Case Number: 3400464/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms F Papworth	**v**	Agellus Hotels Limited T/A Tuddenham Mill Hotel

Heard at: Bury St Edmunds

On: 19, 20, and 25 November 2019
26 November 2019 (Discussion day – no parties in attendance)

Before: Employment Judge Laidler

Members: Mr R Allan and Mr B Smith

Appearances
For the Claimant: In person.
For the Respondent: Mr R Kohanzad, Counsel.

RESERVED JUDGMENT

1. The claimant was not treated less favourably on the grounds of her race and/or religion and such claims are dismissed

2. The claimant was not disabled within the meaning of the Equality Act 2010 and her claims of disability discrimination must therefore fail and are dismissed.

3. Further, and in the alternative, had the tribunal found that the claimant was disabled within the meaning of the Equality Act 2010 she was not treated less favourably because of her disability or treated unfavourably because of something arising in consequence of her disability and such claims would have failed and been dismissed.

REASONS

1. This is the claim of Ms Fatoumatia Papworth received on 3 May 2017. In the claim form the claimant brought complaints of unfair dismissal, direct race discrimination, direct religion/belief discrimination and direct disability discrimination. The issues were clarified at two preliminary hearings before this Employment Judge on 15 August 2017 and 7 December 2018 as follows: -

From the preliminary hearing on 15 August 2017

"Unfair Dismissal

1. The claimant accepted that she had not accrued 2 years' continuous service such as to entitle her to bring a claim of Unfair Dismissal contrary to the Employment Rights Act 1996. Her claim in relation to dismissal is that it was an act of race, religion and disability discrimination.

Race and Religion

2. The claimant describes herself as Black African with Gambia being her country of origin. That was where she was born and raised although she is now a naturalised British Citizen. Her religion is Muslim.

3. Pursuant to an order of this Employment Judge the claimant had provided further and better particulars on the 19th July 2017. These were used for the basis of this discussion to identify the various acts of less favourable treatment as set out below. The claimant however made it clear that she still continued to reply on each and every matter set out in the ET1. The Judge agreed to reconsider the narrative attached to the ET1 when drafting this summary and to include any other matters in the list of acts of less favourable treatment which appeared not to have been covered in this discussion and the further information. The parties will then advise whether this had been in the Claimant's case correctly noted and whether the respondent has any issues to it's inclusion. An order in this respect is set out below.

Acts of less favourable treatment

4. Alleged acts of less favourable treatment are as follows: -

   (1) That on the 1st January 2017 Andrea called the claimant "bad breed" having earlier told her to go home as she was "useless and good for nothing". This was on the grounds of the claimant's race and religion as it was known that she was from the Gambia and a Muslim.

   (2) Being asked to remove her nail varnish. As a dark skinned black woman, it is inevitable that the claimant's nail colour will appear darker than on those who are not black. The allegation is that the claimant was told to remove this on the 22nd and 25th December 2016 by Mandy a waitress. She told the claimant her nails were dirty. Other waitresses wore nail extensions and polish. When

the claimant asked Alex the Restaurant Manager she was told that the only ban was bright colours. From that day the claimant did not use any nail varnish but saw the other white staff putting on extensions and nail polish.

(3) The Assistant General Manager (Paul) stood in front of a wedding guest telling the claimant her right from her left. The allegation is that if it had not been for the colour of her skin and the country of origin that would not have happened.

(4) The claimant was employed as a waitress but was never assigned to take orders or work front of house in the restaurant and/or bar area. She was not given a till code as others were. She was used only as a "runner" taking food from the kitchen and back. All of the other staff are white. The Claimant who was black was left in the kitchen to take the food out.

(5) If the claimant was part of group taking food out to a large table, then all of the staff just carried the plates out without using napkins. If the claimant was working on her own she had to use a napkin. The white staff did not get told to use the napkin. The claimant believes this was on the grounds of her race as it was believed her hands were dirty.

(6) The claimant was not assigned the till code. She asked Simon the Restaurant Manager and he said he would talk to Malcolm the General Manager but nothing was ever sorted out. The claimant saw new staff being employed who did use the till, but she was not allowed to.

