Case No: 1600019 / 2019

EMPLOYMENT TRIBUNALS

Claimant:	**Mrs R Fisher**		
Respondent:	**B&Q Plc**		
Heard at:	**Cardiff**	**On:**	**4 and 5 November 2020 and in chambers on 6 November 2020**
Before:	Employment Judge R Brace Members: Mrs L Owen Ms C James		

Representation
Claimant: Mr A McGill (non-legal representative)
Respondent: Ms J Price (Counsel)

JUDGMENT

The unanimous judgment of the tribunal is that:

1. the claimant's complaint of unfair dismissal is not well founded and is dismissed; and
2. the claimant's complaints of discrimination arising from disability (s.15 Equality Act 2010) and failure to comply with their duty to make a reasonable adjustment (s/20/21 Equality Act 2010) are not well founded and are also dismissed.

WRITTEN REASONS

Preliminary Matters

1. The complaints before us were of:

   a. unfair dismissal arising from the dismissal of the Claimant. The Claimant claims that she was redundant and is entitled to a redundancy payment. It is asserted by the Respondent that the dismissal of the Claimant was on grounds of some other substantial reason, not redundancy, namely the Claimant's refusal to accept the proposed variation to her terms and conditions to change the timing of her shift pattern;
   b. that the Claimant's dismissal was an act of discrimination arising from disability (S.15 Equality Act 2010); and
   c. that there was a failure to comply with the duty to make reasonable adjustments (s.20/21 Equality Act 2010).

2. That the Claimant was a disabled person at all relevant times by reason of her under-active thyroid, depression and anxiety has been conceded by the Respondent.

3. The issues to be determined were set out in the case management order of Employment Judge Moore of 1 August 2019 [27-36] and the Claimant's representative was encouraged to have a copy of the order before him to remind himself of the issues that the Tribunal would be determining, particularly when cross-examining the Respondent's witnesses.

4. The hearing was held as a hybrid hearing. The Claimant and her representative were in person with the Judge, Ms James (member) and the clerk. All other participants, including Mrs Owen (member,) participated remotely by video (CVP).

5. The Tribunal was provided with written witness statements from both the Claimant and the Respondent's witnesses which were taken as read.

6. The Claimant was subject to cross-examination by Counsel for the Respondent and this took the remainder of the first day of the hearing after time had been spent by the tribunal reading the statements and relevant documentation and discussing with the parties arrangements for the hearing.

7. On the second day of the hearing the Tribunal heard evidence from the Respondent's witnesses: Mr Billy Shepherd, in-house solicitor for the Respondent and Mr Richard New, Deputy Manager. The Claimant's representative cross-examined both witnesses.

8. There was a bundle of documents of approximately 249 pages (the "Bundle"). The witness was provided with a copy of the Bundle. References to documents contained in that Bundle appear in square brackets [ ] within these written reasons.

9. It was discovered that the Claimant's representative had only brought with him to the hearing, a file of documents up to page 197. It became apparent that documents, that were contained within the copy of the Bundle provided to the Claimant in the witness stand and to the Tribunal, but not in the Claimant's representative's file:

   a. page 197a and 197b were documents disclosed by the Claimant; and
   b. pages 198-247 were documents provided to the Claimant following a request for specific disclosure.

10. Both sets of documents had been provided in November 2019 and had been added to the Bundle by the Respondent a that stage. This had been confirmed to the Claimant back in November 2016, the Claimant's representative however had failed to add them into his file of papers. He was able to use the Bundle provided by the Tribunal to the Claimant and it was agreed by the Claimant's representative that we were able to continue on that basis.

11. The Respondent's Counsel also provided a chronology and detailed skeleton argument running to some 16 pages.

Assessment of the evidence

12. The Tribunal was satisfied that all three witnesses gave their evidence honestly and to the best of their knowledge and belief. It is not necessary to reject a witness's evidence, in whole or in part, by regarding the witnesses as unreliable or as not telling the truth. The Tribunal naturally looks for the witness evidence to be internally consistent and consistent with the documentary evidence. It assesses a range of matters including:

a. whether the evidence is probable,
b. whether it is corroborated by other evidence from witnesses or contemporaneous records of documents,
c. how reliable is witness' recall; and
d. motive.

Facts

13. The respondent is a nationwide is a DIY, home and garden retail company. It employs over 23,500 employees in over some 296 outlets in the UK. The claimant started her employment 5 August 2002 at the Culverhouse Cross site in Cardiff. She was a valued and respected member of the Respondent's workforce at the Culverhouse Cross store ("Culver store").

14. She was employed on written terms and conditions, a copy of which was in the Bundle [43]. The written terms provided that the job required flexibility as far as hours and days were concerned. The Claimant was allocated to the replenishment department within the Culver store, as part of a team responsible for replenishing stock.

15. At the commencement of her employment with the Respondent the Claimant had been contracted to work 20 hours a week, with shifts of 5 hours per day but over the years, the Claimant's contracted hours increased as did shift patterns and changes to the written terms were predominantly recorded within Employee Details Change Forms ("Change Forms"). Examples of these were provided in the Bundle [44-47].

