



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4100913/2020 (V)**

5

**Held by CVP on 24, 25, 26 August 2020 and 12 and 13 January 2021**

10

**Employment Judge I McFatridge  
Tribunal Member Mr Taggart  
Tribunal Member Mr Doherty**

15

**Miss C I Patterson**

**Claimant  
Represented by  
Mr Cox -  
Solicitor**

20

**Iceland Foods Limited**

**Respondent  
Represented by  
Ms Eeley - Counsel  
[Instructed by Messrs  
Hill Dickinson -  
Solicitors]**

25

### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The unanimous judgment of the Tribunal is that the claimant was not unlawfully discriminated against by the respondent. The claim is dismissed.

### **REASONS**

30

35

1. The claimant submitted a claim to the Tribunal in which she claimed that she had been unlawfully discriminated against by the respondent on grounds of disability. The respondent denied the claim. The claim was subject to a degree of case management. Following the production of medical information by the claimant the respondent accepted that the claimant was disabled at the relevant time. The claimant's representative provided further and better particulars of the claim in response to a request from the respondent dated 31 March 2020. In these particulars the claimant's representative confirmed that the sole claim being made was a claim of discrimination arising from disability in terms of section 15 of the Equality Act 2020. The hearing took place over CVP. It was originally set

down for three days however unfortunately the evidence had not been completed by the end of the third day. The case was then set down for a further two days in January 2021. During the hearing the claimant gave evidence on her own behalf. Evidence was then led on behalf of the respondent from David McMahon who was the Store Manager of the store at which the claimant had worked, Kirsty Louise Wood a Store Manager at the respondent's Grangemouth store who had carried out an investigation into the claimant's conduct and Derek O'Brien an Area Manager with the respondent who had dealt with a grievance lodged by the claimant. A joint bundle of productions was lodged in both paper and electronic format. I refer to the documents below by page number. For the avoidance of doubt, I was using the paper version of the bundle and the page numbering reflects this. On the basis of the evidence and the productions the Tribunal found the following essential facts to be proved or agreed.

#### 15 **Findings in fact**

2. The respondents are a substantial company which operates supermarkets throughout the UK with an emphasis on the sale of frozen foods including prepared meals and vegetables. The claimant commenced employment with the respondent on 29 August 2015 as a part-time Sales Assistant at the respondent's Denny store. The claimant's contract of employment initially required a minimum of 7.5 hours per week with additional hours as required from time to time. The claimant worked flexible hours. On 20 October 2018 the claimant accepted a variation to her contract where she would work a minimum of 16 hours per week effective from 21 October 2018. The claimant's contract of employment was lodged (pages 31-36). The section headed Job Title on page 31 states:

30 *"You are employed as Sales Assistant (PT) which is a grade A role. The nature of our business requires flexibility in its operations and we reserve the right to amend your role from time to time on a temporary or permanent basis."*

The section headed Hours of Work on page 32 stated:

*"Your normal hours of work will be a minimum of 7.5 hours per week (excluding breaks) with additional hours as required from time to time*

*for the efficient performance of your duties. Your working times will be as notified by your manager from time to time. Given the business need for flexibility, your working times (including start and finish time) may from time to time be changed on a temporary or permanent basis. However, we will seek to agree any changes with you and give reasonable notice of any change. The working week is Sunday to Saturday and you may be required to work any five days including Sunday in any working week.”*

3. The claimant signed a variation to this contract on 20 October 2018. The variation notice was lodged (page 37). The respondent confirmed the increase of her minimum contracted hours to 16 hours per week in a letter dated 16 November 2018 which was lodged (page 38).
4. During the period the claimant was employed with the respondent she was also a full time student undertaking, first, a degree course at Strathclyde University and thereafter a course in primary school teaching. By the time of the hearing the claimant was employed as a first year probationer primary school teacher.
5. From around 2014 the claimant began to experience swelling and tenderness of her joints as well as other symptoms. In 2016 she was referred to a Consultant Physician in Rheumatology and was diagnosed as suffering from Psoriatic Arthritis. The claimant's arthritis mainly affects her hands, feet and knees. Sometimes she is okay but other times she can get a flare-up. Flare-ups can be caused by stress or by things like the weather. She also sometimes struggles to move first thing in the morning. Her legs can simply seize up at times. She requires to take tablets every day to ease the pain in her joints. The tablets can make her sick and on occasions she finds herself being sick three to five times a day as a result of the medication she is on. Whilst the symptoms fluctuate the claimant considers that her condition is becoming progressively worse as time passes. At various times, the claimant required to attend hospital appointments. On occasions she would require to ask the respondent for time off for these appointments. The claimant's understanding was that her managers were aware of her condition and the difficulties which she sometimes had. The respondent has an information management system

called Nexus which is used to track and retain employee information. It is effectively an online personnel file. Individual employees have access to the Nexus system. The Nexus system shows them the shifts which they are rota'd to work on. It also provides copies of pay slips and access to company documentation including various employment policies. The respondent have a Dignity at Work Policy, an Equal Opportunities Policy and a Grievance Policy. These are available on Nexus. The Dignity at Work Policy was lodged (pages 25-26). The Equal Opportunities Policy was lodged (pages 27-28). The respondent's Grievance Policy was lodged (pages 29-30).

6. An employee's line manager has access to the Nexus system for the employees they manage. The manager uses the system to record any significant interactions with that employee and any other information which ought to be recorded. At some point during the period when the Denny store and the claimant were managed by Alan Bryce, Mr Bryce put a note on Nexus recording what the claimant had told him about her Psoriatic Arthritis.

7. The Denny store went through a period in 2018/19 when there was a substantial turnover of managers. It went through a substantial number of managers in a short period. The respondent's senior management felt that the store was not performing well and that it was not running as effectively and efficiently as it should. At some point in early 2019 Mr Bryce the then manager went off on long term sickness absence. He then resigned without ever returning to work. After a period the respondent decided to move David McMahon a Senior Supervisor at the respondent's Cumbernauld branch to the Denny store. Mr McMahon's understanding was that he would effectively be Acting Manager when he arrived and his understanding was that after a time he would be made up to Store Manager which would be a promotion for him. By the time of the hearing Mr McMahon was in fact the manager of the Denny store. Mr McMahon had extensive experience within the respondent's business.

8. In the normal course Mr McMahon would expect to have a handover from the previous store manager. In this case that was not possible due to the fact the previous manager had been on long term sickness absence and

then resigned. Initially, Mr McMahon was not given a log-in to Nexus which would allow him to access the details of the employees in the store whom he was managing including the claimant. As a short term workaround Mr McMahon would use the log-in for Mr David Henderson who was a Senior Supervisor at the Denny store and had a login which allowed him the necessary access.

5

10

15

20

25

30

9. Mr McMahon had not had any contact with the claimant prior to coming to the store. After joining the store Mr McMahon's impression of the claimant was that she was a very capable and valuable member of the team. He considered that she worked hard and was pleasant on the till to customers. On two occasions he complimented her about her work.
10. One of Mr McMahon's tasks as manager was to organise shift patterns for the store. He would do this using the Nexus system. He required to take into account the needs of the business and a planning process involved looking at the business needs for particular tasks to be carried out on particular days. He would then have to consider the contracted hours of the various employees who were available. The system was set up so that an alert would show if the planned shift pattern involved an employee based at the store being rostered to work less than their contracted hours. Mr McMahon would follow a base planner and template but each week he would require to make changes to accommodate the business needs during that week. He tended to try to organise the plan 14 days in advance. In addition to letting employees know when they would be working their shift the shift pattern planner was also valuable in providing advance staff cost information to the business so that the manager could ensure that the predicted staff costs for the period were within the appropriate guidelines based on predicted turnover.
11. In terms of particular days and shifts the respondent's base position is that employees will be available to carry out any shift. That having been said there is a formal process where, during the course of their employment an employee can make a formal flexible working request. This could for example cover an employee who has caring responsibilities or other permanent restrictions on their availability which means that they are not available to do any shift. The process of applying for a flexible working

request is a formal one which involves the respondent's HR department. If a formal request is granted then generally speaking a manager is not permitted to ask an employee to work a shift pattern which would contradict the arrangements the company has agreed to in terms of the flexible working request. A flexible working request can also be used by employees who are disabled who have particular difficulty in working certain shifts. At no time prior to the events in question had the claimant applied for or been granted a flexible working request in terms of the company's policies.