(7) On the 24th and 31st December 2016 and 1st January 2017 the claimant repeatedly was asked to clean the bar even though there were other staff at the bar doing nothing. It was Andrea who asked her to do this and Curtis, Rhian and Chloe were present on the first occasion, and Rhian, Curtis and Katy the second occasion. As noted in the ET1 Katy told Andrea that the bar was already clean and there was nothing to clean, and suggested to Andrea on the 31st December 2016 "pee on the floor" and then ask her, the claimant to clean it up. The claimant believes she was being singled out as comments had been made that she was working at Christmas. She had responded that she was Muslim and did not celebrate Christmas. It was after that she was asked to clean the bar and she believed this was less favourable treatment on the grounds of her religion as she did not drink.

(8) When the staff ate no alternative meat was provided to the claimant if pork was being given to all the other staff. The claimant undertook long shifts and was not getting enough to eat. She is not vegetarian but has never eaten pork on the grounds of her religion.

5. The following matters are also set out in the ET1 as further acts of less favourable treatment on the grounds of race and religion:

(1) That the claimant was not given a contract to sign by Simon and then was sent a text by Alex on the 28th February 2017 that she was on a zero hours' contract whilst the claimant believed it was a 20 hours' contract.

(2) On the 22nd December 2016, the claimant had set out glasses for drinks in a decorative fashion but Rhian, Andrea and Mandy undid the setting that she had prepared.

(3) On 19th February 2017, the claimant was constantly given conflicting instructions from Gina and Casey.

(4) On 19th February 2017 Casey presented the claimant with a new notebook but the claimant said she already had one and showed this to her. Jordan, Casey's boyfriend told her to throw it at the claimant. This was said in front of Lee the Head Chef who did nothing about this behaviour.

(5) On 10th November 2016 Andrea asked the claimant if she knew what a 4 or 5-star hotel was and had she ever been to one before. She then asked if the Claimant had been to a 3 rosettes restaurant. When the Claimant explained, she had worked in the hotel industry for 15 years Andrea replied that 'I wouldn't have known that' and that the chef were working hard to upgrade the standard of the restaurant.

Disability

6. The respondent does not at the present time accept that the claimant satisfied the definition of disability by virtue of her anxiety and depression. This is because in the report that the claimant obtained from her General Practitioner she stated that the condition was first diagnosed on the 24th January 2017. The Judge pointed out however that there are references to this being a recurrence of an existing condition. The claimant explained that she had suffered from depression since 2012 when her mother died. The Judge recommended that the claimant agree to disclosure her medical records from that date which may assist the respondent's in coming to a view on whether they do in fact accept that the claimant suffers from a disability within the meaning of the Equality Act 2010. As the claimant needed to take advice 21 days has been given to her to obtain CAB advice on this suggestion.

Allegations of less favourable treatment on the grounds of disability

7. Allegations of less favourable treatment on the grounds of disability are as follows: -

(1) Compelling the claimant to work with Andrea when she no longer wanted to and this was contributing to her depression.

(2) Inviting the claimant to a meeting at which Andrea was to be present.

(3) Not replying to or dealing with the claimant's grievance.

(4) Failing to pay the claimant statutory sick pay.

(5) The claimant's dismissal.

8. The allegations of failing to pay the statutory sick pay and not deal with the grievance are made against Malcolm the General Manager."

