identified the heavy work in the housekeeping shifts which is said to put her at a substantial disadvantage. Her own case was that she was able to do single housekeeping shifts, albeit she did not want to do them on a permanent basis. The role of kitchen assistant also involved heavy duties and the Claimant was able to perform these with some limited assistance. Overall, the Claimant has not proved that the PCP put her at a substantial disadvantage by reason of disability.

87 The second PCP is putting the Claimant on breakfast/housekeeping shifts together in the same day. Initially when she commenced employment, the Claimant was scheduled to work the 7.30am breakfast/housekeeping shift. In August 2017, upon her return to work, the Claimant said that she was not able to do these shifts as they were too much for her because of the pain from her arthritis. The Respondent agreed to take her off the breakfast/housekeeping shifts and the PCP ceased to apply. The Claimant was not scheduled to work the combined shift until the February 2018 rota when she was allocated two breakfast/housekeeping shifts in the Convent. The PCP was therefore applied again in January 2018 when the Claimant was sent the February rota.

88 Again, the substantial disadvantage is said to be the Claimant's inability to do heavy duties because of her arthritis and fibromyalgia. The Tribunal does not accept that the Convent breakfast/housekeeping shift included heavy duties. We accepted Ms Sansum's evidence that the Convent shift involved light duties because nine of the twelve nuns would make their own breakfast and beds. The Claimant did not object to the proposed rota at the time and she did not work the shifts as she was already absent due to sickness. In the circumstances, the Tribunal rejects the Claimant's case that the inclusion on the February 2018 rota of two Convent breakfast/housekeeping shifts placed her at a substantial disadvantage because of her disability.

89 Even if we had found the required substantial disadvantage, the reasonable

adjustments sought for both PCPs were lighter duties and/or a stress risk assessment for mental health. The disadvantage relied upon for both PCPs was solely in connection with the two physical impairments, not the mental impairment of depression/anxiety. In such circumstances, and even if a risk assessment could be a reasonable adjustment rather than a means to identify possible adjustments, it would not have removed or alleviated the disadvantage.

90 As for lighter duties, we have accepted Ms Sansum's evidence that the Convent shifts were lighter duties. Before mid-January 2018, the Claimant did not object to the single housekeeping shifts and so the Respondent could not reasonably have known that the Claimant was at a substantial disadvantage (had one been proved). After mid-January 2018, the Respondent was unable to allocate sufficient work to fill the Claimant's contracted hours without housekeeping shifts. The Respondent is a small home, with only one housekeeping shift per day for each floor and Convent. If the Claimant could not do all of the housekeeping tasks, another housekeeper would be required to cover. The Claimant worked only two weeks after her request to be removed from housekeeping was refused. Light duties were considered at the medical review meeting on 28 June 2018 by the external HR manager but deemed not possible as all roles required a degree of manual handling. By this time, the Claimant was openly stating that she did not believe that she could return to work because of the atmosphere in the kitchen.

91 The claim of failure to make reasonable adjustments fails.

*Direct Discrimination*

92 The less favourable treatment is said to be the failure to deal with four concerns raised by the Claimant. The Claimant's case is that her concerns were brushed aside because they related to her mental health. She does not rely upon her physical disabilities in the direct discrimination claim.

93 The first three concerns relied upon are the Facebook messages to Ms Moulton on 1 November 2017 and 16 November 2017 and the conversation with Ms Harding. The Tribunal has not accepted that the Claimant was disabled at the material time nor could she have been perceived to be disabled given the scant evidence available before January 2018. This is sufficient to dispose of these claims but the Tribunal would have found that Respondent did deal with the Claimant's concerns on 1 November 2017 and in December 2017.

- Upon receipt of the message on 1 November 2017, Ms Moulton tried to arrange cover for the teatime shifts which the Claimant said that she was not able to work and told the Claimant to put her request to change her hours in writing to Ms Barton. This was appropriate as the Claimant's contract stipulated that Ms Barton was the person to whom she reported. Ms Barton met with the Claimant and ultimately agreed to vary her contractual hours to remove the teatime shift.

- In evidence, the Claimant accepted that Ms Harding had acted appropriately in speaking to her and trying to comfort her. Ms Harding expressly offered to intervene and speak to the housekeeper concerned. It was the Claimant who decided that this was inappropriate as it may make matters worse. Ms Harding told the Claimant that if there were any continuing difficulty, she would deal with it formally. The Claimant did not avail herself of that offer.

