



THE EMPLOYMENT TRIBUNALS

Claimant: Miss J McDonald
Respondent: Tyneway Trading Limited
Heard at: Newcastle Hearing Centre
On: Monday 7th and Tuesday 8th December 2020
Before: Employment Judge Speker OBE DL
Members: Ms S Don
Mr KA Smith

Representation:

Claimant: In Person
Respondent: Jan Wright (Lay Representatives)

RESERVED JUDGMENT

The unanimous judgment of the tribunal is as follows:

1. The claimant was fairly dismissed. Her claim for unfair dismissal is dismissed.
2. The claimant was not disabled within the statutory definition of Section 6 of the Equality Act 2010. All of her claims of discrimination on the grounds of disability are dismissed.

REASONS

1. The claimant Joyce McDonald brought claims of unfair dismissal and unlawful disability discrimination. All claims were contested and the respondent denied that the claimant was disabled within the statutory definition.
2. The claimant was dismissed by letter on 4th March 2019 and the effective date of termination was 19th April 2018. It had therefore taken over eighteen months for the case to reach the final hearing on 7th and 8th December 2020.

3. There were three preliminary hearings. On 25th November 2019 a private preliminary hearing was held at North Shields before Employment Judge Johnson. Mrs Reynolds, managing director of the respondent, attended but the claimant did not attend and was not represented. The case was discussed and various directions were made including that the claimant should provide a schedule of loss and a disability impact statement. The claimant was also ordered to provide further information as to her allegations of unfair dismissal and unlawful disability discrimination as no details with reference to the various potential types of discrimination had been set out.
4. Further information was provided by the claimant as well as details of her suggested disability. On 20th May 2020 a further preliminary hearing was held before Employment Judge Aspden and it was attended by the claimant. Mrs Reynolds attended with her lay representative. An unless order was made against the claimant regarding her non-compliance with the orders made on 25 November 2019 that she provide a detailed schedule of loss, a written statement as to her disability and information as to her allegations. It was noted that the claimant had not complied with the earlier directions made by Employment Judge Johnson. The claimant stated at this preliminary hearing that she believed that the respondent had “used my disability to get rid of me” and that “there was a job for me until 31st March 2019”. The claimant was given guidance with regard to what was required of her and the directions made by Employment Judge Johnson were again set out.
5. On Tuesday 6th October 2020 there was a third preliminary hearing. This was a telephone private preliminary hearing conducted by Employment Judge Martin. The claimant participated in person as did Mrs Reynolds. There were issues to be resolved with regard to requests by the claimant for various documents. Although some had been provided by the respondent, there were difficulties with others because the business had closed down and the computers were not all available. It was noted that the case had been listed for a two-day hearing on 7th and 8th December. The claimant said that she had poor internet connection and therefore the hearing by the Cloud Video Platform may be difficult for her. In the event the case was listed for an in-person hearing. Employment Judge Martin recorded the issues in detail namely unfair dismissal and disability discrimination under Sections 13, 19, 20/21, 15 and 26 Equality Act 2010 as well as the issue of whether the claimant was a disabled person. These issues are set out in full below. There was correspondence with the parties as to whether these were in fact agreed issues and the respondent did not accept the wording of these in full disputing, as Jan Wright did at the hearing, that the content in 7.1, 7.4, 8.1, 8.3 and 9.2 were not agreed as being part of the issues in the sense that the respondent did not accept what was in fact the claimant’s case. Directions were made as to a joint bundle of documents and witness statements.
6. The case was heard in detail by an in-person hearing on Monday 7th and Tuesday 8th December. The claimant gave evidence herself. She was accompanied by her two sons but not represented by them. Mrs Jackie Reynolds, managing director of the respondent, gave evidence and was represented by Jan Wright. The tribunal was provided with written statements from those who gave evidence and there was a bundle of documents running to over 200 pages.