From the preliminary hearing on 7 December 2018

"(4) It had been made clear on the last occasion that the issues had been clarified from the discussion with the claimant but also from her further information provided. The claimant was to confirm by 6 September whether the matters as described in paragraph 7 of the previous summary, were an accurate summary of the acts complained off. The claimant did write in on 4 October 2017, stating that she believed that worse things had happened as written in the ET1 but otherwise this was a, *"good summary"* overall. As a result of that email and discussions at this hearing, the following amendments and additions are made to the issues clarified on 15 August.

a. Paragraph 6(3), when the Assistant Manager stood in front of a wedding guest telling the claimant her right from her left he hit her hand and she tried to get away and lost her balance and fell on the floor. This is set out in the ET1 under the 26 November 2016 paragraph.

b. Paragraph 7, sub-paragraph 1, the text was by Adrian not Alex as stated in the summary.

c. Paragraph 7, sub-paragraph 2, the setting on the 22 December 2016 was undone by Adrian and Mandy.

d. In the ET1, the claimant describes how on 1 January 2017, she ran down to reception and sat in the restaurant and sat crying and Andrea came back. She offered the claimant 'an olive branch' which the claimant said she could not accept. Andrea then called the claimant a liar. She came very close to the claimant and was poking her face to the extent the claimant had to cover her face with her hands. The claimant believes this was because of her race.

(5) Other than these additions and corrections, the claimant is satisfied that the previous summary with this summary now represent the matters she complains of. It was emphasised that this would not prevent the claimant giving evidence about other matters in her ET1 by way of background evidence, although they would not be treated as discreet acts of less favourable treatment. They would still be matters that the claimant could refer to."

2. At the two preliminary hearings referred to above the respondent was represented by Ms S Omeri of Counsel. In her witness statement for this hearing the claimant alleged that at the 15 August 2017 hearing Counsel had been "insulting and discriminating towards me". She alleged that counsel suggested as follows: -

2.1 That the claimant was lying about being a British citizen stating that the claimant was an illegal immigrant.

2.2 That the claimant was a benefit scrounger.

2.3 That the claimant was a drug dealer.

2.4 That the claimant was a "nut case".

3. Counsel is also alleged to have kept saying "Money money is not an issue".

4. At the outset of cross examination of the claimant at this hearing counsel cross examined the claimant on these matters. There was a break whilst the Tribunal discussed the evidence that had been given. The Tribunal then indicated to the parties that it would only be determining the issues that had been identified for it to determine at the preliminary hearings. What had occurred at the earlier hearing was not part of the case before this Tribunal. The Tribunal would not be making findings on what then occurred.

5. Counsel for the respondent submitted that this put the respondent in a difficult position as the claimant's answers in cross examination went to the issue of credibility. He would invite the Tribunal to consider the answers given about the preliminary hearings. The respondent should be entitled to make submissions on the answers given. The claimant brings allegations of discrimination and alleges that at the preliminary hearing there were also discriminatory matters that occurred. It was submitted that if the claimant is that easily prepared to lie and make allegations of discrimination at an earlier hearing the Tribunal can draw interferences from that and conclude there has been a pattern of behaviour.

6. If the Judge felt (having dealt with the preliminary hearings) that it was not appropriate for her to hear the matter, then he would ask the Judge to recuse herself if she was not comfortable making those findings. The respondent should be entitled to rely upon the answers given by the claimant. If the Judge does not feel comfortable in dealing with the case then she may feel she has to recuse herself. Counsel then drew the analogy between something that happens on day 5 of a hearing when the Tribunal is asked to consider that that is not what occurred on day 1, the Tribunal as a panel would be entitled to use its recollection of what had occurred. It may however be thought that there is a difference in this case between what happened on day 1 of this hearing and what happened at the preliminary hearing in relation to which the Judge is a witness. What happened at that earlier hearing is pertinent to the respondent's case as there is now an allegation of discrimination arising at that hearing. The Tribunal was invited to determine what happened at that hearing and if the Judge felt it made her a witness then maybe she had to recuse herself.

7. The Tribunal had a further adjournment to consider the matter as a panel. On returning it gave its decision to the parties. The unanimous view was there were no grounds for the Judge to recuse herself. The Tribunal is entitled to determine what findings it needs to make to decide the issues before it. The purpose of this hearing is not to have a 'mini trial' on what occurred at a previous hearing which is not one of the issues before it. The Tribunal does not need to make findings on what occurred at that hearing. That is not a matter before it. The issues have been clarified and counsel will be able to cross examine the claimant on those matters and make submissions that he sees fit on her credibility arising out of her answers to those questions. There was no need for the Judge to recuse herself.