94 The Claimant's case appears to be that the Respondent should have dealt with her concerns by maintaining her contracted 20 hours per week and allocating her only the 9am to 2pm shift in the kitchen, as she had already asked to be removed from the breakfast/housekeeping shift and did not want to do the housekeeping shift. It may well be that the Respondent did not deal with her concerns as she would have preferred, but they did deal with them as they thought appropriate and in a way which was in no sense whatsoever because of her mental health. The criticism of Ms Harding is particularly misplaced and indicative of the overly subjective way the Claimant has approached this case and her readiness to criticise and attach blame where the Tribunal does not consider it warranted. It is not in our view objectively reasonable for the Claimant now to criticise Ms Harding for a failure to act of her own initiative in the face of an employee's reluctance far less can it be said to be linked in any way to the Claimant's disability. We considered that this is a good example of a where the Claimant's emotion has got the better of her judgment.

95 It would have been better for Ms Moulton to pass the Claimant's message on 16 November 2017 to Ms Barton, given her reference to discrimination and isolation, and the Tribunal accepts that she did fail to deal with the Claimant's concerns on that occasion. However, we would need to be satisfied that another employee not disabled who had raised similar concerns would have been treated differently by Ms Moulton. We accept that Ms Moulton was under significant pressure at the time due to workload and her own health issues and we accept that there would have been no such different treatment. The Claimant's mental health (which was not a disability at this date) played no part whatsoever in the reasons for Ms Moulton's failure to act.

96 Finally, it is not correct as a matter of fact that the Respondent failed to deal with the concerns raised in the letter to Ms Barton on 30 January 2018. Ms Barton responded the next day with responses to the three specific concerns raised by the Claimant. She started an investigation into the Claimant's less particularised concern that she had been subjected to silent treatment. Colleagues were interviewed and attempts made to convene a meeting with the Claimant. The Claimant was absent due to sickness and declined to attend that meeting. Again, it appears that the Claimant's case is really that in failing to agree with her outright, the Respondent failed to deal with her concerns. That is not the case and the Claimant has failed to establish a detriment far less that a person without her mental health impairment would have been treated in a more favourable way.

97 The claim for direct discrimination because of disability fails.

*Unfavourable treatment because of something arising in consequence of disability*

98 The unfavourable treatment relied upon is hostility from Ms Moulton between 1 November and 29 January 2018. The Tribunal accepts as genuine the Claimant's perception that she was subject to hostility and "silent treatment" and the significant impact that it has had on her mental health. However, the Claimant's perception and recollection are not objectively reasonable. She has viewed her experience in the workplace entirely subjectively and through the prism of the requirement to do some housekeeping and teatime shifts.

99 As set out above, it appears that the Claimant's real complaint is that she did not get the 9am to 2pm kitchen only role that she now believes that she was promised. Yet,

the Claimant was told from her initial contact with Ms Moulton in May 2017 that the job would involve some 2.30pm to 6.30pm shifts, at least probably every other weekend. The teatime shifts were discussed at the interview, hence the Claimant's reference to not liking night driving. The Claimant also gave the impression at interview that she was flexible about the work that she would do, even if only as cover. As she accepted at the dismissal appeal, at interview it was explained to her that the job was a combined kitchen and housekeeping role and she accepted the job knowing this to be the case. It appeared to the Tribunal that the Claimant believed that due to her friendship with Ms Moulton, the job would be varied in due course to remove the shifts that she did not want to or believed that she could not do. When this did not happen, the Claimant began to perceive herself as ill-treated and to blame Ms Moulton. This is consistent with the final paragraph of her letter of appeal against dismissal.

100 The Tribunal considers that the Claimant had unrealistic expectations of the employer/employee relationship with Ms Moulton and blurred the line between being friends outside of work and cook/assistant in the kitchen. As pressure of work weighed upon Ms Moulton, along with her own health problems, the relationship cooled to the extent that it became less about being friends and more about effectively managing the kitchen. This was in part because of the additional pressure caused to Ms Moulton by the Claimant's cancellation of shifts at short notice when she said that she could no longer do the teatime shift and subsequent decision that she did not feel able to work as sole cook which required Ms Moulton to cancel some of her own annual leave. As the Claimant blamed Ms Moulton for what she regarded as a deteriorating working environment, so Ms Moulton was frustrated as she had "bent over backwards" to support the Claimant. This led to a degree of friction in the kitchen manifest by silence rather than animosity, as described by Ms Morgan in her investigation interview. Ms Moulton was more withdrawn and less "chatty" at this time. Viewed objectively, this was not directed at the Claimant and affected all kitchen staff to some extent although the Claimant genuinely believed that it was directed to her.

101 Given the support which Ms Moulton did give to the Claimant until she went on sick leave, for example changing her shifts in January to avoid working with a particular housekeeper and in order to have the day off before a hen party, and in the circumstances described above, the Tribunal does not accept that Ms Moulton demonstrated hostility to the Claimant even if the relationship was not as chatty as before, nor that she was treated unfavourably in the circumstances.