16. Whilst we heard some evidence on cross-examination from the Claimant regarding one particular change she asserts was made to her Sunday hours by a previous manager, notwithstanding the flexibility provision written into the Claimant's written terms, over the years changes to the Claimant's hours had been made with the Claimant's agreement and for many years in the latter part of her employment the Claimant's hours had predominantly remained Monday to Friday, 7pm to 1am shift. She had for a number of years received a nightshift premium [46] as well as an allowance for her qualification as a Fork Lift Truck ("FLT") driver [47]. At the time of her dismissal, the Claimant reported to two Replenishment Supervisors.

17. The Culver store operated different hours in summer than in winter and the store's seasonal hours changed predominantly at the same time as the clocks changed in March and October. During the seven months' period of summer store hours, the store would close at 9pm and during the five months of winter store hours, the store would close at 8pm. The Claimant's contracted hours were therefore worked over periods when the store was both open and when it was closed to customers in both summer and winter.

18. The Claimant's job title had been, since the commencement of her employment with the Respondent, and at termination of Employment, a Customer Adviser.

19. The Claimant asserts that irrespective of the wording of her contract and that title, she was in reality employed as a FLT driver based in the warehouse and not a Customer Adviser, a title she says is given to all members of staff. She maintains that she had very little interaction with customers; her evidence was that she '*never served customers or had involvement with them for the majority of [her] time at work'*.

20. She accepts that she would 'on occasions' go on the shop floor to look for spaces on the racks to store stock and that sometimes a customer would approach her for help when she would point them in the direction of someone who could help. Whilst not in her witness statement in live evidence she told us that this was 'very infrequent', and that she went on the shop floor only once every few weeks.

21. This is disputed by the Respondent. They rely on the evidence of Richard New, the Deputy Manager of the Culver store, who tells us that he worked with the Claimant for 16 months and from his personal knowledge and seeing the Claimant, when the store was open the Claimant would be on the shop floor 'a great deal of time' and therefore interacting with customers as she would:

    a. help supervisors set up for the replenishment shift by moving stock from the warehouse to the shop floor so that it was in the correct location for products to be replenished quickly onto the shelves; a process known as 'spotting stock; and

    b. prepare pallets to be forklifted, dealing with waste from splitting large pallets of stock on roller cages [R1para4] and moving these onto the shop floor

22. The live evidence did not wholly assist us on its own to ascertain the extent of the Claimant's interaction with customers. Both the Respondent's representative and the Claimant's, drew our attention however by to the documented appraisals of the Claimant which had been untaken in 2015, 2016 and 2017 [56-91].

23. The documentation indicated that:

    a. The Claimant was '*warehouse based';* [63]
    b. Needed training to ensure customer needs were met; [63];
    c. The Claimant was '*predominantly here to remain the warehouse… and to undertake the majority of the forklift work';*
    d. The claimant was the stores '*main FLT driver'.*

24. We found that the Claimant would work a significant part of her shift, whether the store was closed or open on the FLT, undertaking replenishment duties that would require the FLT whether this included moving pallets, sky-storing products which required toe FLT to lift products up onto the higher storage racks or tidying the warehouse.

25. However, we also found that when the store was open the Claimant would undertake some of her replenishment duties on the shop floor and at those times would naturally be in contact and communication with customers. This was also reflected in the appraisal documentation that indicated to us that:

    a. May customers recognised an came up to her to ask for advice [57];
    b. That she engaged with customers to understand their needs [57];
    c. when on site offered '*a friendly approach to customers'*, would take customers to produce and find support if unsure and '*engaged in conversations with customers'* [63];
    d. She was rated as 'above standard' for her customer experience rating [64]

26. The Claimant invites us to find that elements of her appraisal that relate to her interaction with customers, to be an 'over-exaggeration of the truth'. She tells us that she had been encouraged by her managers during the appraisals to exaggerate the interaction with customers due to pressure from senior management following customer criticism regarding lack of advisers on the

shop floor. We did not accept this. The Claimant had not raised this concern at the time and had not asserted this in her witness statement or prior to cross-examination when her attention was drawn to the appraisal documentation. Further, the Claimant effectively wishes us to rely on parts of the appraisal that support her argument that she was a FLT driver only.

27. We accepted the appraisal evidence as contemporaneous documentation that was more likely than not to provide us with an accurate reflection of both the claimant's duties and her interaction with customers

28. We found that whilst the Claimant was predominantly warehouse based and did spend a significant part undertaking replenishment duty that involved the use of the FLT, this was not the only way she carried out her replenishment. She would enter the store during hours, not on the FLT, to carry out her replenishment duties and in doing so would interact and assist customers.

29. We found that the Claimant was not employed as a FLT driver, but as a Customer Adviser. Rather her replenishment role involved the Respondent using her skill and qualification as a FLT to carry out replenishment duties when required but that this was not her only role and that her role was not confined to the warehouse using the FLT.

Replenishment Model

30. In the summer of 2018, the process used by Respondent for replenishing stock was reviewed. That review identified that resource and costs was being used to replenish their stores at times when the stores were closed to customers. It was considered that this was not cost effective. It was also concluded that it was not applied consistently as;

a. some stores only replenished stock when the store was open to customers;
b. most larger stores operated a nightshift with employees working overnight to replenish stock;
c. some stores operated what respondent called a "twilight" replenishment model with employees working shifts that started in the late afternoon/early evening (when the stores were open) and finished in the early hours of the morning; and
d. some stores operated both a nightshift and Twilight shift.