8. Having given that decision Mr Kohanzad for the respondent wanted it noted that he had not made an application that the judge recuse herself but that if the tribunal had felt the matter relevant and the judge deemed herself to be a witness, she may have felt she had to recuse herself. No further arguments were heard on the point and this tribunal proceeded to hear the case.

9. There was time for the Tribunal to read the witness statements and then the claimant gave evidence and so did Mr Malcolm Wyse, formally the General Manager of the respondent. The Tribunal also had a bundle of documents running to 284 pages. It was not necessary to consider all these documents. The bulk were the claimant's medical records. The hearing had been listed for seven days. Mr Wyse, who is no longer employed by the respondent, was not able to attend on Thursday 21 November as he had to attend a fire inspection for his current employer and the tribunal could not sit on Friday 22 November (day 5). It concluded the evidence and heard submissions on Monday 25 November and met in private to conduct its deliberations on the 26 November indicating that written reasons would then be sent to the parties.

The Facts

10. From the evidence heard the Tribunal finds the following facts.

11. Tuddenham Mill is a boutique hotel popular for weddings with 20 bedrooms. At the time of the events complained of Mr Wyse was the general manager. He had overall responsibility for the management of the hotel and the employees. There were approximately 45 employees at that time. In January 2017 the hotel restaurant achieved a third rosette and was also named as Suffolk's 'Restaurant of the Year'. In the same year the hotel's head chef was named Suffolk's 'Chef of the Year'.

12. The claimant first began working for the hotel as temporary agency staff for weddings over the summer in 2016. The hotel often brings in agency staff to assist with large events and weddings.

13. In November 2016 the claimant applied through a recruitment agency for a position at the hotel. This was being advertised by 12 Talent Recruitment. The claimant was interviewed by Malcolm Wyse on 3 November 2016.

14. The Tribunal saw in the bundle at page 93 an example of an unsigned contract given to the claimant. This provided that the company could not guarantee to provide the claimant with work and was under no obligation to do so. Likewise, the claimant was under no obligation to accept any work which was offered.

15. The claimant accepted that she filled out a new starter form (pages 97-98). She accepted receiving various documents including the handbook. The claimant did not accept that she had been given a contract at that time. The claimant says that she was told that she would have 16, 18 or 20 hours. The Tribunal is satisfied that she was given a contract with all the other documentation and that the one seen in the bundle is evidence of the standard form that would have been provided. There is no documentation suggesting she was guaranteed 20 hours.

Christmas Day 2016

16. The claimant alleges that Mandy a co-worker told her to remove her nail varnish. She asserts that she was told her nails were dirty. The claimant went and reported this to Malcolm Wyse. There is little dispute that Mr Wyse told the claimant that as it was approximately 12.30 on Christmas Day and they were extremely busy he could not deal with the matter at that time. He did remind the claimant that the respondent's policy was clear nail varnish only. Mr Wyse's evidence is that the nail polish was red, the claimant's that it was a "nude" colour. Whoever is correct there was coloured nail varnish being worn. The claimant initially in cross examination stated she did not know the policy. Her attention was then drawn to the document that she had signed (page 150) in which it makes it clear that only clear polish can be worn and no false or acrylic nails. The claimant when taken to that document accepted it was her signature. The claimant in cross examination accepted she was in breach of the policy in not wearing clear nail varnish. Her criticism is that Mandy should not have been the one reprimanding her and she alleges Mandy was wearing nail extensions.

17. The claimant's assertion is that Mandy had said the claimant's nails were dirty. The claimant took the Tribunal back to her allegation in the ET1 form at the bottom of page 17 of the bundle where the claimant alleges that when she asked Mandy why she should take her nail varnish off she said "dirt". It was put to the claimant that what Mandy was referring to was that if a member of staff wore coloured nail varnish whether the nails were dirty could not be seen. The claimant was not prepared to accept that distinction in cross examination.

18. The Tribunal is satisfied that the claimant did not complain on Christmas Day to Mr Wyse about Mandy saying her nails were dirty. She only raised the nail varnish issue.