12. In addition to the formal process however there was a less formal process whereby an employee would put in their availability details. This was something which an employee could do setting out those days and times where it would suit them to be on shift and those where they would prefer not to be available. A manager who was setting the forward shift pattern would generally take into account availability requests made by employees but there was absolutely no obligation on a manager to accommodate someone, although the manager will usually try their best. An employee can provide their availability through Nexus by selecting the appropriate tab online and then click on this to enter what their availability is. They could also ask the manager to upload it for them. Generally speaking, Mr McMahon's view was that an availability request was akin to a holiday request. It was something which their business would try to accommodate but equally it might not be possible for the business to accommodate it.

13. In 2019 the claimant was attending a teacher training course at university. She was also having to attend schools on placement. These commitments ate into her availability. In addition to this she had, on occasions, to attend medical appointments. These also ate into her availability. The claimant had, over the years, like many employees, developed a fairly fixed pattern of shifts which she worked. In particular the claimant usually worked a Saturday morning shift from 6:00am to 3:00pm. Although the claimant had no other commitments on a Saturday she tended not to prefer to work the late shift on Saturday which ended at 9:00pm.

14. The claimant's understanding of the position was that she had an absolute right to work whatever shifts she wanted within her 16 hours and

essentially that management had to agree to this. This was not the respondent's understanding of the position nor was it the contractual position. Generally speaking, managers including Mr McMahon tried to accommodate employees. If an employee found that they were working a particular shift which caused them a difficulty then they were entitled to go to the manager and see if it could be changed. It might be that another employee would be asked to cover that shift. The respondent would attempt to accommodate this unless the employee was required to do a specific job within the store which the other employee could not cover.

5  
10 15. When Mr McMahon first started working with the claimant he didn't know anything about her medical condition. This was not mentioned to him and as noted above he did not have access to Nexus and had not had a handover from the previous manager. Around 11 or 12 October after Mr McMahon had been in the store for a few weeks Mr McMahon was rostered to start at 6:00am which was the same time as the claimant was due to start. The claimant was late in starting her shift. Mr McMahon raised the matter with the claimant. He challenged her for being late. The claimant took exception to this. She told Mr McMahon that she had a medical condition and that on occasions she found movement very difficult first thing in the morning. She indicated that she had told a previous manager about this and that previous managers had given her a certain amount of leeway so far as timekeeping was concerned. Mr McMahon advised the claimant that he had been unaware of this. The claimant advised Mr McMahon that he was not much of a manager if he did not know this.

15  
20  
25  
30 16. Mr McMahon logged in to Nexus using Mr Henderson's log-in details as soon as he could after this discussion. He noted that there were indeed medical notes in Nexus relating to the claimant. He read them. He then spoke to the claimant and said that having read the notes he accepted that she might occasionally be slightly late due to her illness. He said that he would not pull her up for this and that he would give her leeway.

17. The claimant and Mr McMahon had a discussion regarding the claimant's illness and the effects of this on her. There was also a discussion regarding shifts. Mr McMahon noted the claimant had been doing the 6-9

shift on a Saturday for a period of some years. She indicated that she had looked at the rotas which Mr McMahon had produced and was concerned that she appeared to be rostered to work some late shifts on a Saturday. The claimant said that she preferred to work the early shift but was prepared to come and go a bit and work late shifts so long as she wasn't expected to work late shifts all the time. Mr McMahon's understanding was that the claimant had indicated that she would prefer to do the early shifts but could do late shifts from time to time.

5

10

18. After the discussion with the claimant Mr McMahon put an entry on the Nexus system using Mr Henderson's log-in. This was lodged (page 112). It is timed at 8:31 on 12 October and states:

15

20

*"Spoke to Caragh today regarding shifts and needs of the business. Caragh made me aware of her medical issues and the stresses she faces daily/weekly. She also informed me of her shift pattern on a Saturday and was unhappy about rotas that are published for the coming weeks as she is planned to work two weeks in a row. I looked at Caragh's notes and I am now better informed of her medical issues and also looked back on the previous 15 weeks' Saturday shifts. Caragh has been either planned off or early shift so I have took this all on board and will endeavour to change these when I get confirmed replacements. Caragh agreed that she could come and go regarding some shifts which helps."*

25

19. When discussing the matter with the claimant Mr McMahon made it clear to her that he had not put her on the late shift out of malice but it was a shift that he needed covered. It was also in line with the availability sheet which was currently on Nexus for the claimant.

30

20. The claimant was rostered to work on 26 October 2019 which was a Saturday. She was rostered to start at 6:00am. She telephoned the evening before to indicate that she was unable to come into work. The claimant was feeling ill and attributed this to a poor reaction to a new medical treatment which she had been put on because of her arthritis. The respondent's absence management procedure involves completing a form on Nexus. The form for the claimant's absence was lodged (page 134d). It notes the telephone call from the claimant on 25 October. It also notes



that the claimant subsequently phoned again on 30 October and 1 November. The claimant was in fact off for a number of days until eventually returning to work on 9 November. During that period Mr McMahon had prepared the staff rota going forward. It was prepared slightly further in advance than usual as Mr McMahon wished to do a draft rota for financial planning purposes so that he could see how his anticipated staff usage fitted in with the anticipated turnover of the store going towards Christmas. He had put up a note to this effect on the staff noticeboard. Additionally, Mr McMahon had been told that one of the respondent's other stores in the area was closing and he was asked if it was possible to accommodate some of the employees from that store to avoid them being made redundant and if he could allocate some shifts to them. As well as phoning in on 1 November to say that she would still be off for her further shifts the claimant also spoke to Mr McMahon on 1 November by telephone regarding proposed rota. Mr McMahon recorded a note of this telephone call on the Nexus system again using Mr Henderson's log-in. The note was lodged (page 112). It states:

*“Caragh called today at 3:45pm today and seems stressed and upset about published planners for the coming weeks leading to Christmas. She said that these shifts hadn't been agreed with her and that she point blank wouldn't be doing them and that's not what was agreed. She also mentioned handing her notice in if that was how shifts were going to be. I explained to Caragh that the rotas had been published purely to plan for sales and home deliveries and shifts weren't finalised yet. As Caragh is currently absent through sickness she hadn't seen the staff notice explaining this to staff. Having looked at the availability sheet that has been handed in by Caragh none of the shifts go against that but she said that she had an agreement with David Henderson that she would work 12-9 Wednesday and 6-2 Saturday. She then hung up as was clearly stressed.”*

21. Mr McMahon had been puzzled about the fact that the claimant was upset regarding her shifts. He had based his planning on the latest availability sheet he had for the claimant which was one which she had given on or about 12 October. He accepted that sometimes staff get in the habit of doing certain shifts however his view was that no-one was entitled to a

specific shift pattern. He felt he would endeavour to accommodate individual employees but at the end of the day he was entitled to set shifts on the basis of what was best for the store. Mr McMahon was not 100% sure what the claimant meant by “not agreed”. So far as he was concerned there was never any specific agreement between himself and the claimant regarding what shifts she would be given. He had not been provided with any update on her availability or any note changing her availability prior to the conversation on 1 November. His understanding was that he could still use the availability sheet which was the one sent in on or about 12 October. He was unaware of any agreement between the claimant and any previous manager. At some point before the claimant’s return to work on 9 November Mr McMahon was also approached by David Tait. He is an employee of the store who was also a “talking shop representative”. As such, Mr Tait was a type of Shop Steward responsible for conveying matters of concern from employees to management. Mr Tait indicated to Mr McMahon that the claimant was unhappy about the shifts she had been allocated. Mr McMahon advised Mr Tait of what he had told the claimant. He said that the shifts were in accordance with her availability as far as he was aware and in any event the shifts were not yet finalised. He also said that as indicated he had put the shifts up a little bit more in advance than usual because he was trying to do financial planning and see what wage allowance he would have for the Christmas weeks.

22. The claimant returned to work on 9 November. The claimant was due to start at 6:00am and Mr McMahon was also due to start at that time. They were the only two people on duty at that time in the morning. Mr McMahon had a number of deliveries which were to come in during the course of the morning which he would have to deal with. He had anticipated speaking to the claimant and having a quick return to work meeting with her at the very start of her shift at 6:00am. Unfortunately, the claimant was late in arriving and by the time she had arrived Mr McMahon was busy with deliveries. At around 10:00am he spoke to the claimant and said that he would deal with her return to work meeting in the afternoon shortly before she was due to go off at three o’clock. This was on the basis that he would have staff in in the afternoon which would enable the meeting to take place without interruption. The claimant indicated that she also wanted to talk

about her shifts and Mr McMahon agreed that he would talk to the claimant about her shifts at that point.