The issues

7. The issues as defined by Employment Judge Martin and accepted by the tribunal as the relevant issues in the case were as follows:

Unfair dismissal

- 7.1 What was the reason for the claimant's dismissal? The respondent asserts that it was by reason of redundancy. They say that their business closed down and that everyone was made redundant. The claimant does not dispute that but says that she was dismissed early for another reason relating to her disability.
- 7.2 Did the respondent warn and consult the claimant about the redundancy; did they apply fair selection criteria and consider alternative employment up to the date that the business closed?
- 7.3 Did the respondent follow a fair procedure and was dismissal a reasonable response in the circumstances of the case?
- 7.4 Would the claimant have been fairly dismissed in any event if a fair procedure had been followed and, if so, when?

Disability discrimination

- 7.6 Is the claimant a disabled person as defined under Section 6 of the Equality Act 2010? The impairment upon which the claimant relies is Reynaud's Disease.
- 7.7 The respondent disputes disability. They do not deny that the claimant suffers from Reynaud's Disease, but dispute that it has a substantial adverse effect on her ability to undertake normal day to day activities.

Section 13 Direct discrimination because of disability

- 7.8 Did the respondent treat the claimant less favourably? The less favourable treatment relied upon by the claimant is that she alleges she was made redundant earlier than other employees.
- 7.9 Did the respondent treat the claimant less favourably as alleged than it treated or would have treated other comparators? The comparators relied upon by the claimant are George the cutter; Alan in the warehouse; Robbie who works on the internet; Susan who works in the office and a number of independent workers being Lynn who owned Apollo; Linda who owned Dancewear and Jean who owned Sportswear.
- 7.10 Can the respondent prove primary facts from which the employment tribunal could properly and fairly conclude that the difference in the treatment was because of her disability?

- 7.11 If so, what is the respondent's explanation? Can it prove non-discriminatory reason for any proven treatment?

Section 19 Indirect discrimination in relation to disability

- 7.12 Did the respondent apply a provision, criterion and/or practice (PCP)? The PCP relied upon by the claimant is the requirement to work in the warehouse to undertake all tasks including lifting heavy materials during the period when the business was closing down.
- 7.13 Does the application of that PCP put disabled people at a particular disadvantage when compared to other persons who are not disabled?
- 7.14 Did the application of the PCP put the claimant at that disadvantage and if so how?
- 7.15 Can the respondent show that the treatment was a proportionate means of achieving a legitimate aim? The aim which the respondent relies upon is the requirement for all the duties in the warehouse to be undertaken and not be limited to only lighter duties.

Sections 20/21 Equality Act 2010: failure to make reasonable adjustments

- 7.16 Did the respondent apply the provision, criterion or practice (PCP)? The PCP relied upon is the requirement to work in the warehouse to undertake all the duties including lifting heavy materials during the period that the business was closing down.
- 7.17 Did the application of that PCP put the claimant at a substantial disadvantage in comparison to persons who are not disabled?
- 7.18 Did the respondent take such steps as were reasonable to avoid the disadvantage? The claimant says that the respondent should have requested her not to do the full duties in the warehouse and limit it for her to undertake just the lighter duties.
- 7.19 Did the respondent not know or could the respondent not be reasonably be expected to know that the claimant had a disability or was likely to be placed at a disadvantage?

Section 15 Equality Act 2010: discrimination arising from disability

- 7.20 Was the claimant treated unfavourably? The unfavourable treatment relied upon is her early dismissal for redundancy. She accepts that all the other employees were ultimately made redundant.
- 7.21 Did the respondent treat the claimant unfavourably because of something arising in consequence of her disability? The "something arising" in consequence of her disability was her inability to be flexible in other roles in the organisation; including doing George's job in cutting and working in the

warehouse. The claimant says the “something arising” was her inability in cutting materials to undertake George’s work and lift heavy materials in the warehouse because of her disability.

- 7.22 Can the respondent show that the treatment was a proportionate means of achieving a legitimate aim? The respondent said that there was a need to continue the business up to the point of closure but with limited resources.
- 7.23 Can the respondent show that it did not know or could not reasonably have been expected to know that the claimant had a disability?