31. Having looked at ways at how they could change the way that stores were replenished, the Respondent proposed that they changed their replenishment model to no longer replenish stores overnight i.e. after 10/11pm (depending on the time the store closed) or before 5am. The effect of this was that no employee would work between the hours of 11pm and 5am.

32. The Respondent decided that it would need to consult with employees that worked between the hours of 11pm and 5am as it determined that if an employee only worked when the store was closed to customers, requiring them to work in a customer-facing environment was a significant change in the nature of the work they were employed to carry out, and that such employees should be placed at risk of redundancy.

33. For those employees who worked any form of Twilight shift, the Respondent devised a principle that if 75% or more of an employee's contracted hours were spent when the store was closed, those employees would also be placed at risk of redundancy. The Respondent considered that such a pool of staff could argue that they should not be placed at risk of redundancy (on the basis that the work of the particular kind had not ceased or diminished,) and the

Respondent considered that it was fair and reasonable to give them a choice on whether to accept a day role or to receive a redundancy payment.

34. The Respondent took the position that the changes, for employees who worked less than 75% of their contracted hours when the store was closed, would not fall within the statutory definition of redundancy, on the basis that the work of the particular kind that they carried out had not ceased or diminished. That pool of employees was consulted on change to their hours only and were not placed at risk of redundancy.

35. A collective consultation process was entered into by the Respondent with a body of elected staff representatives forming the National People's Forum. Senior management teams within each store were informed of the changes and instructed to identify employees within their store who worked between 11pm and 5am and to calculate whether they worked more or less than 75% of their contracted hours when the store was closed. They were instructed to use the most recent shift patterns of the previous 6 weeks, a time when the company was trading on summer store hours, as being the most accurate reflection of what was happening in practice at any given store at that time.

36. Some 2,300 employees were identified as working between 11pm and 5am and who would be consulted over a change in shift pattern.

37. The Deputy Manager for the Culver, Mr Richard New was given responsibility for the consultation process, with an objective of retaining as many staff as possible and to move them to hours to the daytime.

Meeting - 4 October 2018

38. On 4 October 2018 Mr New announced the changes to the team at the store and staff were advised that they could lose their jobs [96].

39. Save for the Replenishment Supervisors, of the replenishment staff employed to work at the Culver store, only the Claimant worked hours that covered times when the store was both open and closed.

40. All other replenishment staff had been working hours when the store was closed i.e. commencing work after 9pm. As such, these staff were placed at risk of redundancy and a separate redundancy consultation took place with this pool of staff.

41. Mr New met with the Claimant on an individual basis later that evening. Due to the hours she worked, the Claimant was identified as falling and did in fact fall within the pool of employees working less than 75% of her contracted hours when the store was closed. The Claimant did not work in excess of 75% of her working time when the store was closed to customers calculated on the basis of summer hours and calculated on an average of 7 summer months and 5 winter months.

42. He used a script to aide him as provided in the Bundle [103-106].

43. There is a dispute between the parties as to whether Mr New 'nodded' when the Claimant asked him if her 'job had gone' (which had been asserted by the Claimant in her witness statement (at para 6)), although Mr New was not cross-examined on the point. When questioned on cross-examination, the Claimant responded that Mr New had '*slightly nodded his head, as in a yes'*. This was far less emphatic than that stated in her witness statement. We did not consider the claimant's evidence to be reliable on this point and whilst we

appreciate that this would have been a very difficult meeting for the Claimant, we did not find that Mr New had confirmed to the Claimant at that meeting that her job had disappeared.

44. The Claimant was informed that if she was able to agree to a change in her terms and conditions by moving hours, this would be confirmed on a Change Form [108] which would come into effect on 6 November 2018. She was warned that if the proposals were to go ahead and they were unable to agree to the change to the terms and conditions, then she may be dismissed on the grounds of some other substantial reason.

45. The Claimant confirmed to Mr New the hours that she was available to work as being from 5am to 11pm, Monday to Friday. She was unable to work on Saturdays as she saw her granddaughter, or on Sundays, as she worked in another job as a cleaner. The Claimant expressed a preference to work late nights. A matrix was completed by Mr New based on the Claimant's responses [107]. The Claimant did not tell Mr New that she would not be able to work early mornings. The Claimant signed both a copy of the note of the meeting [104] and the completed matrix.

46. The Claimant questioned whether overtime had been included. Mr New confirmed that he would look into this. At the end of the meeting the Claimant was provided with a copy of the Frequently Asked Questions [109-119] and informed that there would be a further meeting on 12 October 2019.

47. After the meeting Mr New checked the Claimant's overtime records and concluded that even taking into account overtime, the Claimant was not working 75% of her time when the store was closed to customers.

Meeting – 12 October 2018

48. A further consultation meeting took place on 12 October 2018. The meeting was brief. Brief manuscript notes of that meeting together with the queries raised by the Claimant identified and circled within the notes [127].

49. The Claimant asked for a copy of her payslips and if there would be cushion payments for the removal of night shift premium. She queried why she was not offered redundancy.

Email 15 October 2018

50. On 15 October the Claimant emailed the Respondent's human resource department [120]. The email should be reproduced to do it justice, but the Tribunal incorporates it by reference and is summarized as the Claimant:

    a. expressing concern that of the thirteen, night replenishment workers, she had been the only one not offered redundancy;
    b. that in reality she was a FLT driver, that was all she had done for the previous 12 years and that the changes represented a significant change in her work;
    c. that she had '*absolutely nothing to do with the customer*s';
    d. daytime working would leave her fatigued during the day. She referenced a September 2017, Occupation Health Report ("OHA Report")[92-94].