23. The respondent's Nexus system operates in such a way that before an employee can be paid the return to work template has to be completed. Mr McMahon was aware of this and at some point in the morning he completed the return to work template indicating that a return to work meeting had taken place with the claimant. He completed this in advance of the return to work meeting. He did so to ensure that she would be paid for the shift she worked.
24. The claimant met with Mr McMahon at around five past two. The meeting took place in the manager's office. This is a small area cordoned off from the main shop near the till. It has a glass window on to the shop floor but is soundproof. It is designed so that meetings such as this can be held in privacy rather than on the shop floor or in other areas where other staff might be passing.
25. The claimant first of all raised the issue of the shift she had been allocated on Monday. The claimant had been allocated a shift between 5 and 9. The claimant said that this did not fit in with her study pattern. She was currently at her university course until 4 on a Monday. Starting her shift at 5 on a Monday meant that it was difficult for her to get from the centre of Glasgow out to the store in Denny in time and would cause her stress. Mr McMahon indicated he was happy to change this. He had put the claimant on this shift because her availability showed that she was available from 5 on a Monday. Although Mr McMahon was not aware of this at the time the claimant had submitted a different availability sheet to Nexus earlier on 9 November. This availability sheet had not been visible to Mr McMahon at the time he had completed his rota.
26. Having agreed to move the Monday shift to a Wednesday the claimant then raised the matter of her Friday shift. She said she was unable to do the rota'd shift on a Friday because she had a meeting with an adviser at the university on Friday afternoon. Mr McMahon indicated he had not hitherto been aware of this meeting. The claimant had not mentioned this meeting before. All that the claimant told Mr McMahon about the meeting was that it was a meeting with an adviser from university. In fact the

situation was that the claimant had contacted the university counselling service seeking assistance in dealing with the effects of her arthritis on her mental and physical health. The university had arranged a counselling session for Friday afternoons. The claimant did not pass any of this information on to Mr McMahon. Mr McMahon indicated that if the claimant was not available for a shift then he accepted she was not available. He then went on to say that the only way he could see of dealing with this and accommodating the claimant would be to give her that shift off and record it as an authorised absence. He believed that this was the only way he could do it contractually since on the basis of the information he had, given that the claimant was unable to work Monday, there was no other way of hitting her full contractual entitlement to hours within the week. He said that he would be happy to mark the claimant as off on authorised absence. He felt that this was the best he could do. If the claimant was marked on authorised absence then she would not be paid. The claimant indicated that she was not happy with the solution proposed by Mr McMahon. She said to him that she would not be paid for the shift on the Friday and Mr McMahon confirmed that this was the case. She was very unhappy but Mr McMahon said he did not see any other solution available. He had already moved one shift. He felt he had no real alternative. Mr McMahon's position was that the claimant saying that she had a meeting with an adviser was reason enough for him to allow her to have the shift off. He did not necessarily need to know what the meeting was about and didn't question the claimant any further regarding this or about what type of adviser it was.

27. The discussion moved on to the Saturday shift where the claimant was rostered to work from the afternoon until 9pm. The claimant became angry. The claimant basically said that she was entitled to work the morning shift 6 till 3 and she was not prepared to work the afternoon shift. She said she was only prepared to do 6 to 3 and not prepared to do the afternoon shift. Mr McMahon's understanding was that this was to do with the claimant wishing to go out socially on a Saturday evening. His position was that he genuinely thought that the claimant was the best person to work the Saturday afternoon shift between 3 and 9. He felt it was in the interests of the business for her to be working that shift. He accepted that he would

not put her on it all the time but believed that in their previous conversation she had agreed that she would come and go regarding this shift. The claimant indicated she was very unhappy. She raised her voice. She swore at Mr McMahon. She told Mr McMahon that “you are fucking pissing me off”. She said to Mr McMahon that “you are not fucking listening to me”. Mr McMahon confirmed to the claimant that he was listening to her and reiterated the points he had made. The claimant once again swore at Mr McMahon saying that he wasn’t “fucking listening” to her. The claimant’s demeanour was very agitated at that point. She was extremely angry. She stood up and was almost pacing what is an extremely small room. Mr McMahon’s impression was that if he did not agree to what the claimant wanted then this behaviour from her would continue. Mr McMahon explained to the claimant again why he put her down for these shifts. He explained why he wanted her on the 12-9 shift on Saturday. He said that regarding Friday there was no option but to put it down as authorised absence so that her contracted shifts could be accommodated. The claimant made it clear she still wasn’t happy. Mr McMahon suggested that she telephone the Area Manager Derek O’Brien to discuss matters. She was extremely heated and angry. She kept saying Mr McMahon was not listening to her. She eventually took a swivel chair and rolled it in the direction of Mr McMahon before storming out of the room. She slammed the door violently behind her.

28. Mr McMahon was shaken by the meeting. He had never had anyone speak to him in such an abrupt manner in his working life up to that point. After a few minutes he decided that he would go out the back of the shop and have a cigarette to try to calm down. He went through the shop and out the back where the deliveries usually came in. As he was doing this the claimant passed him with her jacket on and carrying her bag. She was on the telephone and appeared to be speaking to her father. As she passed Mr McMahon he heard her say “Dad he is a fucking arsehole”. The claimant then walked past Mr McMahon and out of the shop.

29. A few minutes later, once Mr McMahon had finished his cigarette he went back towards the main shop. The claimant then met him at the door of the back shop. She said that her father had told her that she had to go back into the store and finish her shift. She told Mr McMahon that she was not

in a fit state to go on the till and asked her if she could run stock up to the end of her shift. Mr McMahon said yes and the claimant worked stock for the remaining period of her shift up until 3:00pm.

5 30. The claimant worked to the end of her shift and left. Following this Mr McMahon telephoned his Regional Manager Mr O'Brien and advised him what had happened. Mr O'Brien indicated that he would deal with the matter.

10 31. Mr O'Brien contacted the respondent's HR department and they decided that they would appoint Ms Kirsty L Wood of the respondent's store at Grangemouth as Investigating Officer. Ms Wood had considerable experience of carrying out investigations and disciplinaries for the respondent. She had had no dealings with the claimant prior to being asked to carry out the investigation. The remit she was given was to establish if there were reasonable grounds to believe that the claimant had  
15 sworn repeatedly and pushed a chair at Mr McMahon. The incident had happened on 9 November which was a Saturday. The next day the claimant was due to be on shift was Wednesday 13 November and Ms Wood arranged that she would attend at the Denny store in order to meet with the claimant and Mr McMahon on that date.

20 32. Ms Wood duly attended the Denny store on 13 November 2019. She first of all interviewed Mr McMahon. Ms Wood took notes of her meeting with Mr McMahon and these were lodged (pages 57-62). These notes are an accurate albeit not verbatim record of the meeting between Mr McMahon and Ms Wood. It is probably as well for ease of reference to set out what  
25 Mr McMahon initially told Ms Wood regarding the incident on 9 November. He stated

30 *"Caragh started at 6.00am and let me know during the course of her shift that she wanted to talk about her planned shifts for the next week. I said I would make time near the end of her shift. At 2.05pm I asked Andrew Fraser to let Caragh off the till so we could go to the office to discuss this. I started the conversation with saying I realized her Monday shift may have caused an issue due to the time she finishes her placement and the time it takes for her to start her shift. Her placement finishes at 4.00pm and she was scheduled to work at*

5.00pm. I agreed to move this shift to a Wednesday 4-9 shift. She then questioned every other shift. I made her aware that the shifts she was planned in for were based on her availability that she had handed in on Friday 11 October. The availability was scanned onto Caragh's Nexus. She then started to blow up and said that I was fucking pissing her off and just giving her shifts that don't suit her. I said it was most definitely not the case. I gave her shifts to fit her availability and for the needs of the business. She then said I wasn't changing anyone else's fucking shifts. I said I was as a planner needed to suit the shop's needs. She then said she wouldn't be turning up for her scheduled shift on Friday as she had a meeting with her advisers. I said I understand and that I would record that shift as authorised absence. She then said I wasn't listening and said 'so I won't be paid for that then'. I said that would be the case as to fulfil her 16 hour contract I would need to record that heading as I had listened to her reason for not being able to meet her Friday shift. She asked for her rota for the following week and I said the shifts what are on Nexus with consideration to her Friday shift I warned Caragh to be careful how she was conducting herself towards me and that if it continued then we would have to have a different conversation. I said I wasn't conducting myself other than professional and to be aware of her language. She again said I wasn't fucking listening and repeated the earlier statement that I was fucking pissing her off. She then got up and said she was going to phone Derek and proceeded to push her swivel chair in anger towards me. She then opened the office door and slammed it behind herself. I took two minutes and went to the back shop and I went to the back shutter for a cigarette. She came out with her jacket on and bag and she shouted 'but Dad he's a fucking asshole'. I finished my cigarette and went back on to the shop floor where a customer asked me for onion rings. I went to the cold store to get them and Caragh came back in and said her dad told her to finish her shift so could she run stock as she wasn't fit to go on the till I said yes. At 2.30 she left."