Section 26 Equality Act 2010: harassment related to disability

- 7.24 Did the respondent engage in unwanted conduct? The unwanted conduct relates to an incident on 12th February 2019 when the claimant alleges that the respondent swore, shouted at her and threw a bag of clothing at her.
- 7.25 Did that conduct relate to the claimant’s disability?
- 7.26 Did the conduct have the purpose or effect of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
- 7.27 In considering whether the conduct had that effect the tribunal will take into account the claimant’s perception, the other circumstances of the case and whether it was reasonable for the conduct to have had that effect.
- 7.28 Was the claim for harassment presented in time? If not, is it part of a continuing course of conduct act and/or is it just and equitable to extend time?

The facts

- 8. The tribunal found the following facts:
 - 8.1 The respondent, Tyneway Trading Limited, was established in 1986 and was in the business of design, manufacture, wholesaling, delivering and retailing alternative clothing under the brand name “Phaze”. This was niche clothing particularly for youth cults described as mods, rockers and punks. The company had grown steadily and had substantial business in the UK and abroad, particularly in Europe. Sales to Europe had accounted for 65% of the business, much of which gained from attendance at trade shows. These had regularly taken place in October and February each year.
 - 8.2 The company also traded through the internet. There were concerns as to the future of the business as soon as the decision had been made by the UK to leave the European Union and the respondent did have concerns as to the impact upon the business. There were other threats to the turnover including changes in styles. The company did diversify into accessories, jewellery and hair colouring and also invested in computer systems to cope

with increased internet shopping but despite all of these efforts the business was declining. There was also significant competition from cheap retailers and from large internet suppliers.

- 8.3 The company operated from premises in Gosforth consisting of offices and a warehouse. Designs were undertaken within the company and samples of new garments were produced, the majority of this being concentrated on the lead-up to the trade shows. The bulk of the make-up of the orders in the past had been done through factories in Pakistan and China although very much less so in the later years. The vast majority of the manufacture was done by what was referred to as the “factories” which were three external operators engaging home sewing operatives. Orders would be sent out to these by the factories and sent back to the respondent already packaged to be stored in the warehouse and despatched pursuant to orders.
- 8.4 The claimant had been employed by the respondent as a machinist at an earlier time but had left the company to work elsewhere for a period of three years and then had re-joined as an employee from 18th July 2011. In her contract of employment she was described as sample machinist and at her re-commencement she had not been the only person undertaking that work. However, it was accepted that this was her main occupation although her contract stated that she had other duties including all aspects of the sewing room, making up documents, packing, printing labels, costing sheets, specification sheets and keeping the sewing room tidy. During times when samples were not required to be prepared and made up, the claimant would work on other existing patterns sewing orders as necessary.
- 8.5 The claimant worked in a small room by herself during the latter part of her employment which was an arrangement which she favoured. Mrs Reynolds would call in to see her at least once a day to discuss work or exchange pleasantries. When the claimant had recommenced her employment with the respondent in 2011 there was a conversation between her and Mrs Reynolds which the claimant referred to as “the promise”. This related to the fact that Mrs Reynolds did value loyalty and the claimant’s abilities and the essence of the conversation was that she hoped that the claimant would remain with the company “until the end” and would not see the need to leave again to work elsewhere. The claimant took this to mean that she would be there “until the end” that is until either she retired or the respondent ceased carrying on the business.
- 8.6 The respondent company had a small number of employees and the length of service indicated that there was some considerable loyalty. By the time of the claimant’s dismissal there were four other employees. Susan dealt with administration, invoicing and wages and had been with the company for seventeen years. George whose duties were mainly cutting out of fabric in accordance with plans had been with the company for fifteen years. Robbie was responsible for the internet sales in the company and had been with the company for twenty-five years. Alan dealt with other duties in relation to orders, the warehouse and carrying heavy rolls of fabric and had been with the company for thirty-five years. By the time of her termination, the claimant

had been with the company for seven years which is still service of substance but it was acknowledged that all of the employees were long-term. It was said that Robbie and Alan had spent their whole working lives as employees with the respondent.

