



EMPLOYMENT TRIBUNALS

Claimant: Mrs N Jones

Respondent: Next Retail Limited t/a Next Online

Heard at: Nottingham by Cloud Video Platform

On: Monday 18, Tuesday 19 and Wednesday 20 January 2021

Before: Employment Judge Hutchinson

Members: Mrs J Hallam
Mr A Wood

Representatives

Claimant: Max Gordon of Counsel

Respondent: Wie-Men Ho, Solicitor

JUDGMENT

The Employment Tribunal gave judgment as follows: -

The claims of disability discrimination fail and are dismissed.

REASONS

Background to this hearing

1. The Claimant presented her claim to the Tribunal on 12 April 2019. She had been employed by the Respondent as a Credit Adviser from 24 September 2018 until her resignation on 1 March 2019.

2. It is not in dispute that the Claimant suffers from type one diabetes and is disabled in accordance with section 6 Equality Act 2010.

3. Her claims are: -

- Discrimination arising from disability
- Indirect discrimination
- Failure to make reasonable adjustments

Issues

Discrimination arising from disability

4. The Claimant relies on the following matters as arising from her disability: -
 - (a) The need to eat when required including outside her set lunchtime and break time.
 - (b) The need to take medication and test her blood sugars when required including outside her set lunchtimes and break times.
 - (c) The need for adjustments to her working arrangements.
5. Mrs Jones complains about the following unfavourable treatment namely: -
 - (a) Being challenged and/or reprimanded for eating at her desk.
 - (b) Being challenged and/or reprimanded if she took a break outside her set times to administer medication and/or test her blood levels.
 - (c) As a result of having less/insufficient break time Mrs Jones was forced to use her set breaks to administer medication and/or test her blood sugar levels.
 - (d) She suffered a detriment to her health by not being able to test her blood sugar levels when she felt it was required.
 - (e) Refusing to give her additional breaks.
6. We must determine whether the Claimant had been subjected to the unfavourable treatment that she alleged and whether it arose out of her disability.
7. If we are so satisfied, it will be for the Respondent to show that the unfavourable treatment was a proportionate means of achieving a legitimate aim.

Indirect discrimination

8. The policy, criterion or practice ("PCP") relied on are: -
 - (a) The Respondent's policy to refuse staff members to be allowed any food/eat food at their desk.
 - (b) The Respondent's policy that employees have set and limited breaks.
9. The Respondent accept that these policies were applied by the Respondent although they assert that adjustments were made to both policies. The implementation of adjustments is in contention and the Claimant relies on a hypothetical comparator of an employee who is not disabled/does not have type one diabetes.
10. The Claimant alleges the following disadvantages: -
 - (a) Being reprimanded and/or challenged for eating at her desk.

- (b) Being reprimanded and/or challenged when she took a break outside her allotted time.
- (c) Having to use her limited and set break times to administer medication and/or check her blood sugars.
- (d) Her health suffering after she was stopped from eating at her desk when required and not being able to check her blood sugars and/or administer insulin when required.

11. We must be satisfied that the Respondents applied the PCP at the relevant time to Mrs Jones and that they also applied it to others who did not share her characteristics.

12. We then must ask whether that put Mrs Jones at the disadvantage that she alleges and if so are the Respondents able to show that the PCP is a proportionate means of achieving a legitimate aim.

Reasonable adjustments

13. The Claimant relies on the same PCP's as in her indirect discrimination claim. She says that the substantial disadvantage that she has suffered are as follows: -

- (a) Being reprimanded and/or challenged for eating at her desk.
- (b) Being reprimanded and/or challenged when she took a break outside her allotted time.
- (c) Having to use her limited and set break times to administer medication and/or check her blood sugars.
- (d) Not having a private/safe space to test her blood sugars and inject insulin.
- (e) A deterioration in her health due to being stopped from eating at her desk when required and not being able to check her blood sugars and/or administer insulin when required.

14. The Claimant has suggested the following adjustments: -

- (a) Allowing the Claimant to keep and eat food at her desk.
- (b) Providing flexible working such as allowing the Claimant to take breaks outside set times when required.
- (c) Allowing the Claimant to take additional breaks to test blood sugar levels and inject insulin.
- (d) Providing a private/safe place for the Claimant to test her blood sugars and inject insulin.
- (e) Conduct welfare meetings/consultations with occupational health to ensure the Claimant was supported.

15. The Respondents contend that they had made the reasonable adjustments outlined above such that Mrs Jones was not placed at any disadvantage. In particular they say that: -

- (a) They allowed Mrs Jones to keep food at her desk.
- (b) Provided flexible working to enable her to take breaks outside her normal break times.
- (c) Conducted regular welfare/consultation meetings.
- (d) Provided her with a private/safe space to test her blood sugars and inject insulin.

The evidence

16. The Tribunal heard evidence from the following: -

- The Claimant
- Maria Boucher, Team Manager in the Credit Department
- Maria Baker, Department Manager
- Barbara Bowyer, Head of Credit and Risk Operations

17. Where there was a dispute on the evidence (and there was little that there was in dispute) we preferred the evidence of the Respondent's witnesses.