19. The Tribunal accepts the evidence of Mr Wyse (paragraph 12 of his witness statement), that he acknowledged that it was not for Mandy to raise this with a fellow worker and told the claimant he would speak to Mandy which he did, and he believed the matter was resolved.

20. The claimant has not disputed that she was acting in breach of the policy in wearing the nail varnish. It matters not whether it was red or her skin colour.

Till codes

21. At the respondent's restaurant where the claimant was employed the food and beverages assistants did not do the ordering. They take the food from the restaurant and deliver it to the customers. Supervisors or managers are responsible for taking the orders and discuss the particular menu and customer requirements with the customers. As such food and beverage assistants did not need a till code as they would not be entering items in the till. The only exception to that is food and beverage workers who on occasions work on reception. That was a separate till to the restaurant. All of the other food and beverage assistants were white, and they did not have the code to the restaurant till either.

Email from Andrea Cureton, 2 January 2017.

22. Andrea Cureton the claimant's supervisor wrote to Malcolm Wyse on 2 January 2017 stating she had had problems with the claimant. She felt she needed to email whilst the matters were fresh in her head and even though the Tribunal has not heard from her (she left the employment of the respondent in January 2017 or thereabouts) the Tribunal accepts this was a contemporaneous record of matters she was having difficulties with.

23. When Ms Cureton had started her shift, she had gone up to see the claimant who was sitting folding napkins and asked her when she was finished to hoover the whole restaurant before service. The claimant did not respond to confirm she would do this. Ms Cureton went upstairs again at about 5.30pm and the claimant was still sitting having eaten her staff meal. Ms Cureton again asked her if she could do this hoovering. The claimant did not however start this until 6.15pm and did not do the whole restaurant as requested.

24. The claimant then helped set up the buffet and brought out plates and refreshed a few dishes between 6.30-7.30pm. Ms Cureton had mentioned to her that she could come to the bar and help with a deep clean to which the claimant had said "What is it with this place and cleaning?" and said that she would stay and polish, and Andrea could stay in the bar. The claimant then disappeared, and Ms Cureton found her sitting down again later upstairs. Ms Cureton then made the decision to send her home.

25. Ms Cureton's email then records that the claimant "Over-reacted and started shouting at me", she told Ms Cureton "You can't tell me to clean, I won't clean". Ms Cureton explained she was also cleaning but the claimant then swore at her and shouted that she was going. She concluded that the claimant did not like taking instructions and once challenged about it turns it into shouting match which Ms Cureton found disruptive.

26. The tribunal accepts that Mr Wyse had planned to meet with both of them although this was not possible as the claimant only worked weekends and Ms Cureton left the business soon after. He did what he could to separate them on the rota. He did manage to speak with the claimant on the telephone when it was agreed that they would all sit down together. That did not turn out to be possible. The Tribunal accepts that although the claimant told him she did not like being given orders by Ms Cureton and did not like the way she was spoken to, she did not suggest or complain there was discrimination on the grounds of any protected characteristics. Neither did the claimant mention suffering from anxiety or depression.

27. The claimant has told this Tribunal that Ms Cureton sat on her knee and poked her in the face. This she says went on for over an hour. She accepted however that she did not mention that to Mr Wyse on the telephone.

28. The claimant also asserts that Ms Cureton called her "bad breed" but also acknowledged that she did not mention that either.

29. The Tribunal has had to conclude that those matters did not occur. If another member of staff sat on the claimant's knee poking her in the face and called her a "bad breed" the Tribunal is satisfied that the claimant would have raised this with Mr Wyse on the telephone. She does not mention it in her ET1 or further and better particulars that she was sat on.

30. The claimant sent a letter to Mr Wyse on 26 January 2017 asking for his help in "resolving problems at work." She referred to her treatment by Ms Cureton who "I feel is bullying me at work. I am particularly concerned because I feel that there is an element of discrimination about her behaviour and the other members of staff". She did not provide any further details in that letter.