51. The Claimant suffered and still suffers ill-health by way of under-active thyroid coupled with anxiety and depression and had a period of sickness absence in July 2017. As a result, the Respondent had referred her to occupational health

and a report had been provided following assessment on 26 September 2017 [92-94] ("OHA Report").

52. The OHA Report confirmed that at that point

    a. the claimant was fit to continue in her current role (30 hours per week working the night shift and operating a FLT);
    b. that there were no restrictions to her role;
    c. symptoms could include fatigue and depression, reduced concentration and focus and that it could take time to control the condition with medication;
    d. her performance might be impacted with reduced concentration, increased fatigue and joint pain if her blood levels fell below normal levels.

53. The OHA Report does not specify whether the Claimant had difficulty in working certain times of the day. We accepted that it did not as at that time the Claimant was working nights and it is more probable than not, the adviser was not asked to put their mind to the issue.

Meeting 15 October 2018

54. A third consultation meeting was held with the Claimant later that evening when the Claimant was provided with the pay slips she had requested, and her queries were answered regarding:

    a. Cushion payments; and
    b. Why she had not been offered redundancy [127].

55. The Claimant was informed that she was not offered redundancy as she worked less than 75% of her hours whilst the store was closed.

56. Whilst the Claimant believed that these responses had been provided at the later meeting on 29 October 2018, she conceded on cross-examination that she couldn't honestly be certain due to time lapse. A note of the responses provided at the meeting of 15 October 2018 [127]) were provided to and signed for by the Claimant as accurate.

57. We accepted the evidence of Mr New on this issue, that this information had been provided to her on the 15 October 2018. His evidence was clear and was supported by contemporaneous documentary evidence.

Meeting on 22 October 2018

58. A further meeting took place on 22 October 2018 when the claimant was informed that the business approach regarding her concerns as set out in her email of 15 October 2018 to HR, was to resolve them as part of the consultation process.

Letter 29 October 2018

59. On 29 October 2018, the Claimant gave in a handwritten letter regarding her concerns on the changes; essentially that the proposed changes in hours would result in a significant change in the nature of her work. She reiterated that she had been a FLT driver for 12 years and that 'this is all that I have done'. She challenged that she was customer facing / dealing directly with customers and again reiterated that she should have been offered redundancy.

60. The Claimant and Mr New agreed to meet on 2 November 2018 to discuss her letter. This meeting was postponed as the Claimant was unable to get

transportation and was unwilling to meet Mr New in her home. There was some confusion in the Claimant's evidence on cross-examination as to whether this meeting did not go ahead as her trade union representative was unavailable.

61. We did not consider this to be a relevant consideration for us as no meeting did in fact take place on 2 November 2018 and the Claimant was instead invited to a formal meeting arranged to take place on 5 November 2019. The Claimant was notified of this by way of letter dated 1 November 2018 [131] which ahd been hand-delivered to her home on 2 November 2018. The letter confirmed that the meeting would be a formal meeting to discuss changes to terms and conditions and that the meeting may result in the Claimant's dismissal on the grounds of some other substantial reason if they were unable to agree changes. The Claimant was advised that she could be accompanied by her trade union representative.

62. The Claimant responded by way of hand-written letter dated Sunday 4 November 2018 confirming that she was unable to contact her trade union representative and asked for the meeting that had bee arranged for 5 November 2018 to be rescheduled.

Meeting 7 November 20218

63. The 5 November 2018 meeting did not take place as a result.

64. Instead, Mr New arranged to meet the Claimant on 7 November 2018 to address the concerns she had raised in her grievance letter.

65. Handwritten notes (signed by the Claimant on 7 November 2018 as an accurate summary of the meeting) [137-144] and a typed transcript [146 – 148] were provided as part of the Bundle. The Tribunal accepted the handwritten notes as an accurate summary of the matters discussed. No issue was raised by the Claimant that the type written notes were not an accurate transcript and we refer to those instead for ease of reference.

66. At that meeting, the Claimant was asked how they could work together to get the Claimant back to work and accept the change in hours. The Claimant confirmed that ideally, she wanted to work Monday to Friday 4pm to 10pm and be warehouse based.

67. Mr New confirmed he was able to offer her a position working in the building/tradepoint team working 4-10pm Monday to Friday and every other Saturday working an early shift. He indicated that he was willing to compromise the Saturday shift (of 1pm – 7 pm or 2pm – 8pm) until the New Year to allow a period of transition.

68. The Claimant responded referring to the OHA Report and stating that she was unable to work an early shift but could work until 10pm on a Saturday. The claimant was not prepared to say what shifts she could work on the weekends. When the Claimant was offered, as an alternative to a Saturday shift, a Sunday shift from 12pm – 6pm the Claimant again indicated that she was not prepared to comment at that time.

69. With regard to her complaints, Mr New confirmed:

    a. That the Claimant did not qualify for redundancy as she did not meet the business threshold of working more than 75% of her hours when the store was closed [146];

b. That the Claimant would still be required to be a FLTY driver particularly when the store was closed but that the Respondent had not roles for FLT drivers. He acknowledged that the Claimant was anxious to moving to work more hours when the store was open and confirmed that there would be development training [146];

70. They discussed the Claimant's assertion regarding the amount of time that she spent in the warehouse using the FLT and Mr New confirmed that she did not meet the Respondent's criteria to qualify for a redundancy payment as she spent less than 75% of her time working when the store was closed.