- 8.7 During late 2018 Mrs Reynolds was conscious of the fact that the business had made a loss in the year 2017/18 and was already giving consideration to whether the business would have to close and all employees were to be made redundant. She deferred a decision on this until the London Edge trade show which, instead of being in February had been brought forward to January 2019. One of the purposes was to try to assess the impact of Brexit upon the business and in any event Mrs Reynolds did not wish to consider giving the staff notice of redundancy before Christmas.
- 8.8 Mrs Reynolds attended the London Edge on 27th and 28th January, for only two days rather than the usual three. It was made clear that European customers were concerned about Brexit, the leaving date having been given at that time as 29th March 2019 and requests from customers that orders be delivered before that date. The claimant had been off sick from 3rd to 27th January because she had slipped on a dog toy and hurt her back although her sick note referred to “viral upper respiratory tract infection”.
- 8.9 Mrs Reynolds was at work from 4th to 7th February and acknowledged that sometime during those days, the claimant had shown her a letter from a doctor which made reference to Reynaud’s Disease. She had not kept a copy of that and there was no detailed conversation as to whether this affected the claimant with regard to her work. The claimant made no request for any adjustments. The exchange began when the claimant began to tell Mrs Reynolds that she would no longer be able or willing to carry out the cutting of fabric for work to be undertaken by George. Mrs Reynolds stated that this was at the end of a very trying day. She had considerable worries about the business and she was very unwell and had only come into work because of urgent things that needed to be done at that time. She became upset at the claimant giving her these problems at the end of the day and harsh words were exchanged on both sides including Mrs Reynolds swearing and using bad language. She also picked up half a bag of material and cast this towards the claimant. The claimant said that this had struck her in the stomach although Mrs Reynolds disputed this. The claimant was very upset by the incident and went home to tell her family about it. Such was their concern that they suggested that the claimant should record the next meeting with Mrs Reynolds.
- 8.10 At a meeting the next day, 13th February, the claimant made a covert recording using her mobile telephone and from the transcript it was clear that Mrs Reynolds apologised profusely with regard to what occurred. There was not agreement with regard to the precise words used but Mrs Reynolds apologised that she should not have spoken to the claimant as she did and there was certainly no evidence that there had ever been any such altercation between them in the past. It appeared that the air was cleared during this conversation. Nothing further was said about the claimant’s

request that she should no longer undertake cutting of George's work and from the evidence that requirement of her stopped and she no longer had to cut work other than for her own tasks.

- 8.11 With regard to the atmosphere in the workhouse the claimant suggested that the atmosphere was very bad. However the examples which she gave were not evidenced and in many cases went back several years including an incident when she said that Susan had addressed foul language to her when she had not co-operated when the workforce were attending the funeral of a work colleague and the claimant had not got into the car. Mrs Reynolds heard about this altercation later but did not take any action about it. The claimant said that her relations with Susan were poor and that she felt excluded from events like Christmas parties but admitted that on the last Christmas party in 2018 she had in fact participated. There was no other evidence as to the alleged bad atmosphere.
- 8.12 The respondent's concerns about the future of the business continued and on 27th February 2019 Mrs Reynolds had a consultation with all of the employees to tell them that she feared that the business would have to close and was asking whether there were any suggestions for alternative measures which could be taken to improve the business or to save the company. Nothing substantial was put forward.
- 8.13 Individual meetings were held. There was a meeting with the claimant on 4th March when she was told that it had been decided that she was to be made redundant. A letter of dismissal confirmed that dismissal would be from that day and that the final day of work would be 19th April 2018. The claimant was given her statutory seven weeks notice and was told that she would be receiving her redundancy payment. At the time of the conversation was expected that the claimant would work her notice. George was also dismissed at this time although his letter also dated 4th March was not given until the next day. He was entitled to twelve weeks notice as he had worked fifteen years and his final day was to be 24th May 2018.
- 8.14 Although the claimant prided herself in always working her notice, over the weekend after 4th March she was admitted to hospital and underwent an operation. Although she initially had said she was intending to come back to work on the Monday she was in fact off on the sick for the whole of her seven weeks of notice. On 6th April 2019 the claimant sent a handwritten letter to the respondent expressing her regret that she had not been able to work her notice explaining that she was on various medication. She expressed the wish that she could have her redundancy cheque as soon as it was due and that she could have her notice. She expressed thanks to Mrs Reynolds and asked for a reference. She expressed her thanks several times in the letter and it was written in very favourable terms towards Mrs Reynolds and towards the other staff. Individual meetings were held with Susan, Alan and Robbie and they were each given letters on 28th April 2019, the final day of employment being 26th July 2018. Each of them was entitled to twelve weeks notice.