33. Ms Wood questioned Mr McMahon regarding the issue and then asked if he had anything else to add. He said:

5           *"Today at 12.45 Caragh phoned me to say that the notes on her Nexus don't reflect what she said. She asked for another note to be added to reflect what she said before. I think she realised she might be in trouble and is trying to backtrack. She is being overly nice saying I know you didn't mean to misunderstand her but I told her that what was on her Nexus is an accurate account of what happened."*

10       34. Ms Wood asked Mr McMahon if there was anyone in the store who might have witnessed the incident. Mr McMahon said that he was not sure whether anyone would have but said that 'Brian' was on his break in the back warehouse at the time and that he may have heard some of the incident but he could not be sure whether he was in a position to hear it or not.

15       35. Following this Ms Wood met with the claimant. A note of the meeting was taken by Rebecca Collins Apprentice Supervisor based at the Denny store. The note was lodged (page 44-55). The note is signed at the bottom of each page by the claimant and Ms Wood. The Tribunal considered that it was an accurate, albeit not verbatim, record of what took place at the meeting. The first part of the meeting incorporated lines which Ms Wood read out from a script prepared by the HR department which set out the purpose of the meeting which was so that Ms Wood might consider whether suspension was appropriate or not. The claimant indicated in response to that question that she considered that it probably would be correct for the claimant to be suspended to keep herself right and to keep her out of the store. It was put to the claimant that the allegation against her was that she had sworn repeatedly and pushed a chair at David McMahon (Senior Supervisor) which may constitute gross misconduct. The claimant's position with regard to the background was:

30           *"I had returned to work after two weeks off sick. This was at 6.00am. Worked my shift normally. I was not asked how I was doing. Dave came in at 10.00am and asked about my return to work to which Dave said there was no need for one. I thought this was weird and asked if we could speak later regarding shifts. Dave said OK I'll let you know. I went on till at 1 and Dave said we should speak half an hour after this. This made me stressed but I carried on. We spoke at 2.00pm in*



*the office. I explained the shifts and initially I was down for a Monday shift 5-9 but I finished Uni at 4.00pm so this was not feasible.”*

36. There was then a discussion with the claimant regarding her availability. Ms Wood indicated that she had obtained from Nexus the claimant's availability which was dated 11 October. The claimant said that she had handed in an updated copy as of the 9 November which was the date she returned after two weeks' sick. The claimant was asked to go back to the meeting and said that she would not say there was swearing but that the meeting was heated on both sides. She said that:

10                   *“Dave wasn't pleasant to me and I wasn't pleasant to him.”*

37. When asked to give examples of why Mr McMahon had been unprofessional the claimant said:

15                   *“For example, on the Friday I explained I couldn't attend the shift as I was meeting a University adviser over my mental and physical health. I am unsure when their meetings finish or if they are continuous to which he replied your adviser doesn't work here so what does that matter to me.”*

38. Ms Wood asked the claimant if she properly understood what Mr McMahon had done in relation to this shift being treated as authorised absence and the claimant said she did. The claimant asked what she was looking for to be done different. The claimant explained that these were not her usual shifts and she had expected she would get her usual shifts ongoing from the summer but with reduced hours. The claimant went on to say that she felt the problem was that Mr McMahon was not listening to her. He was saying those are my shifts and that's it. There was further discussion regarding the way the respondent dealt with shift requests and availability. The claimant asked again about the meeting and she denied that she had acted aggressively towards Mr McMahon and said that she had not shoved a chair at him. He said that for half the time she stood at the door as this was how distressed she was. She said she was crying. The claimant became upset at this point and the meeting adjourned. When the meeting reconvened Ms Wood asked the claimant if there had been any other incidents. The claimant said that there had not been and that she had not

had other heated discussions. She said, "That's just not me. I wouldn't swear, shove a chair or be violent." Ms Wood asked the claimant if she felt she had been unfairly singled out and the claimant said, "Yes absolutely". Ms Wood asked the claimant to explain and the claimant said,  
5 "There is public knowledge of other staff's needs and these have been met easily." The claimant confirmed that she did not feel that her needs had been met and that if she had been afforded a return to work meeting then things might have gone better. She agreed with Ms Wood that the matters could have been resolved more level headed.

- 10 39. The claimant then raised the issue that she considered that Mr McMahon had previously lied about a conversation with her. She referred to the note on Nexus relating to a phone call when she was sick and "a second one from a month ago regarding 12-9 shifts." She said that "on the one regarding 12-9 shifts from a month ago I had explained due to university I  
15 can come and go if he asks me with enough notice." Ms Wood asked if three weeks' notice was not enough notice. The claimant said yes but she had spoken to him shortly after the shift was posted. Ms Wood again tried to explain the way the rota worked to the claimant. The claimant stated:

20 *"I feel he has given me this shift to suit the needs of the business but he isn't listening to how stressed this shift is making me by giving me it."*

40. Ms Wood asked the claimant if she believed Mr McMahon required to ask her about every shift individually. The claimant said she did not but became distressed. The meeting was adjourned for a second time.

- 25 41. Following the adjournment Ms Wood asked the claimant for her views about how to avoid such conflicts in future. The claimant said:

*"I would say there has been miscommunication on both parts. I feel I may not have been clear enough about my availability and that Dave has been dismissive."*

- 30 42. There was then a discussion where the claimant said that during the phone call on 1 November she had not said that she would leave if she was not given the shift she wanted. The claimant said she had simply said, "I can't do that." There was then a discussion about whether the shift agreed for

Saturday had been 6 till 2 or 6 till 3. The claimant then went on to say that she did not want to be alone with Mr McMahon in the store at any point. Finally, it is recorded that the claimant was asked if she had anything to add and then stated that “the reason for the shift adjustments this was advised by my doctor.” Ms Wood asked the claimant if she had any medical evidence to support this. The claimant said that she had offered to bring in evidence from her doctor. She stated, “There is medical evidence to support certain shifts but the doctor has it and I would need to bring it in.” At the end of the meeting Ms Wood advised the claimant that she was suspended. She read out the script provided to her by the HR department regarding this. The claimant was suspended on full pay pending investigation.

43. Following the meeting with the claimant Ms Wood went back to Mr McMahon to check a particular point with him. A note of this meeting with Mr McMahon was lodged (page 56). Ms Wood indicated to Mr McMahon that the claimant was denying both instances of foul language and aggression. She asked if Mr McMahon could give any reason why the claimant would deny this. Mr McMahon said he could not think of any reason. He maintained his position. Ms Wood asked if the claimant had shown signs of aggression or foul language in front of any other colleagues. Mr McMahon stated that he had recently had a conversation with a former colleague ‘CD’ who had previously worked with the claimant who had told Mr McMahon of a similar situation where the claimant had used foul language and aggression towards CD. Ms Wood advised Mr McMahon that she would be carrying out a full investigation which would also involve speaking to Brian the potential witness and that she would be in further contact in due course.