71. The Claimant was offered a position in the team working the hours offered of Monday to Friday 4pm to 10pm with afternoon shifts on a Saturday or a Sunday commencing in the New Year.

72. The Claimant confirmed that she did not wish to accept the new terms and was informed that she would be invited to a further meeting which would be her final opportunity to accept the change in hours and that if she did not this may result in her dismissal.

73. There is a dispute as to whether the Claimant was told by Mr New at this meeting, that she could not appeal any decision with focus by the Claimant's representative on Mr New's comments made, reflected in the notes [@139], that the points in her grievance would be dealt with by him informally as the consultation manager and that he did not want to '*pass* this *onto someone else as they would not be able to personally change the outcome of the change'*.

74. Whilst we considered that Mr New could have made it clearer to the Claimant that whilst her concerns regarding the restructuring process should be dealt with as part of the consultation process, and not via the grievance procedure, this is what he was communicating to her at that meeting. We did not find that anything that Mr New said to the Claimant at that meeting prevented her from appealing Mr New's decision. That was made clear to her in his later letter of 9 November 2019 given to her after her employment had been terminated [178].

Meeting 9 November 2019

75. A final meeting was arranged for 9 November 2019 and at that meeting the Claimant handed to Mr New a further handwritten letter [150-153] which in essence:

a. confirmed that she would not sign to accept new terms and conditions;
b. that she believed that her old role had gone and that the proposed changes were substantial alteration to her employment;
c. She maintained that she was employed as a FLT driver and was not customer facing;
d. That she felt she could be required to work between 5am and 10/11pm;
e. That she considered that the proposals were in breach of the Equality Act 2010;
f. That she regarded herself as redundant.

76. Again, handwritten notes (signed by the Claimant on 9 November 2018 as an accurate summary of the meeting) [154-172] and a typed transcript [173 – 177] were provided as part of the Bundle. Again the handwritten notes are accepted as an accurate summary of the matters discussed and the type written notes are referred to for the reasons given in relation to the 7 November 2018 meeting. They are incorporated by way of reference but in brief a summary could be described as follows:

a. An offer to work a fixed patter of 4pm to 10pm Monday to Friday and afternoon/evening shift of 2pm-8pm or 4pm to 10pm on Saturdays was reiterated. Mr New again confirmed that he would forgo the Saturday shift until January 2019 to allow the Claimant a period of transition.

b. The Claimant was told that the weekend shifts would not come into operation until the New Year. At no point did the Claimant indicate that she could not work one shift a week commencing at 12 noon, 2pm or later.

c. The Claimant expressed concern that she was being asked to sign a flexible rota that could allow the Respondent to change her rota. She reiterated that she never replenished shelves and worked solely as a FLT driver.

d. Mr New confirmed that he accepted that she had a skill as a FLT but that she was not the sole FLT on shift and clarified why the other refurbishment workers had been offered redundancy as their hours were over the 75% threshold. He confirmed that there were no available warehouse roles and that the Claimant reported to the Replenishment Supervisors;

e. The Claimant reported that she fatigue affected her over mornings and dinner times.

77. The claimant has sought to argue that she was told that the afternoon weekend shifts was only on offer until the New Year. It was not clear whether this was at one or other or at both of the meetings of 7 November and 9 November 2018.

78. We did not consider that this was a reasonable conclusion for the Claimant to have reached. Whilst we do not consider that the Claimant is lying and accept that this is what the Claimant believed was being said to her, that was not a reasonable understanding based on what she was being told.

79. The Claimant was assured that she was not required to work early shifts on the Saturday and that weekend afternoon shifts would not start to operate until the New Year.

80. If the Claimant had agreed to the change in hours, as set out above, she would have been asked to sign an Contract Change form [108] and these would have been a fixed rota.

81. The Claimant did not agree to the change in hours at that meeting and Mr New made the decision to dismiss the Claimant for failing to agree a change to her terms and conditions of employment. This was confirmed in a letter dated 9 November 2018 [178]. The claimant was informed of her right of appeal but did not do so.

82. She commenced employment with another nationwide retailer, The Range shortly after the termination of her employment.

Submissions

83. The Respondent's Counsel presented written submissions compromising 16 pages (69 paragraphs). The Tribunal will not attempt to summarise those submissions but incorporates them by reference. She supplemented her written with additional oral submissions, focussing on some of the case law she had submitted to the Tribunal contained in the written submissions.

84. The claimant's representative reminded us of the Claimant's long service and how she drove the FLT for the majority of her shifts. He asked to note hat the Respondent had what he termed 'cherry-picked' the elements of the Claimant's appraisals which talked of interaction with customers missing out references to the Claimant being warehouse-based.

85. He maintained that the Claimant was in the exact-same position as other Twilight workers and questioned why the Claimant would need training if she was already an experienced Customer Adviser and that she would not be asked to work the 5am shift when she was the most experienced FLT driver.

86. With regard to her discrimination claim, it was contended that she repeatedly asked her to work from 5am to 11pm and that discrimination arose as the Respondent was asking her to carry out a role that she could not as a result of her disability; that the Respondent was not requiring her to work fixed hours but flexible hours. He maintained that the Claimant was only one on the Twilight shift that was not offered redundancy and that she did not deal with customers. He reminded us that the Claimant was redundant, that she should have been offered redundancy and that if she had been offered it, at 61 years of age with health problems, she would have taken it.