- 8.15 In the latter months the business was concentrating on disposing of existing stock and was not producing new goods. If some extra pieces were required to make up orders this work was sent out to the factories/the home sewers.
- 8.16 The claimant issued her application to the tribunal on 12th September 2019. Mrs Reynolds had had no prior notification of an intention to make a claim, other than the call from ACAS, indicating that the claimant was proposing to make a claim or to make an allegation with regard to disability discrimination. During her employment the claimant had not lodged any grievance about alleged discrimination or otherwise.

Submissions

9. On behalf of the respondent it was submitted that the reason for dismissal was clearly redundancy. This was necessary because the company was to close down. It was logical to dismiss the claimant and George first because their primary role was related to samples and this activity was stopping because of the intention to close the business down. This had been obvious from the date of the last trade fair. Therefore, Jan Wright submitted that there was proper consultation and that it was reasonable for the respondent to dismiss the claimant when she did as with George and to retain the other employees for the period thereafter. The claimant's suggestion that she was not being kept 'until the end' was not valid because effectively this was the end as the business was closing down. It was reasonable to keep on using the factories to keep making any clothing which was necessary.
10. As to discrimination it was submitted that the claimant was not disabled within the statutory definition. She prided herself on being a very fast machinist and continued to do that throughout and this was continuing in her new job. There was no evidence submitted as to the Reynaud's Disease or its effect on Hetherington claimant's ability to do day to day activities but the claimant's evidence indicated that she was not hampered with regard to day to day activities.
11. As to the incident on 12th May Mrs Reynolds had explained how this had come about and had apologised but it was not apparent that the claimant bore a grievance following that conversation as the air had been cleared. It was notable that following dismissal the claimant wrote a very friendly letter to Mrs Reynolds. It was not accepted that the respondent had in any event discriminated against the claimant in any way. Mrs Reynolds and the claimant had a good relationship. Mrs Reynolds was obviously heartbroken at the closure of the business and the need to make anyone redundant.
12. On her own behalf the claimant stressed that in in her opinion the dismissal was revenge for the incident which had occurred on 12th February and that this was discrimination. She felt that the incident may have been all over after 12th February but she argued that her dismissal was because of that incident. She claimed that she had not been told that there would be no more sample work. She felt in any event that she should not be described as a sample machinist as she undertook all of the other duties and these were continuing after the date when she was dismissed. She argued that she was discriminated against in several respects, a) being made redundant, b) not being considered for the other duties which she was

capable of performing, c) being asked for a fit note when she had never been asked for this before, d) not having a risk assessment with regard to other absences.

13. She stated that she complied with everything that was said to her by Mrs Reynolds at the redundancy meeting because she was afraid that if she did not do so then she would face delays in getting her redundancy payment and might not then receive a reference. She felt that what was being done to her was wrong but she was not in a position to challenge it. She referred to the behaviour by Mrs Reynolds and felt that there was no excuse for the way in which she had acted and that she should not have sworn at her or thrown the bag of cloth at her causing her to be afraid.

14 She felt that the reference to Brexit was not relevant as other businesses had to deal with this. She explained that she did not put in any grievance because she hoped that everything would be resolved and she suggested that the handwritten letter was in those terms to protect her position with regard to redundancy payment and her reference.

15 As to her Reynaud's she specifically stated in her submissions to the Tribunal "I have never said my Reynaud's affected my day to day life as I learned to cope". She said that there were things she could not do such as opening a bottle but her two sons helped her with that.

16 As to why she had not gone to Mrs Reynolds to ask for adjustments to be made she repeatedly made the point that she felt it was for Mrs Reynolds to come to her and that Mrs Reynolds should have been aware of the difficulties and asked about them. She referred to the fact that she had applied for a personal independent payment (PIP) and that this had been refused although she conceded that she had not provided any documentary evidence and no medical report and she had not appealed against the refusal.