44. Following the meeting Ms Wood considered matters. She noted that the claimant challenged the Nexus notes. Ms Wood felt that the notes had a degree of ambiguity and that the claimant disputed having said that she would leave if she was made to do the shifts. Ms Wood felt that so far as what had been said was concerned one was saying one thing and one saying the other. She noted that the claimant had said that she had no history of having heated discussions with anyone and that this was not part of her personality. She noted that Mr McMahon on the contrary indicated

that CD had said that the claimant did have a history of this type of behaviour. Ms Wood decided that she would speak to CD in order to find out more about the situation. She contacted CD by telephone. She produced a note of her conversation which was lodged (page 71-72). CD confirmed there had been an incident and advised Ms Wood as follows:

*“At the time another colleague was going through an investigation and suspended from duties we had to bring Caragh in. So we had to interview Caragh in relation to this when she kicked off. She started swearing. I was note taking and the store manager was taking the interview. It was very hard to get a word in because she kept saying fucking this and fucking that. It kept going on and she refused to cooperate or sign the notes but eventually we managed to get her to sign them.”*

45. Ms Wood asked if there had been any reason why the claimant would exhibit such behaviour. CD said he had no idea and that was just who she is. CD was then asked if he had found the claimant's conduct to be professional most of the time other than on this occasion. CD responded that there had been other conflicts over shifts and often there had been arguments. He said that the occasion mentioned was the only one on which he had witnessed the claimant swearing instore. Ms Wood read her notes of the call to CD and he agreed them.

46. Although not available to Ms Wood at the time there were notes on the Nexus system of the meeting CD referred to. These had not been lodged as part of the Tribunal bundle however the claimant referred to them in her evidence and following a discussion the Tribunal considered that it would be appropriate for the document to be lodged in the bundle. The initial copy produced by the claimant was not particularly legible and a further copy was provided by the respondent. The document was numbered 41a-41d. It is a note of a meeting attended by the claimant on 18 May 2019. The remit of the meeting is said to be to establish whether there are any reasonable grounds to believe that Caragh Patterson may have breached cash and admin and or security policy which may constitute gross misconduct and therefore if there is a disciplinary case to answer by Caragh Patterson or not. The investigation was carried out by Alan Bryce

who was Store Manager at the time and notes were taken by CD. The notes of the meeting make no reference to the claimant swearing.

47. Ms Wood also spoke to Brian Tait. The interview was carried out on the telephone. Ms Wood made a note of the telephone conversation which was lodged (pages 73-74). Mr Tait indicated that he knew that the claimant and Mr McMahon were meeting in the office but that he could not hear anything. He mentioned that he had previously spoken to Mr McMahon on the claimant's behalf regarding her shifts.
48. Ms Wood decided that what she was left with at the end of the day was a situation where there had been two people in the room when the incident happened. Mr McMahon had a version of the incident where the claimant had behaved inappropriately. The claimant totally denied this. Ms Wood felt that she had really no way of determining which of the two should be believed. She felt that there was no way to choose between the two different versions and that accordingly the only appropriate thing to do was to make a finding that the case should not proceed any further to a disciplinary hearing. The official ruling she made was 'no case to answer'.
49. She arranged to meet with the claimant in order to deliver her findings and met with the claimant on 14 December 2019. The meeting had originally been arranged for 3 December but the claimant had been unwilling to attend since she was unhappy with the note taker proposed by Ms Wood. At the meeting on 14 December notes were taken by Rebecca Collins. These notes were lodged (page 87a-87b). The Tribunal accepted they were a reasonable accurate record of what took place at the meeting. The claimant was told that due to a lack of concrete evidence it was Ms Wood's intention to close the case on this occasion. She stated that she was advising the claimant to look again at the respondent's Dignity at Work Policy and familiarise herself with what was acceptable and what wasn't. She also wished to ensure that the claimant was aware of her rights but also her responsibility and ensure everyone was aware of what was acceptable. Ms Wood printed off the appropriate document with the claimant and went through it with her so as to ensure that the claimant understood it. She had the claimant sign a copy at the bottom of the document in order to record the discussion. The policy which Ms Wood

referred to is the respondent's Dignity at Work Policy which was lodged (page 25-26). The claimant's signature appears on both documents as does that of Ms Wood. Ms Wood was aware that normally after an investigation results in no case to answer the employee will return to work at the same store. She was aware however that the claimant had by this time lodged a grievance and she discussed with the claimant that it would be in the best interests to remain suspended on full pay until a decision had been made with respect to the grievance. The claimant's response to that was that that was fine.

50. The claimant's grievance was contained in a letter dated 13 November 2019 which was lodged (pages 63-65). She accused Mr McMahon of making a false accusation against her. She referred to the notes on Nexus and considered that they were inappropriate. She stated she considered the allegation to be vexatious. She complained about shift changes having been made without consultation. She complained about the way that the investigation meetings were conducted by Ms Wood and she indicated she felt that her current health issues had not been considered. She also disagreed with the notes on Nexus. The claimant's grievance was investigated by Derek O'Brien who was the respondent's Area Manager. He was asked to investigate the matter by HR. He had considerable experience of investigating grievances having worked for the company for over 20 years. He had done seven since becoming Area Manager. He had some prior knowledge of the claimant. He had not worked with her but he had received feedback from a number of his managers. The feedback was to the effect that the claimant could be volatile particularly in situations where she was not getting her own way initially.

51. Once the claimant's grievance was uploaded to Nexus Mr O'Brien read through it. He understood her complaint to be that in general terms she had been mistreated by Mr McMahon. Mr O'Brien arranged to meet with the claimant. The meeting took place on 9 December 2019. The claimant was accompanied at the meeting by Brian Tait. Mr Davey Horne took notes. These typed notes were lodged (pages 84-87). The Tribunal consider these to be an accurate record of what took place at the grievance meeting. Mr O'Brien asked the claimant what she wanted out of the grievance. She said that she wanted correct steps to be taken about the

allegation against her and to be treated fairly. She said that she wanted to continue working at the store but did not know if she could work with Mr McMahon. She said she would not be comfortable working alone with him.

- 5 52. The claimant set out her position which was that she thought that Mr McMahon had deliberately put her in for shifts that didn't allow her time to get back from university. She referred to going to the doctor. She said that they were talking about counselling. She said she was now getting a steroid injection and that she had been coming in to work unwell. She referred to her having side effects from drugs and having to take a lot of painkillers. She wanted the workplace to understand her limitations. She referred to having made Mr Bryce aware of her condition and that there were notes on Nexus. She indicated that shift changes were having an impact on her welfare. Mr O'Brien had not had any knowledge of the claimant's health condition, he heard about it for the first time when he read the grievance letter. Mr O'Brien understood the claimant's belief was that Mr McMahon was deliberately provoking her in order to get her to leave the store. She accepted that the wrong availability list was being used and she believed that the one on Nexus at the time was out of date. She still felt that Mr McMahon was doing it deliberately and that this was "stressing her out". Mr Tait who was the claimant's representative at the meeting said he had spoken to Mr McMahon about the claimant's shifts and understood the matter had been resolved. The claimant confirmed that the return to work meeting note had been completed outwith her presence and she objected to this. She said that she had approached Mr McMahon early in the day to have the meeting but it hadn't taken place until later on. He was unhappy with the notes on Nexus. During the course of the meeting Mr O'Brien agreed with the claimant that the broad outline of her grievance fell into five key points. These were false allegations about 9 November, shift changes being made without consultation, the way the investigation was conducted, that the claimant's health issues had not been properly considered and that the notes on Nexus were to be removed.
- 10
- 15
- 20
- 25
- 30
- 35 53. At the end of the meeting Mr O'Brien said that he would fix a date to go into the store and speak to staff members about the issues raised.

Mr O'Brien then visited the store on 18 December. He spoke to Bernardine Buchanan a Cleaner/General Assistant in the store. A note of his conversation with her was lodged (page 88-89). The Tribunal consider this to be an accurate record. Ms Buchanan confirmed that she believed that Mr McMahon had treated Caragh fairly. She was quite definite on the point. She said that she had always said to the claimant in the past that the claimant didn't know that she was living in the store. Ms Buchanan said she felt that Mr McMahon was trying to run the store right where others hadn't.