Issues and Law

Unfair dismissal

87. With unfair dismissal, we first have to consider the reason for the dismissal and whether it was a potentially fair reason for the dismissal.

88. In this regard, the respondent bears the burden of proving on balance of probabilities, that the claimant was dismissed for one of the potentially fair reason set out in section 98(2) Employment Rights Act 1996 (ERA 1996). The respondent states that the claimant was dismissed by reason of some other substantial reason ("SOSR") which was a potentially fair reason for dismissal pursuant to section 98(2)(b) Employment Rights Act 1996 (the "Act")

89. To satisfy this stage, the employer needs only to establish an SOSR reason for the dismissal which could justify the dismissal of an employee holding the job in question: it is not necessary to show that it actually did justify the dismissal. Indeed, at this first stage, the tribunal must not consider the justification, reasonableness or fairness of dismissing for SOSR, since such an approach risks conflating the two distinct stages of the statutory test.

90. It is suggested by the Claimant that SOSR, for the reasons given by the Respondent was not the reason and, in fact, the Claimant's role had ceased or diminished such that her role was in reality redundant within the meaning of s.139 ERA 1996.

91. After considering the reason for dismissal, on the presumption that we identified a potentially fair reason for dismissal, we then have to consider whether the application of that reason in the dismissal for the Claimant in the circumstances was fair and reasonable in the circumstances (including the respondent's size and administrative resources). This should be determined in accordance with equity and the substantial merits of the case and the burden of proof in this regard is neutral.

92. For this second stage of the statutory test, the burden of proof is neutral, so the onus is neither on the employer to prove it was fair, nor on the employee to prove that it was not.

Discrimination – s.15 and s.20/21 Equality Act 2020

93. The correct approach for an employment tribunal to take to the burden of proof (s.139 Equality Act 2010) in discrimination claims entails a two-stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out to the tribunal's satisfaction (i.e. on the balance of probabilities) is the second stage engaged whereby the burden then 'shifts' to the respondent to prove, again on the balance of probabilities, that the treatment in question was 'in no sense whatsoever' on the protected ground.

94. Section 15(1) Equality Act 2010 provides as follows:

> *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*

95. Section 15(2) Equality Act 2010 goes on to state that s.15(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*.'

96. As for the correct approach when determining section 15 claims we referred to **Pnaiser** v **NHS England and others** UKEAT/0137/15/LA at paragraph 31. The relevant steps to follow are summarised as follows:

a. the tribunal must identify whether there was unfavourable treatment and by whom – no question of comparison arises;

b. the tribunal must determine the cause of the treatment, which involves examination of conscious or unconscious thought processes. There may be more than one reason but the "something" must have a significant or more than trivial influence so as to amount to an effective reason for the unfavourable treatment;

c. motive is irrelevant when considering the reason for treatment;

d. the tribunal must determine whether the reason is "something arising in consequence of disability"; the causal link between the something that causes unfavourable treatment and disability may include more than one link – a question of fact to be assessed robustly;

e. the more links in the chain between disability and the reason for treatment, the harder it is likely to be able to establish the requisite connection as a matter of fact;

f. this stage of the causation test involves objective questions and does not depend on thought processes of the alleged discriminator;

g. knowledge is required of the disability only, section 15 (2) does not extend to requirement of knowledge that the "something" leading to unfavourable treatment is a consequence of disability;

h. it does not matter precisely which order these questions are addressed. Depending on the facts the tribunal might ask why the respondent treated the claimant in an unfavourable way in order to answer the question whether it was because of "something arising consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to "something" that caused the unfavourable treatment.

97. When considering justification, the role of the Tribunal is to reach its own judgment, based on a critical evaluation, balancing the discriminatory effect of the act with the business/organisational needs of the Respondent

98. This states that the duty comprises three requirements and we were looking at the first requirement only which is a

'*requirement where a provision, criterion or practice 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'*

(s20(3) EqA 2010)

99. Guidance on the approach to be taken in reasonable adjustment claims has been given by the EAT in the **Environment Agency** v **Rowan** 2008 ICR 218 which has stated that an Employment Tribunal must consider

a. the PCP applied on behalf of the employer;
b. the identity if appropriate of a non-disabled comparator; and
c. the nature and effect of the substantial disadvantage suffered by it.

100. In **HM Prison Services** v **Johnson** 2007 IRLR 951 Mr Justice Underhill stated that it was necessary for a Tribunal to identify with some particularity what 'step' it is that the employer has said to have failed to take in relation to the employee.

101. The onus is on the claimant to identify in broad terms at least the nature of the adjustment or step that would ameliorate the disadvantage. The burden then shifts to the respondent to show the disadvantage would not have been eliminated or reduced for the proposed adjustment and/or that the adjustment was not a reasonable one.

Conclusions

Unfair Dismissal

Reason for dismissal

102. In applying our findings to the issues identified at the outset, we needed to initially consider the reason for dismissal and whether it was potentially a fair reason for dismissal.

103. The Respondent contended that it dismissed for some other substantial reason of a kind justifying the dismissal of the Claimant. In this case the Respondent submitted that the dismissal of the Claimant for her refusal to accept the proposed variation to her terms and conditions in order to change the timing of her shift pattern.