17 She summarised the position by saying that she had a promise from Mrs Reynolds that she should be kept until the end and her early dismissal compared with the other employees was not justified. It was incumbent upon Mrs Reynolds to stop using the factories when she, the claimant, was capable of carrying out all of that work. She said that she loved sewing and wanted to get back on to machine work which was why when she left the respondent she went to work for Vertu booking in car sales and subsequently took a job with Clothing for Work which she enjoyed and was still treated as the fastest machinist.

18 The law

Employment Rights Act 1996

Section 98

- (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)--

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
- (b) shall be determined in accordance with equity and the substantial merits of the case.

Equality Act 2010

Section 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.

Section 13 Direct discrimination

- (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.
- (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

- (3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.
- (4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.
- (5) If the protected characteristic is race, less favourable treatment includes segregating B from others.
- (6) If the protected characteristic is sex--
 - (a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;
 - (b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.
- (7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).
- (8) This section is subject to sections 17(6) and 18(7).

Section 19 Indirect discrimination

- (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
- (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if--
 - (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
 - (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
 - (c) it puts, or would put, B at that disadvantage, and
 - (d) A cannot show it to be a proportionate means of achieving a legitimate aim.
- (3) The relevant protected characteristics are--
 - age;
 - disability;
 - gender reassignment;

marriage and civil partnership;
race;
religion or belief;
sex;
sexual orientation.

Section 20 Duty to make adjustments

- (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
- (2) The duty comprises the following three requirements.
- (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
- (4) The second requirement is a requirement, where a physical feature 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.
- (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.
- (6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.
- (7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.
- (8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.
- (9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to--
 - (a) removing the physical feature in question,
 - (b) altering it, or

- (c) providing a reasonable means of avoiding it.
- (10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to--
- (a) a feature arising from the design or construction of a building,
 - (b) a feature of an approach to, exit from or access to a building,
 - (c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or
 - (d) any other physical element or quality.
- (11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.
- (12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.
- (13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

Part of this Act	Applicable Schedule
Part 3 (services and public functions)	Schedule 2
Part 4 (premises)	Schedule 4
Part 5 (work)	Schedule 8
Part 6 (education)	Schedule 13
Part 7 (associations)	Schedule 15
Each of the Parts mentioned above	Schedule 21

Section 21 Failure to comply with duty

- (1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
- (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
- (3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

Section 15 Discrimination arising from disability

- (1) A person (A) discriminates against a disabled person (B) if--

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

Section 26 Harassment

- (1) A person (A) harasses another (B) if--
- (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) the conduct has the purpose or effect of--
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (2) A also harasses B if--
- (a) A engages in unwanted conduct of a sexual nature, and
 - (b) the conduct has the purpose or effect referred to in subsection (1)(b).
- (3) A also harasses B if--
- (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
 - (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
 - (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account--
- (a) the perception of B;
 - (b) the other circumstances of the case;
 - (c) whether it is reasonable for the conduct to have that effect.

- (5) The relevant protected characteristics are--
- age;
 - disability;
 - gender reassignment;
 - race;
 - religion or belief;
 - sex;
 - sexual orientation.