54. Mr O'Brien spoke to Ms McGucken who was a General Assistant in the store mainly carrying out cashier duties. Notes of the meeting were again taken by Mr Horne an HR representative with the respondent. These notes were lodged (page 90-91). The Tribunal considered them to be an accurate record of the discussion. Ms McGucken was asked how Mr McMahon treated the claimant. Her answer was:

*"The same as he treats everyone else, he's a gem, he is the first manager to deal with Caragh. Her attitude stinks. Previous managers have let her away with lots of things. Hungover, etc. Me and Joe have had to cover her when she has not turned up. Kieron Norrie was here and she was screaming and shouting at him in the back. Always think that she knows her rights and tells everyone she feels her shifts are her shifts. She would come in maybe after 10 minutes would disappear if a friend came in. She would just go. Staff have been brought up about how she gets away with everything but nothing gets done about it. I have seen her with a hangover slouched over the till eating sandwiches and drinking coffee at the tills. David is the only one who has dealt with issues in a while. He is very fair. Prior to David coming here there were members of staff looking to leave. Morale and the store is now a lot better. Now want to come into work."*

55. Mr O'Brien asked if there was an Agenda to get the claimant out of the store. The response was

*"Not that I am aware of only heard about improving the store. Staff have said that things need to be sorted. Two members of staff get away with whatever they want ..."*



56. Ms McGucken confirmed in her view the claimant was one of the members of staff she was talking about.

57. Mr O'Brien met with Brian Tait on 18 December 2019. Once again notes were taken by David Horne which were lodged (pages 92-93). Mr Tait confirmed that he was unaware of any agenda to get the claimant out of the store. When asked how Mr McMahon had settled into the store he said, "He has done really well, the team are really motivated, I have brought it up at a recent TS meeting he has had a really positive impact on the store." He was asked if he was aware of times when the claimant was physically sick in store and had still carried out shifts. His answer was:

*"Yes, not sure what the cause was. One day in particular when she had to leave the till to throw up in the back. She seemed to be unwell and struggling that day it appeared to be genuine."*

58. He was asked if management had been in and if she had asked to go home. Mr Tait's response was

*"Can't remember, wasn't that long ago but don't remember who was in. I don't know if she spoke to anyone. Not aware who presumed that she would have."*

59. Mr O'Brien spoke to Rebecca Collins on 18 December. Once again notes were taken by Mr Horne. The notes were lodged (page 94-95). When asked if she aware of the claimant's health issues she said:

*"I have been made aware that she had arthritis and attended hospital for it. Knew that she has been on medication but didn't know if she was currently. Can't remember when but she came back from a break and was sick and said that it was to do with medication. She had eaten ice cream, she shouldn't have because she knew it would react to her medication. Her medication had left her with certain allergies. I asked why she had eaten it she said she had just fancied it even though it could make her ill. She was going to go home, we agreed on 7pm later on she felt better and stayed for the rest of her shift. I was in charge that night."*

60. She was asked about how far in advance planners were published. She indicated it was probably about three weeks and that it was normal practice that if someone was off sick or needed a shift off then amendments were normally accommodated.

5 61. She was asked if the claimant had submitted a flexible working request. Her response was:

*“I know that she asked for early Saturday shifts. I had seen a bit of paper that she had written her availability. She wanted Saturdays off to socialise that she didn’t get a lot of time to socialise outside of uni.”*

10 62. Ms Collins also denied that there was any agenda to get the claimant out of the store. She was asked if she had anything to add and she stated

*“.... my personal experience of Caragh is being on the shop floor on her phone turning up late. On one occasion I made a flat bed of sweets and told her to put it out. She snapped at me that it wasn’t like she wasn’t doing anything. It was quite confrontational.”*

15 63. Mr O’Brien also spoke to Andrew Fraser on 18 December. He is a Trainee Duty Manager with the respondent. Once again a note was taken by Mr Horne which was lodged (page 96). He confirmed that he was unaware of any agenda to get the claimant out. He complimented Mr McMahon saying that he wanted to make the store better and that he had got the store back to a good standard and morale was a lot higher now.

20 64. Mr O’Brien met with Mr McMahon on 18 December. Once again a note was taken by Mr Horne. This was lodged (pages 97-101). This is an accurate record of what took place at the hearing. Mr McMahon essentially confirmed his position regarding the various issues raised by the claimant. When asked what considerations he gave to the claimant’s health condition he said, “She raised a point about starting his shift late. I had challenged her and I said that I would be more lenient with her. She said that it took her longer to walk to work and I said that I would not pull her up on every single occasion. This happened no matter what the shift start time was. She didn’t offer me any solutions. She said it took her three minutes to walk here but she wasn’t willing to leave earlier. In answer to

25

30

being questioned as to whether he tried to accommodate her working patterns he stated:

*“I accommodated her availability that she’d handed in. there was also an issue with the shift that caused her issues in getting here after uni I moved that shift back by a day. She went through the TSR for that issue and I fed the outcome back to both of them. Caragh seemed happy about that.”*

- 5
- 10
- 15
65. He confirmed that the claimant had handed him an availability matrix on 12 October and that he had uploaded it to Nexus. He set out his position on what happened at the meeting with the claimant as set out above. He confirmed that he felt he treated the claimant the same as everyone else in the store professionally and with respect. He denied any agenda to get the claimant out of the store. He said he was not aware of times when the claimant was physically sick in the store and carried out shifts. He confirmed that he had completed the return to work template on Nexus prior to the meeting. He said:

*“No Caragh was late that day I was under pressure said that I would catch up later in the day. That was the meeting that she stormed out of so I didn’t have the chance to carry out the return to work. I uploaded on the morning to get her onto the time sheets.”*

- 20
- 25
66. Mr O’Brien was due to have a telephone conversation with David Henderson on 19 December but could not complete this due to a family emergency. Mr Horne spoke to Mr Henderson and his note of the meeting was lodged (pages 102-103). Mr Horne also spoke to Kirsty Wood and her note of the meeting was lodged.

- 30
67. These notes were forwarded to Mr O’Brien. From the meeting with Mr Henderson noted by Mr Horne, Mr O’Brien noted that Mr Henderson stated he had been aware of the health issues the claimant had and that he had answered when asked for considerations he gave to this he said, “to be honest if she was run down or tired I would assume that it was the medication that was causing the tiredness. She didn’t discuss in depth. I was aware that there could be side effects.” He confirmed that Mr McMahon had changed the claimant’s shifts but that they were within

the availability the claimant had given on her sheet. Mr Henderson stated that the claimant had mentioned her shifts a couple of times to him. He had said that he would look at it but it fell within her availability. He confirmed that he believed the notes lodged by Mr McMahon were factual. He also confirmed that he believed Mr McMahon treated the claimant with respect and fairness and that there was no agenda to remove her from the store.

5  
10  
15  
20  
68. When reading the interview with Ms Wood, Mr O'Brien noted that at the first interview the claimant had made no allegation of being intimidated by Mr McMahon. He also considered that the claimant had showed that she did not know the difference between putting in her availability and the flexible working request. He understood that Ms Wood had found no case to answer because she couldn't either prove or disprove either of the claimant's or Mr McMahon's statements. He believed that she had not found enough evidence to move the case on to a disciplinary. He noted that the claimant had been asked to read over and sign the Dignity at Work Policy. He also confirmed that he was aware that at the time Mr McMahon was trying to build up morale in the Denny store which had been poor. The store had not been running well and it had a succession of managers. Mr McMahon's role was to sort out the store. In addition to this, Mr McMahon had also been required to change colleagues' shifts so as to accommodate employees from the store which was closing. He noted that the claimant had since 9 November submitted a flexible working request.

25  
69. Mr O'Brien considered matters and then wrote to the claimant on 22 January. He set out the five points of grievance which had been agreed. He did not uphold the grievance in relation to false allegations being made against the claimant. Essentially, he agreed with Ms Wood that he was unable to ascertain which version of events was the true version.