104. Whilst the Claimant asserted that the reason for her dismissal was redundancy, the Respondent had satisfied us that the reason or principal reason was the SOSR ground relied upon which is a potentially fair reason for dismissal.

105. This was supported by the evidence from both the Claimant and that of both the Respondent's witnesses that there was a programme of changing terms and conditions for certain categories of replenishment employees; namely those who worked less than 75% of their contracted hours when the store was shut during summer store hours.

106. Having found that the Claimant fell into that category of workers at the Culver store, and not the category of workers that worked only when the store was shut (or worked more than 75% of their contracted hours when the store was shut when operating summer opening hours,) the Respondent had not placed in her in a pool of workers to be consulted on redundancy but had placed her in the pool of workers to be consulted on changing terms.

107. The Respondent engaged in a series of consultation meetings with the Claimant on an individual basis and on a collective level with the National People's Forum and at each meeting, it was confirmed to the Claimant that the Respondent did not consider that she was redundant and she was asked to agree a change in hours.

108. We accepted that on the evidence there was a causal link between her refusal to accept the proposed change in hours and her dismissal. We were satisfied as a result that the Respondent had satisfied us that the principal ground for dismissal was not redundancy but the SOSR reason put forward, namely a refusal to accept a change to her hours of work.

109. We analysed our findings on the restructuring of the replenishment model and in relation to the Claimant's working hours and responsibilities and whilst we accepted that the Claimant had been driving the FLT for a considerable proportion of her working time, this was in her role as Customer Adviser and whilst carrying out replenishment duties. There was no evidence that the Respondent would not be carrying out replenishment duties after the changes, rather we concluded that there would simply be a shift in time spent undertaking the different replenishment duties such that:

a. That she would still be tasked with using the FLT and would be paid a premium for doing so albeit less hours per shift that previously worked.
b. The Claimant would be on the shop floor for more hours in each shift;
c. This would result in the Claimant having more interaction with customers; interaction that she had undertaken previously and for some years as evidenced in the appraisal documentation.

110. We concluded that other elements of her role, including store location, had not changed. Terms and conditions had not changed, only the hours or work, which were to be fixed weekly hours. She was not being asked to sign an entirely new contract only a Contract Change form which would reflect her agreed fixed rota.

111. We were satisfied that whilst the reorganisation, which had been done in the interests of efficiency, may very well have led the Respondent to dismiss some staff by reason of redundancy, it did not lead the Respondent to dismiss the Claimant by reason of redundancy. We concluded that the Claimant neither met the Respondent's criteria for being placed at risk, nor, in our view, the s.139 Employment Rights Act 1996 definition of redundancy.

112. Rather we concluded that the changes in the arrangements for carrying out replenishment of stock made by the Respondent, work did not constitute a change in the particular kind of work undertaken by the Claimant so as to trigger a redundancy situation.

113. In reaching this conclusion we focussed on the kind of work being carried out by the Claimant rather than her job title. We did not conclude that the Claimant would have been employed on a different job/kind of work after the change in terms and conditions (irrespective of title). We were satisfied that there was no change in the kind of work being carried out by the Claimant.

114. We accepted that there were changes to the nature of the replenishment process such as:

a. An increased contact with customers,
b. A reduced requirement to carry out the replenishment process using a FLT,
c. Greater working hours worked whilst Culver store was open.

115. We also accepted that such a change was unattractive and unpalatable to the Claimant. However we were satisfied that the Claimant did have some interaction with customers, both historically and more recently as reflected in her appraisals, and the change to a focus being more on the customer and being visible on the store floor whilst carrying out replenishment did not change the kind of work that the Claimant carried out.

116. We were not compelled to conclude however that there was a sufficient change to the nature and quality of the tasks or the way that they were being carried out that would convince us that the work that was going to be of a different kind.

Overall Fairness

117. In terms of overall fairness, we were satisfied that the Respondent had adopted overall a fair and reasonable process.

118. Mr Shepherd's evidence for the rationale for the change in the replenishment model satisfied us that the management of the Respondent considered that there was a 'sound, good business reason' for the change *(Hollister* v *National Farmers' Union* [1979] IRLR 238) and we reminded ourselves that 'sound business reasons' were not restricted to where the survival of the business was at stake (*Catamaran Cruisers v Williams [*1994] IRLR 386*).*

119. We considered the reasonableness of the change and of the dismissal. We took into account all the circumstances of the case in whether the Respondent acted reasonably in this case in treating their business reason as a sufficient reason to dismiss the Claimant and we concluded that it had for the following reasons:

a. The changes and the process adopted by the Respondent had been agreed with the National People's Forum;
b. There had been individual consultation with the Claimant;
c. We concluded that there had been fair and consistent application of their process and the number of staff that ultimately agreed to the changes was a relevant factor for us in the Respondent demonstrating fairness in their process

d. We did not consider that the proposed terms were worse than the existing terms;
e. The Claimant was warned throughout the consultation that dismissal was a potential outcome if she did not accept the changes;
f. She was provided with the right to be accompanied throughout the process.

120. We did not accept that the Claimant had been deprived of a right of appeal, rather that she chose not to avail herself of that right.

121. Whilst we understood that the Claimant had a strongly held belief that it was unfair not to dismiss her for redundancy, particularly when she was so keen to take a redundancy dismissal and when others had been given this opportunity, this did not impact on the fairness of the process having concluded that the Claimant's role was not in fact a redundant position.