31. The claimant then began a short period of sick leave the following day, 27 January 2017 due to depression. She returned to work on 11 February 2017 and Mr Wyse met with her on that day to discuss her grievance letter. Ms Cureton had by then left the hotel. He informed the claimant of this and told her it would be difficult for him to fully investigate her grievance without having the opportunity to interview Ms Cureton. The claimant agreed with that. The claimant said she had nothing else to raise and was happy to return to her duties.

32. It was put to the claimant in cross examination that this was another opportunity to raise the "bad breed" comment. She stated she did not do

that at that meeting and did not explain anything when Mr Wyse said Ms Cureton had left. She asserted that he had said he would get in touch with HR who would contact her. She did not explain anything about the incident as there was nothing to explain. She did not complain about anything. This is when the claimant had every opportunity to raise the matters of which she now complains, but she did not do so.

Allegation about right and left hand

33. The claimant asserts that the assistant general manager Paul stood in front of a wedding guest telling the claimant her right from her left. The allegation was said to be less favourable treatment because of her race and that "if it had not been for the colour of her skin and the country of origin that would not have happened".

34. In cross examination the claimant stated that she had been asked to get a bottle of wine. In front of guests Paul had asked who wanted the bottle of wine and the claimant pointed to a gentleman on table 2. It is at this point the claimant alleges Paul asked if she could tell her left from her right. The claimant alleges that he then smacked her hand. In trying to get off him the claimant pulled away, he pulled the claimant and grabbed her, and she fell down in front of all of the customers. This was whilst the restaurant manager and supervisor were there. The claimant accepted that she did not report this to Mr Wyse on the 11 February 2017 or at any point. The Tribunal does not find it happened.

Cleaning the bar

35. The claimant alleges that a co-worker Katie suggested to Ms Cureton on 31 December that she "pee on the floor" and then asked the claimant to clean it up. The claimant believes she was being singled out as comments had been made that she was working at Christmas. She had responded that she was Muslim and did not celebrate Christmas. It was after that that she was asked to clean the bar and she believes this was less favourable treatment on the grounds of her religion as she did not drink.

36. It was part of the claimant's role to clean the bar area. Whilst Mr Wyse explained that there were a team of cleaners for the hotel, they did not do the bar area which was the responsibility of those working in it. Even Ms Cureton was involved in cleaning the bar.

Staff meals

37. The claimant alleges that when the staff ate, no alternative meat was provided to the claimant if pork was being given to the other staff. The claimant was not getting enough to eat. She is not vegetarian but has never eaten pork on the grounds of her religion.

38. The Tribunal heard from Mr Wyse whose evidence it accepts that pork was sometimes offered if it had been the Sunday roast. Otherwise on the

Saturday alternative food was offered and was often a pasta bake. Even if pork was offered there was substantial amount of vegetables and other things to choose from and his evidence was that vegetarians and vegans were catered for. The claimant says that she does not eat vegetables. That is her choice. It does not amount to less favourable treatment by her of the respondent on the grounds of her religion.

Napkins

39. The claimant asserts that if she was part of a group taking out food to a large table then all of the staff just carried the plates out without using napkins. If the claimant was working on her own, she had to use a napkin. The white staff did not get told to use a napkin. The claimant believes this was on the grounds of her race as it was believed her hands were dirty.

40. The evidence of the respondent is quite clear that staff had to carry out food from the kitchen using a black napkin. That is one of the standards within the hotel that was applied consistently, and all staff were aware of this and knew to follow it. The only time this was not adhered to was if there was a very large order and food was carried out on a tray. Other than this the Tribunal accepts that all staff carried plates with a napkin and therefore the claimant was not treated any differently to any other employee by being asked to do so. Mr Wyse never saw any other employee failing to adopt this policy and had he done so he would have raised it with them irrespective of their race or religion.

41. In the preliminary hearing the claimant raised further allegations of less favourable treatment on the grounds of race and religion. These included that on 22 December she set out glasses for drinks and colleagues undid the setting, that she was given conflicting instructions from Gina and Casey, and that there was an incident about a notebook.