30  
70. He upheld the second point made about shift changes made with no consultation. He set out his position on this and explained the management issues that there were in the Denny store and that he had needed to appoint someone capable of running the store and who could steady the ship. He stated that part of the rebuilding programme needed

at the time involved Mr McMahon looking at getting the right people in at the right time. He said

5           *"I accept that at times this was done without establishing the implications on staff and that planners were being changed. .... I can see that he tried to accommodate shifts in relation to the availability that you had provided. He was working from a handwritten sheet that was scanned on to Nexus and did not accept the availability request that you had actioned on Nexus as it did not tie up with the information that he already had. Indeed the meeting that was to take place on*  
10           *9 November 2019 was to gain clarity around shifts. I note that you have now submitted a flexible working request and I confirm to you that shifts will be based around the information on that request and will be reviewed with you in six months' time. You will be informed of shift patterns on your return to work."*

15    71.    He did not uphold the grievance about the way the investigation meetings were conducted. With regard to the issue of whether the claimant's health conditions had been considered he stated:

20           *"As stated previously David McMahon was appointed to resolve an issue that you had in Denny store at short notice. There was no management handover of the store and David did not initially have access to Nexus. I accept he was unaware of your health issues at the time although you made him aware and he then gained access to Nexus to read the details within your file. There was also an issue on your return to work on 9 November when RTW was uploaded to Nexus without the accompanying meeting being held at the time. Due to*  
25           *operational issues the form was uploaded to activate you on to Nexus and a meeting was planned for later that day to understand your health issues and related shift patterns. As the person responsible for colleagues within the store David should have been aware from the*  
30           *start of the health issues of any of the staff and a return to work meeting should have taken place prior to you starting your shift. I uphold this point of grievance."*

72.    With regard to point 5 the claimant's disagreeing with the notes on Nexus Mr O'Brien stated:

*“I have made arrangements for the notes recorded on 1 November to be removed from your Nexus record. Having looked at the wording I can see that some personal thoughts have been expressed. I uphold this point of grievance.”*

- 5 73. Mr O'Brien also met with the claimant in order to deliver these findings. The meeting took place on 21 January, the meeting note being sent out the following day. He agreed that the claimant and he would meet again to discuss her return to work after she received the letter. Mr O'Brien met with the claimant at the beginning of February and discussed the options
- 10 available to get her back to work. The claimant did not wish to return to the Denny store. The claimant was given the option of returning to stores in Stirling, Cumbernauld, Easterhouse, Dennison and Grangemouth. The Glasgow stores were highlighted as possibilities because the claimant attended university in Glasgow and these were believed to be convenient
- 15 for her. The claimant submitted an appeal against the grievance outcome, a copy of this was lodged (pages 109-111). The claimant did not in fact return to work. She resigned on or about 26 February. The claimant subsequently attended a grievance appeal meeting which took place online. Her appeal was not upheld.
- 20 74. Following the termination of her employment with the respondent the claimant applied to work with children for an organisation which worked with children over the summer but because of Covid this did not proceed. The claimant then obtained a five week placement in the summer once Covid restrictions eased. She then commenced her probationary teaching
- 25 year.

### **Observations on the evidence**

75. The Tribunal were satisfied that the respondent's witnesses were genuinely trying to assist the Tribunal by giving truthful evidence. All three were measured and professional in the way they gave evidence. They
- 30 made appropriate concessions and did not pretend to knowledge they did not have. The Tribunal accepted their evidence as credible and reliable. The Tribunal were less impressed with the evidence of the claimant. On a number of occasions, she failed to answer questions put to her even by her own solicitor in examination in chief. Instead of answering the question

she would proceed to give a completely irrelevant answer which sometimes degenerated into a rant. It was clear that although the claimant on occasions became upset she is at the same time an extremely forthright person who has little time for alternate points of view. In addition to this  
5 general point some of her assertions lacked credibility. Her position was that Mr McMahon had deliberately used the wrong availability details albeit her position is that these were only put on Nexus after he had arranged her shifts. It was her position that Mr McMahon had deliberately manipulated the notes. She confirmed in cross examination that her view  
10 was that there was a wide ranging conspiracy which went well beyond Mr McMahon to remove her from the business. Her case did not hang well together. In many cases her evidence went well beyond the pleaded case.

76. The claimant's version of events in relation to the pleaded case was essentially that set out in her grievance and in her statement to Ms Wood.  
15 She stated that she had indicated she was unhappy with her shifts but denied what was in the Nexus notes to the effect that she had said she would leave if she had to do these shifts. During cross examination she was questioned carefully as to her understanding of the position regarding shift rotas. Her clear evidence was that she believed that the respondent  
20 were under an absolute duty to give her the shifts that she wanted and no others. Even when it was put to her by her own solicitor that management had to have the final say, her answer was to the effect that 'this was what Mr McMahon said'.

77. With regard to the incident on 9 November the Tribunal noted that the  
25 respondent's management in the form of Kirsty Wood and Derek O'Brien had decided that they were not able to decide one way or the other whether the claimant's version or that of Mr O'Brien had to be believed. The Tribunal's position was that whilst not making a finding was something which was open to the respondent and was in fact probably the correct  
30 thing to do from their point of view the Tribunal required to come to a view on the matter. Our view was that we had little hesitation in preferring the evidence of Mr McMahon to that of the claimant. We are required to make our decision on the balance of probabilities. Whilst there was no corroboration for either statement we felt the following circumstantial

matters were sufficient to make us consider that the evidence of Mr McMahon was more probable.

78. The first is that whilst Mr McMahon came over as a professional who gave his evidence in a dispassionate manner the claimant very much was at the opposite end of the spectrum. It appeared to the Tribunal that she was someone who could be volatile.
79. Secondly, the suggestion that the claimant was someone who was volatile when she did not get her own way was one which was spoken to by several of the witnesses interviewed for the grievance and also something which was passed on as hearsay evidenced by Mr McMahon and Mr O'Brien.
80. Three, there was a specific incident where the claimant had allegedly behaved badly at a formal meeting which was spoken to by CD. The Tribunal did not believe this was significantly undermined by the fact that the formal note of the meeting did not refer to this. CD is noted as saying that the claimant initially refused to sign the notes. If the circumstance of the claimant's behaviour had been recorded this would only have been in the context of taking the matter further and the manager at the time clearly decided not to take it further.
81. Next, the position which the claimant is said to have adopted at the meeting namely that she was entitled to demand that she obtain the shifts she wanted was the same position as she later confirmed at the Tribunal hearing.
82. Next, the claimant's own evidence accepted that she had said not nice things to Mr McMahon albeit she alleged that he had said not nice things to her.
83. Mr McMahon contacted Mr O'Brien immediately after the meeting and the matter then proceeded to a formal investigation. We think it highly unlikely that Mr McMahon would simply have made the matter up.
84. The respondent's actual treatment of the claimant was, in the view of the Tribunal extremely lenient and does not in any way support the claimant's trenchantly held view that there was a conspiracy amongst the respondent's management to get her out of the store.



85. At the end of the day we were not prepared to accept the claimant as a credible and reliable witness. We accepted her evidence to the extent that she does suffer from a disabling condition which makes her ill from time to time. We also accepted her evidence that on occasions she has suffered  
5 an adverse reaction to medication and that she has sometimes been sick in the store. We preferred the evidence of the respondent's witnesses where it conflicted with that of the claimant.

### Issues

86. In this case the claimant submitted the claim form herself. The  
10 respondent's position was that they required further and better particulars before they could properly respond to this and they helpfully produced a list of questions which were incorporated into a questions order. The claimant by this time had instructed a solicitor who responded to the questions order and set out the basis of claim. This document is lodged  
15 at page 24 of the productions. It was confirmed that the sole claim being made by the claimant was a claim under section 15 of the Equality Act of discrimination arising from disability. The claimant was asked to state in what way she considered the respondent treated her unfavourably because of something arising in consequence of her disability. The  
20 answer on page 24 states:

*"Despite initial comments made by David McMahon he was fully aware of her medical condition as this had been detailed on the internal Nexus system operated by the respondent. On a number of occasions said Mr McMahon allocated the claimant shifts the claimant could not  
25 possibly fulfil due to the commitments of her university course of which he was well aware.*

*On 9 November the claimant sought on a number of occasions throughout the day to have a meeting to discuss her concerns. He was either unwilling or unable to have the meeting. The claimant was  
30 suffering due to her illness with sore hands and ended up having to ask two other managers if she could come off the tills. Eventually, she was only approached by the said Mr McMahon for a meeting at around 2pm at which it was then alleged that an argument took place which ultimately led to the claimant being suspended.*

Following later investigation, the claimant was exonerated as to her behaviour at that meeting. It is alleged that the said Mr McMahon exaggerated the alleged behaviour of the claimant at that meeting with a view to getting rid of her from the store due to her disability and her inability to complete the shifts he wanted her to do. It is believed that this part of a larger picture whereby the said Mr McMahon was seeking to have any members of staff with disability removed from his store.”