Findings

Unfair dismissal

19. Under Section 98(1) of the Employment Rights Act in determining whether dismissal of an employee is fair or unfair it is for the employer to show (a) the reason (or if more than one the principal reason) for the dismissal and (b) that it is either a reason falling within subsection 2 or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
20. Of the permissible reasons under Section 98(2) the tribunal finds that the reason for the dismissal of the claimant was redundancy. Although the claimant challenged the timing of the redundancy, she did not seek to suggest that there was any other reason for her employment being brought to an end. There was clear evidence that the respondent's business was closing down and everyone employed in it would need to be made redundant.
21. As to the process adopted by the respondent, the tribunal finds that there was adequate warning by the respondent as soon as it became clear that redundancies would have to be made. As to the selection, this only applied in relation to the timing of who was to be made redundant first. The tribunal finds that it was entirely reasonable in the interests of the business to dismiss the claimant and George before the other employees, as those other employees had duties and abilities which were going to continue for weeks or a few months as the business wound down. Although it is correct that the claimant could have undertaken some of the sewing work which continued such as making up missing sizes in orders, it was reasonable for the respondent to have that work done by the factories as they would have to be paid only for jobs undertaken on a piecework basis. The business was losing money. A description was given that the company was producing in a month what it had normally done in a week. It was a proper and reasonable decision to make to cut down the fixed costs namely salaries. To dismiss the claimant and George when they were dismissed was appropriate. Insofar as this was a selection, then the tribunal considers that it was fair. There was no scope for the respondent to look for other employment for the claimant at that time.
22. As to the question of the promise that the claimant would be kept to the end, the tribunal finds on a fair assessment of the evidence that the claimant was in fact

“kept to the end”. The fact that the others, namely Susan, Robbie and Alan, remained in employment for slightly longer for a limited period was to meet the reasonable needs to the business.

23. It had been put to the claimant that for all of the employees to end at the same time would effectively mean that they would all have had to be given what amounted to twelve weeks notice. Susan, Robbie and Alan were entitled to twelve weeks notice because of their significantly long length of service. It would not be realistic to suggest that all employees should have, as she was claiming, the same length of service.
24. Specifically the tribunal did not find that the decision to dismiss the claimant when she was dismissed related at all to the incident on 12th February. That was something that was regrettable but had been resolved and was not the reason for deciding to end the claimant’s employment when it was ended.
25. Under Section 98(4) of the Employment Rights Act the tribunal considered the statutory test. It took into account the case of Iceland Frozen Foods Limited v Jones 1982 IRLR439 as to our approach
 - (i) the starting point should always be the words of Section 98 themselves;
 - (ii) in applying Section 98(4) an employment tribunal must consider the reasonableness of the employer’s conduct and not simply whether they, the members of the employment tribunal, consider the dismissal to be fair;
 - (iii) in judging the reasonableness of the employer’s conduct an employment tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer;
 - (iv) in many (though not all) cases there is a band of reasonable responses to the employee within which one employer reasonably take one view another quite reasonably takes another;
 - (v) the function of the employment tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair. These principles were also supported in the case of HSBC Plc (formerly Midland Bank Plc) v Madden 2000 IRLR827CA.
26. The tribunal has not substituted its own view but finds unanimously that for the respondent in this case to have made the decision it did was a decision which a reasonable employer could make and it falls within the band of reasonable responses. Accordingly, under the statutory test the dismissal of the claimant when she was dismissed was within the band of reasonable responses and was fair. this applied to the decision as to the time of the claimant’s dismissal. Accordingly, the claimant was fairly dismissed and her claim of unfair dismissal is dismissed.