42. Very little evidence has been given about these matters and the claimant put no questions to Mr Wyse about them. There is nothing from which the Tribunal can infer less favourable treatment of the claimant or that such was on the grounds of any protected characteristic.

43. It is clear from contemporaneous documents that Mr Wyse was receiving regular complaints from staff including the head chef that the claimant was regularly refusing to polish crockery and cutlery. The Tribunal saw an internal email from Mr Wyse to HR of 3 March following receipt of a letter from the Citizen's Advice Bureau of 2 March indicating that the claimant had not heard in response to her grievance. In his email to HR, Mr Wyse brought to HR's attention that last week the claimant's performance hit an all time low:-

> "With absolutely no communication from the woman to colleagues or guests and a thoroughly miserable and aggressive demeanour at a time when the hotel and restaurant were full and we needed efficiency and smiles. She is now refusing to polish crockery and cutlery and stands in the restaurant to the extent that one of our guests complained they felt uncomfortable with her in the room. Fatoumatia is in at 11 on Sunday and I'm

actually planning to speak to her in view of sacking her but since a communication has come in from the Citizen's Advice Bureau, I will need to take some advice in this matter and even allow you to take over as our HR representative."

44. By letter of 8 March Mr Wyse replied to the Citizen's Advice Bureau setting out the chronology as he understood it and as has been seen by this Tribunal. He confirmed that he had been unable to substantiate the allegations made and had explained to the claimant that he considered the matter closed. He said that if the claimant wished to raise anything further or felt the matter was not resolved he would invite her to submit further comments in writing.

45. On 20 March Mr Wyse wrote again to HR that they had heard nothing from the claimant over the weekend. It appears that there was a text message on WhatsApp to a colleague on 5 March that the claimant was not well, but that was the last they had heard. This is confirmed in Mr Wyse's letter to her of 27 March. In that email he confirmed the text message to Adrianne Allen on 5 March advising the claimant was unwell and unable to attend work. He had recorded the 5 March as the claimant's first day of absence. He asked that the claimant complete a statutory sick pay form to cover the first 7 days of absence until 11 March 2017. He reminded the claimant that as she was aware more than 7 days should be covered by a 'Statement of fitness for work' and as they had not received the statement, he asked that the claimant send one as soon as possible to cover the absence from 12 March 2017 to date.

46. Mr Wyse confirmed that the claimant qualified for statutory sick pay during the period and it was payable at the rate of £86.45 per week for up to 28 weeks. That was subject to the claimant providing medical certification. He invited the claimant to a review meeting on 30 March 2017 to review her performance during the probation period. An HR representative would be present. Although the Tribunal saw in the bundle at page 110A a fit note of 13 March 2017 stating the claimant was unfit for work from 10 March to 7 April 2017 it appears from the contemporaneous documents that that had not been seen by Mr Wyse and the respondent at that time.

47. The claimant did not attend the meeting on 30 March 2017 and a further letter was sent on 5 April 2017. Mr Wyse again said he was extremely concerned to note there had been no contact since the WhatsApp message of 5 March. He noted that the claimant had failed to attend the review meeting, submit medical certificates, answer phone queries or voicemail messages. As they had not heard from the claimant they had contacted the ACAS conciliator who explained that the claimant had spoken to them and that she considered her zero hours contract unsuitable, she was trying to sort out benefits and speak to her advisor. Mr Wyse asked that the claimant contact them urgently by 7 April and if she did not do so they would process her as a "leaver by reason of resignation".

48. Nothing further was heard from the claimant and by letter of 10 April Mr Wyse wrote to her stating that she was taken as having resigned with the last date of employment being 7 April 2017. Her final payment of salary would include pay in lieu of unused holiday entitlement. It was accepted at this hearing that that letter did in law amount to dismissal.

49. The Tribunal is satisfied that sick notes had not been provided for the whole period but that in the March payslip a payment of £221.13 was made for sick pay but that that was for the February period.