102 Even if we had found that there was unfavourable treatment in the behaviour of Ms Moulton, the Tribunal would not have concluded that it was because of something arising in consequence of disability. The Claimant relies upon Ms Moulton, and indeed Ms Barton's, frustration at her inability to work teatime shifts because she could not drive in the dark. This was a material part of the reason for the cooling of the relationship and, as we have found, Ms Barton made clear that she would not have employed the Claimant had she known that she could not drive in the dark. As it was a large part of the case before us, and even though the claim fails as no unfavourable treatment has been proved, we nevertheless considered whether this did arise in consequence of fibromyalgia.

103 As set out in the paragraphs above considering disability, the evidence before the Tribunal is the Claimant's own belief as set out in her impact statement dated 7 August 2019 (although not addressed in the impact statement dated 2 August 2019), the reference in the ESA report dated 30 October 2018 and the internet print out. The internet

print out says that vision problems can often accompany fibromyalgia and that night driving can be dangerous as those with fibromyalgia often have trouble seeing the lights of oncoming cars. That extract is not specific to the Claimant and not every symptom of a condition will be experienced by those with that condition, hence the use of "can" not "will" be experienced. As part of the case management process the Claimant was required to provide all evidence of copies of her medical records addressing the conditions of fibromyalgia, arthritis, failing vision and depression/anxiety. The Claimant has not provided to the Tribunal any medical evidence confirming that her vision has been affected by fibromyalgia beyond the ESA report which said that she reported sensitivity to light but where the medical examination makes no reference to problems with vision nor is there any reference to inability to drive at night. The rheumatologist's letter does not refer to any effect upon the Claimant's eyesight caused by fibromyalgia. There is no evidence adduced from the optician. Given the importance of the issue and the clear instruction for the Claimant to obtain medical evidence to support her case, the lack of medical evidence is significant. The Tribunal does not accept that the Claimant has proved that her difficulty or inability to drive at night arose in consequence of fibromyalgia.

104 The Claimant's dismissal on 28 June 2018 was undoubtedly an act of unfavourable treatment. She was dismissed for capability reasons, namely her sickness absence. Her sickness absence was because of depression/anxiety which we have concluded was a disability from 1 May 2018.

105 In deciding whether dismissal was a proportionate means of achieving a legitimate aim, the Tribunal took into consideration the following factors. This was an employment relationship which at the point of dismissal had lasted for approximately one year. The Claimant had been absent since the end of January 2018, some five months of that year's employment. The Respondent had sought to meet with the Claimant and obtain up to date medical evidence as to the nature of her condition, likely prognosis and any steps it may take to assist her to return to work. It had obtained appropriate Occupational Health advice which it discussed with the Claimant at a medical review meeting at which she was accompanied. Possible adjustments were considered but deemed unreasonable, something with which the Tribunal has agreed. There was no realistic prospect of an imminent return to work and the Claimant stated on more than one occasion that she did not consider that she could return to work given the relationship with her colleagues and that she had no confidence in the Respondent.

106 The Respondent is a small employer looking after those in need of residential care. Its aim to cover shifts, reduce pressure on colleagues, the efficient running of the home and use of limited resources was legitimate. As Ms Lord submitted, the Claimant's job could not be held open indefinitely. In all of the circumstances, the Respondent has shown that dismissal was a proportionate means of achieving this legitimate aim.

107 The claim of discrimination because of something arising in consequence of disability fails.

## Concluding remarks

108 We appreciate that this has been a difficult case for all parties and, at the end of the hearing, the Tribunal thanked those involved for the dignified way in which they had conducted their case. We were particularly grateful to Ms Appleby for her support and assistance of the Claimant and her handling of cross-examination in an assured and

competent manner. The Claimant can be reassured that any point that could have been made on her behalf was ably done so by Ms Appleby.

109 In reaching its conclusions, the Tribunal has not underestimated the impact upon the Claimant of the events giving rise to this case. We accept as genuine the Claimant's very real distress caused by her belief that a dream job with a former friend has turned out to be what she believes is the cause of a significant worsening in her health. This is a regrettable and sad feature of the case. The nature of the claims in this Tribunal are whether the conduct of the Respondent was in some way because of a disability whereas it seemed at times that the Claimant's principal complaint was that what she believes was unreasonable conduct by the Respondent had exacerbated her arthritis and/or fibromyalgia and caused her depression and anxiety. Although damages for personal injury may be awarded if a disability discrimination claim succeeds, a claim in tort for personal injury caused by breach of duty of care is not within our jurisdiction.

110 It is clear that there is a sense of disappointment and disillusionment on each side and the Tribunal sincerely hopes that the parties are able to move forward and put the circumstances of this case behind them.

Employment Judge Russell

6 January 2020