Disability discrimination

27. The first issue for us to address in relation to this was whether the claimant was a disabled person as defined under Section 6 of the Equality Act 2010. The impairment of upon which she relied was Reynaud's Disease. The respondent disputed this as being a disability.
28. This was a case where very little was provided to us by way of medical evidence. There were a large number of fit notes produced but mainly these related to other medical conditions which adversely affected the claimant. This included Sclerosis, ulceration on her fingers, nerve tests and Angina. She had been referred to Doctor Vesaravanan, consultant rheumatologist, at Queen Elizabeth Hospital Gateshead. He had referred to Reynaud's Disease in a letter shown to the claimant and the tribunal. There was no detail with regard to the condition or the extent to which it caused the claimant any problems. The medical letter seen related to other issues that she had with regard to a cocktail of medication which she was taking. There was evidence to the effect that there were recommendations as to how she could control the symptoms of Reynaud's Disease.
29. The tribunal accepted on such evidence as was produced that the claimant suffered from Reynaud's Disease. This can be a condition which renders a person disabled within the meaning of the 2010 Act but it does not automatically do so. It is not a condition by which a sufferer can claim automatically to be within the meaning of the statutory definition. Accordingly it was for us to consider whether in her case it met the definition. Certainly it is a medical impairment but to meet the definition in Section 6 it must have a substantial and long-term adverse effect on the claimant's ability to carry out normal day to day activities. In considering this the tribunal observed that on many occasions the claimant was proud to say that she was the fastest and most effective of the machinists employed by the respondent and that even in her new job she is treated as the fastest machinist. Going through her normal day to day activities she mentioned only some slight difficulty in dealing with fastenings or opening of a bottle but in all other respects she was able to deal with day to day activities. This included tasks at work, being a fast and effective machinist and cutting out patterns for samples. She also said that she was able to undertake all of the other duties which might be available for her in the factory other than handling very heavy rolls of fabric. In her home circumstances she was independent and able to deal with cooking and any housework tasks and made reference on a couple of occasions to the fact that one of her hobbies was getting up early and doing puzzles using her iPad. There was no evidence from any hospital or her GP practice. Significantly she had made an application for PIP which had been refused but she did not produce details of this explaining the grounds of the refusal and she did not appeal against that refusal. The tribunal was only able to note this but it was one extra factor in our determination as to whether she was a person who suffered substantial adverse effect in her ability to undertake normal day to day activities but we unanimously found that she did not suffer any such substantial effect and on that basis she is not a person who is disabled within the meaning of the Equality Act.
30. In view of this finding, it is not necessary or appropriate to deal with her specific claims with regard to disability. However, as we spent a considerable amount of

time hearing evidence related to those, it may be helpful to the claimant if we indicate our conclusions with regard to it. We did not find that she had been treated less favourably because of her Reynaud's Disease in any way. When she did make one request as to not undertaking what she regarded as heavier cutting for George's work this was immediately complied with. There was no other evidence that she was treated less favourably in relation to other employees because of the fact that she had Reynaud's Disease.

31. With regard to the suggestion that the respondent indirectly discriminated against her by having a PCP as to heavy work, the tribunal did not find any evidence with regard to this. She was not placed at any particular disadvantage with regard to lifting heavy materials in the warehouse.
32. As to the claim that there was a failure by the respondent to make reasonable adjustments the tribunal found no basis for this claim at all. It was significant that at no stage apart from the February incident did the claimant make any suggestion that she required adjustments of any type to be made for her. We also found that Mrs Reynolds would have been very willing to take steps to accommodate the claimant if it had been made known to her that this was necessary.
33. As to the claim of discrimination arising from disability, the claimant suggested that her inability to cut George's work and lift heavy materials led to her being treated unfavourably but the tribunal found no evidence of any unfavourable treatment resulting from those factors. Insofar as there was unfavourable treatment in her termination date being earlier than that of three of the other employees, we did not find that this was attributable to the something arising out of disability or in any way related to it.
34. Finally with regard to the claim of harassment, the tribunal did find that the behaviour of Mrs Reynolds at the time of the incident on 12th February was unfortunate. The language used was unacceptable and more care should have been taken about the way in which Mrs Reynolds passed the bag of material to the claimant telling her that if she wanted work then here was some work to be done. That was certainly unwanted conduct and may have fitted into the statutory definition of harassment under Section 26. However, we unanimously find that this conduct did not relate to the claimant's alleged disability and accordingly the claim was not made out.
35. For all of the above reasons we find that the claims of disability discrimination cannot be upheld because there is no jurisdiction bearing in mind that the claimant is not disabled in the meaning of Section 6 of the Equality Act.
36. In conclusion we express the view that this was certainly an unfortunate situation. The claimant was certainly a very hard working and effective machinist who was valued by the respondent for her loyalty and her commitment. We also find that Mrs Reynolds was a caring employer and did everything that she could to keep the company going and protect the employment of her staff. The steps that Mrs Reynolds took were for legitimate business reasons and it appeared that Miss McDonald did not fully accept or appreciate that the needs of the business required steps to be taken to meet orders and deal with the wind-down of the business in an

effective, responsible and as far as possible affordable manner. Mrs Reynolds did want to keep the claimant until the end of the company and in any meaningful sense this is what was achieved.

Authorised by EMPLOYMENT JUDGE SPEKER OBE DL

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON 18 December 2020**

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