Disability

50. The claimant asserts that she is disabled within the meaning of the Equality Act 2010 by virtue of depression. Medical records had been obtained and produced in the bundle together with various medical reports and the claimant provided an impact statement.

51. A report had been prepared from the claimant's general practitioner dated 7 July 2017 which appeared to be an answer to the Tribunal's order made on the issue of proceedings. The impairment was described as depression and anxiety which the claimant had first seen the doctor about on 4 January 2017 following incidents at work. The claimant had been re-started on medication on 24 January and her symptoms were low mood, sleep disturbances and ruminating on events. The only impairment in the list of activities taken from the Equality Act definition which was said to be impaired was concentration. It was not possible for the doctor to predict how long the claimant's depression might last.

52. The claimant's medical records were in the bundle. They did show some periods of depression in 2013 but then nothing until the current periods in 2017. There were reports in the bundle for 2018 but the Tribunal has concluded that they do not assist as the Tribunal must determine whether the claimant had a disability at the relevant time which was in 2017.

Relevant Law

53. The claimant brings claims of direct disability discrimination under s.13 of the Equality Act: -

> "(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

54. The claimant also claims disability discrimination. Disability is defined in s.6 as follows: -

> **"6 Disability**
>
> (1) A person (P) has a disability if—
>
> (a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

(2) A reference to a disabled person is a reference to a person who has a disability.

(3) In relation to the protected characteristic of disability—

(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—

(a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and

(b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.

(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).

(6) Schedule 1 (disability: supplementary provision) has effect."

55. The Tribunal has taken into account the guidance on the definition of disability (2011) and in particular section C the meaning of long term. Section C3 provides as follows:-

"**Meaning of 'likely'**

C3. The meaning of 'likely' is relevant when determining:

- whether an impairment has a long-term effect;
- whether an impairment has a recurring effect;
- whether adverse effects of a progressive condition will become substantial; or
- how an impairment should be treated for the purpose of the Act when the effects of that impairment are controlled or corrected by treatment or behaviour.

In these contexts, 'likely', should be interpreted as meaning that it could well happen.

C4. In assessing the likelihood of an affect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. Account should also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual (for example, general state of health or age)."

56. In interpreting the provisions of the Equality Act the Tribunal must also take into account the burden of proof provisions and that it is for the claimant to establish facts from which it could be concluded that she had been treated less favourably on prohibited grounds before the burden passes to the respondent. A difference in treatment and difference in protected characteristic is not sufficient. Rather than apply the strict burden of proof provisions the Tribunal may consider the reason why the claimant was treated as she was and that may be a more beneficial way of reaching its conclusion.

Conclusion

57. The claimant was not treated less favourably in any respect and not on the grounds of her race or religion or disability.

58. Either events which the claimant complains of now did not occur as set out in the Tribunal's findings of fact or if they did, they were not less favourable treatment of the claimant.

59. The claimant had every opportunity to raise issues with Mr Wyse and even wrote to him wishing to discuss issues. Some of the matters raised before this tribunal were never even mentioned to him. The tribunal has had to concluded, as stated in its findings, that they did not occur. If a supervisor sat on the claimant's knee poking her in the face, that is a matter she would have reported to Mr Wyse, but she never raised it. It did not happen.

60. Whilst accepting that the claimant in 2017 suffered from depression the Tribunal cannot find that it was more likely than not at that point that the condition would be long term. The tribunal must consider the issue of disability as at the time of the acts complained of. The claimant was only employed by the respondent from 5 November 2016 to 26 February 2017 being her last date of working. The respondent did not have evidence from which it could or ought to have concluded that the claimant had a disability. It did not have matters in front of it to be able to know that the condition would be long lasting (if indeed it has been).

61. Even however if the claimant were disabled within the statutory definition by virtue of depression she had not been treated less favourably on the grounds of her depression. All the matters of which she complains were either managerial matters which were dealt with or had absolutely no bearing on the claimant's disability.

62. For all these reasons the claimant's claims are dismissed in their entirety.

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Employment Judge Laidler

Date: 31 December 2019

Sent to the parties on: 14 January 2020

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For the Tribunal Office