- 5
- 10
- 15
- 20
- 25
- 30
87. During the course of her evidence the claimant appeared to depart from her pleadings in a number of respects. She confirmed that other members of staff with disabilities were given adjustments. She also appeared to wish to talk about further adjustments which she claimed the respondent ought to have made for her. This line of evidence was objected to by the respondent’s representative on the basis that there was no claim before the Tribunal of a failure to make reasonable adjustments and the respondent did not have fair notice in relation to this. At that stage I asked the claimant’s solicitor to set out his position. I asked him if he wished to lodge an application to amend. I indicated that given the circumstances if such an amendment application were made and then granted it was unlikely that it would be proper for the Tribunal hearing to continue since otherwise the respondent would not have had fair notice of the claim being made and would not be in a position to respond properly to any further allegations made by the claimant. I allowed an adjournment for the claimant’s solicitor to speak to the claimant privately and take her instructions in relation to the matter. Following the adjournment, the claimant’s solicitor confirmed that his instructions were not to make an application to amend the claim but to proceed. The Tribunal proceeded on the basis that the sole claim was one of discrimination arising from disability in terms of section 15 of the Equality Act. The respondent had previously indicated that they accepted that the claimant was disabled in terms of the Act. Their letter of concession was lodged (page 181).

### Discussion and decision

88. Both parties made full submissions. Rather than repeat these at length we shall refer to them where appropriate in our discussion below.
89. Section 15 of the Equality Act 2010 states:-

*“(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.*

5

*(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.”*

90. In order to succeed the claimant required to show that she was treated unfavourably and that the unfavourable treatment arose in consequence of her disability. Both parties referred to the case of **City of York Council v Grossett** [2018] EWCA civ 1105 which makes it clear that there is no requirement in the legislation for the employer to have actual or even constructive knowledge of the causal connection between something which arises from the employee’s disability and the unfavourable treatment. The question for the Tribunal is was there unfavourable treatment and was there a causal connection between that unfavourable treatment and something arising from the claimant’s disability. If the answer to that is yes then the Tribunal requires to go on to consider whether or not the employer can justify their action on the basis that it was a proportionate means of achieving a legitimate aim. The employer’s knowledge only comes in to play in section 15(2) and only to the basic question as to whether or not the respondent had actual or constructive knowledge that the claimant was disabled.

10

15

20

25

30

91. In this case the unfavourable treatment alleged would appear to be that related to exaggerating the alleged behaviour of the claimant in relation to the incident on 9 November. In submissions we understood the claimant’s solicitor to broaden this out slightly in that he also referred to the note that Mr McMahon put on Nexus on 1 November. We also understand that the claimant’s submission was that the note on 1 November illustrated what he described as Mr McMahon’s negative attitude to the claimant which was said to be the something arising from her disability.

92. In the view of the Tribunal the claimant's claim falls at the first hurdle in that as a matter of fact the Tribunal found that there was no unfavourable treatment. We found as a fact that Mr McMahon did not in any way exaggerate the alleged behaviour of the claimant at the meeting on 5 9 November. The claim therefore falls to be dismissed at the earliest stage however in any event we considered that the claimant had entirely failed to get her claim off the ground in respect of any of the other matters she would have required to prove.
93. We accepted the respondent's representative's contention that in general 10 terms it is not unfavourable treatment for an employer to investigate a concern raised by a manager. An employer is entitled to raise a concern and then have it investigated. The claimant's position appeared to be that because the allegation did not proceed to a disciplinary hearing this was somehow evidence of malice on the part of Mr McMahon. This was far 15 from the case. The reason it did not go to a disciplinary is because there was a clash of evidence and Ms Wood made the entirely reasonable decision that in those circumstances it was not appropriate. The Tribunal's view is that the employer was acting favourably towards the claimant in dealing with the matter thus, particularly as our view is that the claimant was in fact guilty of the misconduct alleged by Mr McMahon. 20
94. We entirely rejected the suggestion that the fact that Mr McMahon was initially unaware of the claimant's disability was discriminatory in itself. We entirely accepted that in the normal course if an employee has a disability and communicates this to the employer then it is reasonable for the 25 manager to take this into consideration. In this case Mr McMahon had taken over the management of the shop at short notice and had not had a handover. He did not even have a proper log in to Nexus so as to enable him to browse employee records. The fact that he was unaware of what had been uploaded to Nexus in relation to the claimant's disability was not 30 something which arose from the claimant's disability but from the fact that there was no handover and he could not browse Nexus. It was clear that as soon as the claimant brought the matter to his attention he checked Nexus and thereafter specifically told the claimant that he was prepared to allow her some leeway in relation to her timekeeping.

95. We were struck in this case by the fact that the claimant appeared to believe that the respondent had much more knowledge of her disability than they actually did.
96. The evidence was that the claimant was someone who was volatile and who managers had found difficult to handle and according to her colleagues she had in the past been handled somewhat with kid gloves. There appears to have been one entry on Nexus (which was not produced) which had been placed by a previous manager relating to the claimant's condition. This was what Mr McMahon had seen and he acted in accordance with it by giving the claimant leeway with her timekeeping. There was absolutely no suggestion that this document stated that the claimant's disability in any way impacted on her ability to do shifts.
97. The Tribunal also considered that all of the evidence showed that the reasons the claimant found the shifts proposed by Mr McMahon to be unacceptable had nothing to do with her disability. The primary reason appears to have been that the claimant thought that she had an absolute right to have whatever shift she wanted. She had a problem with the Monday shift because of her university placement and the time it would take to get her from there to place of work. The reason for not wanting to do the Saturday afternoon shift appeared to be one of general convenience coupled with her view that she was entitled to the 6-3 shift on a Saturday. With regard to the Friday shift the claimant's position at the Tribunal was that she wished to attend some form of mental health counselling session on a Friday afternoon which had something to do with her disability. The Tribunal did not see any documentary evidence of what this appointment was about and it appeared to us that the link to her disability was somewhat tenuous. In any event, what is absolutely clear is that Mr McMahon accommodated the claimant's preference in respect of this shift by granting her authorised absence. Overall, the reason why Mr McMahon planned the shifts in the first place as he did was entirely to do with his view that this was the best allocation of the claimant's hours so as to benefit the business. It had absolutely nothing to do with the claimant's disability.
98. In submissions, the claimant's position appeared to be that Mr McMahon had treated her well up until the point where she had advised him of her

disability and that in some way his attitude had changed after that. We did not find any factual basis for this assertion.

99. With regard to the timing of the meeting on 9 November the claimant's position appears to be that this was specifically designed to cause her stress and as she put it at the meeting "piss her off". The Tribunal's view was that the respondent had demonstrated that there was a perfectly good and valid reason for holding the meeting at the time it was held which had absolutely nothing to do with the claimant's disability. Mr McMahon's evidence was that he had intended to hold the return to work meeting first thing. He could not do this because the claimant was late. In line with the undertaking he had previously given her he did not upbraid her for this but it did mean that it was not possible to have the meeting first thing in the morning. Mr McMahon was aware that if he did not complete the entry on Nexus showing the claimant as having returned to work then there was a danger she would not be paid on time for the shift and he therefore put through the details of the return to work meeting in advance of the actual meeting happening. We should say that his evidence was that this was not something which his managers had since told him was incorrect so long as the return to work meeting was actually held.
100. The evidence was that Mr McMahon had spoken to the claimant in the morning and arranged for the meeting to take place later in the day which it did. The meeting itself only dealt with the shift issue and did not proceed to discuss general return to work issues because of the claimant's action in storming out of the meeting.
101. Even if the Tribunal were entirely incorrect in our view that there was no disadvantage then, if there were (which we did not accept) it had nothing to do with the claimant's disability. It was absolutely clear to us that even if we had found all of the disadvantages alleged by the claimant to have been established and the causal connection established then the respondent had demonstrated that their actions were a proportionate means of achieving a legitimate aim. The legitimate aim was that of managing the store properly. In order to achieve that aim it was necessary for Mr McMahon to fix the shifts which the store needed. He was entitled to proceed as he did and say that whilst the employer would try to

accommodate the claimant this was not something she had an absolute right to. He was also entitled in the interests of normal employee discipline to report the actions of the claimant to his manager when she behaved as she did at the meeting on 9 November.

- 5 102. For the above reasons the claim of disability discrimination does not succeed and is dismissed.

10 Employment Judge: Ian McFatridge  
Date of Judgment: 10<sup>th</sup> February 2021  
Entered in Register: 19<sup>th</sup> February 2021  
Copied to Parties