122. Furthermore, and in any event, those she was comparing her position with, namely other replenishment workers at the Culver store all worked hours when the store was closed and had no interaction with customers. The fact that the Respondent chose to accept those as qualifying for a redundancy payment, did not render their refusal to accept the Claimant as qualifying for a redundancy payment, as an flawed part of the process or rendering the Claimant's dismissal unfair.

123. For those reasons we did not consider that the Claimant's unfair dismissal claim was well-founded and concluded that it should be dismissed.

S.15 Equality Act

124. It was accepted by the Respondent that the dismissal of the Claimant was unfavourable treatment of the Claimant.

125. However, turning to the question of whether the Claimant had proven facts from which the Tribunal could infer that discrimination has taken place, we first had to be satisfied that the Claimant had proven on balance of probabilities that she could not work specific hours in the period from 5am to 11pm.

126. There was no medical evidence before us to support her assertion that her disability prevented her from working a shift that started as early as 5am. Indeed, the OHA Report did not indicate any restrictions on the Claimant's ability to work. The Claimant had indicated that she was available from 5am to 11pm Monday to Friday in her availability matrix [107]. The Claimant had however indicated that she preferred to work nights and had:

a. Informed the respondent that 'Daytime' working would affect her health condition and leave her fatigued (Grievance letter of 15 October 2018 [120]; and
b. Informed Mr New on 7 November 2018 that she was unable to do an 'early shift'.

127. She did not inform Mr New that she could not work from noon. Rather she was not prepared to say if she could do a shift that commenced at 1pm.

128. We accepted the Claimant's evidence, given on cross-examination, and reflected at paragraph 24 of her written statement, that the first few hours of waking was difficult and that she '*wouldn't be able to work early morning shifts*', and we accepted that the claimant would not have been able to work shift patterns commencing at 5am, despite the lack of medical evidence. There was

no evidence that the Claimant would be prevented from working afternoons by reason of her disability.

129. We did not accept the Claimant's submissions that the Respondent would have asked the Claimant to work an early shift however. This was not a reasonable conclusion for the Claimant to have reached. The Claimant had always been employed on terms that required flexibility, yet the Respondent had not altered her shifts without agreement or without seeking the Claimant's agreement. Where they had sought to change hours, they had done so by way of lengthy consultation and it was not reasonable for the Claimant to conclude that they would, after any agreement to work fixed rota, oblige her to work an early shift. Rather the changes would not have required the Claimant to work before 1pm on any given day.

130. The Respondent had always operated an early 5am shift for replenishment that required use of the FLT. It did not follow that the changes in hours would increase the need to ask the Claimant as a qualified FLT driver to work such hours.

131. We concluded that the Claimant's disability did not prevent her from being able to work the changed shifts patterns of between 1pm and 10pm which were the changes being sought.

132. Further and in any event, we concluded that the Claimant was not dismissed because of her inability to work a shift pattern between 5am and 10 pm. Rather the Claimant was dismissed as she refused to agree a change in hours that would require her to work a shift pattern between 1pm and 10pm, a shift pattern that she was able to work and was not prevented from doing so by her disability.

133. The claim is therefore not well founded. The Claimant has not discharged the burden of demonstrating a prima facie case. The s.15 Equality Act 2010 claim fails and is dismissed.

Section 20/21 Equality Act 2010

134. Lack of knowledge is not in issue, as the Respondent concedes that it knew, or could reasonably have been expected to know that the Claimant was a person with a disability at all relevant times.

135. The provision criterion or practice ("PCP") relied upon, as formulated by EJ Moore at the case management hearing of 1 August 2019, was set out in her order of the same date as:

> 'A requirement to work a shift pattern between 5am and 10pm'

136. We do not conclude that the Respondent applied that PCP. There was no requirement for all workers to work a shift pattern between 5am and 10pm and this was not a PCP that was in fact applied to the Claimant. On that basis the claim would not succeed and would fail.

137. We accepted however the more specific PCP that had been proposed by the Respondent's Counsel, as being a requirement that its replenishment workers (who previously worked less than 75% of their contracted hours whilst the store was closed) agree to amend the hours of work so that their shifts could start no earlier than 5am and finish no later than 10pm, had been applied.

138. It had been applied in such a way however that had not disadvantaged the Claimant. Whilst the Claimant maintained that she could and would have been obligated to work from 5am, this contention was not borne out by the fact that the Respondent had not, in the years that she had been working for the Respondent, changed her shift patterns in such a way, Rather they had sought agreement with a resolution or, as in this instance, consulted with a view to reaching a resolution. It was unreasonable for the Claimant to be convinced that this would arise in the future. The Respondent had always had replenishment workers working a 5am shift and had not asked the Claimant to do so. There was no reason for her to assume that they would do so in the future and this concern was without foundation in our view.

139. As we concluded that the Claimant had not demonstrated that she was unable to work the fixed shift pattern that had been offered to her (from 4pm weekdays and from 1pm weekend) as a consequence of her disability, the more specific PCP did not place the Claimant at a significant disadvantage in comparison with other Twilight employees, and her claim under s.20/21 Equality 2010 is not well founded and is likewise, dismissed.

Employment Judge R Brace

Date: 9 November 2020

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON 12 November 2020

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FOR EMPLOYMENT TRIBUNALS