18. The Claimant's evidence was not consistent. An example of this relates to the events of 11 December 2018. The Claimant asserts that she suffered a hypoglycaemic attack on that date even though there is no medical evidence to support it. There is evidence that she was ill suffering with pneumonia and swine flu which is consistent with the sick note that the Claimant provided. The Claimant had been ill during that week and after the events she was taken to hospital by her family where she stayed and was diagnosed with pneumonia.

19. None of the Respondent's witnesses were aware that the Claimant was suffering from a hypoglycaemic attack on the day and that is consistent with the fact that she did not suffer an attack.

Facts

20. The Respondent is a large retail employer employing approximately sixteen hundred employees. The Claimant was employed at its call centre at Enderby. She commenced her employment with the Respondent on 24 September 2018 as a Credit Adviser. This involved dealing with orders and speaking with customers and carrying out additional security checks and holding, cancelling and authorising orders. We have seen the staff handbook or extracts from it including the company's sickness absence policy which is at pages 71 to 81 of the bundle. Last within probationary period is dealt with at page 76. It provides;

"The corrective action procedure described above will not apply during the probationary period. Action taken will be in line with the table below.

Occasion	action	period
First	Counselling	In 6 month period
Second	Contract terminated	In 6 month period”

21. When the Claimant commenced her employment, she completed a new starter form which is at page 82. It says that the Claimant is “diabetic” and takes insulin.

22. The Claimant’s offer letter is at pages 83 to 88. It confirms that the Claimant would be undertaking training between 24 September and 26 October 2018. The training was conducted between 9:00 am and 5:00 pm.

23. Thereafter, on 29 October 2018 she was to commence her role as Credit Adviser. She worked 32 hours per week and her normal working hours were: -

- 6:00 pm to midnight on Mondays, Thursdays and Fridays
- 5:00 pm to midnight on Saturdays and Sundays

24. The probationary period is detailed at page 86. It provides: -

“During your probationary period you will not be subject to the company’s disciplinary procedure. If during your probationary period your employment is terminated by the company, you will not have the right to appeal the decision of dismissal.”

25. Under the sickness absence and pay section at page 85 it states:

“During your probationary period, if you have two occasions of sickness absence your contract with the company will be terminated. All occasions of sickness absence will be counted, including those occasions when an employee does not complete their full shift due to sickness.”

26. The awareness of the Respondents of the Claimant’s diabetes is shown in the e-mail of 24 September 2018 at page 90 from Sophie Norris.

27. It states:

“In order to support you in your role and to enable the company to consider reasonable adjustments, we need you to contact your GP and ask for a letter to be produced on headed paper stating the following: -

- What condition you have been diagnosed with?
- When were you diagnosed with this condition?
- What medication or treatment has been prescribed/given for this condition?
- Any side effects of the medication and if they are impacting on you?
- How this condition may impact on you within the workplace?
- Any adjustments the company should consider?”

28. She was asked to obtain a receipt from her GP and that they would pay the cost of the report up to a maximum of £50. She was asked to e-mail the report to HR. It goes on to say:

“Should you feel that your trainer needs to be aware of your medical condition or you require any adjustments within the training environment it is your responsibility to make your trainer aware, if you are happy for us to share this information with your trainer on your behalf, please confirm this in your e-mail.”

29. The Respondents never received any letter/report from the Claimant's GP. The Claimant was chased in respect of this and says that she chased her GP but in the rest of her employment with the Respondent, the Respondent had to rely on the information provided by the Claimant.

30. Rakhee Patal was the Manager in charge of the training during the first five weeks of her employment. It is not in dispute that Mrs Jones told Ms Patel that she was diabetic and was going to provide HR with the documentary evidence in respect of her condition. This is referred to by Ms Patel during the investigatory meeting that took place on 21 February 2019 (see pages 214a-f).

31. Ms Patel had explained to Mrs Jones about the rule that food was not allowed in training and she said that she had allowed the Claimant to have food on her desk because of her condition.

32. Maria Boucher who became the Claimant's Line Manager when she commenced on 29 October 2018 was advised by Ms Patel that the Claimant was diabetic and was requesting specific breaks and wanted to eat “on the floor”. This is confirmed in Ms Boucher's witness statement dated 19 December 2018 at page 115.

That statement goes on to confirm;

“When Nita came out on the floor during sponsorship it was arranged that she would have her lunch at 6:30 PM 9 PM and 10:45 PM to allow her to control her diabetes which was forward to Nimesh to put on the system permanently moving forward.

Also, I spoke with Amanda and subsequently Ziyaad to agree that Nita could have a snack bar on her desk in case she felt like she was going poorly with her diabetes as she did not feel that she would have enough time to get to her locker without the possibility of collapsing.

Whilst I was away on holiday Diane informed me that she needed different times of break which have been changed accordingly.”

33. Ms Boucher had started her position in July 2018.

34. Ms Boucher was not able to have a discussion on the first day but on the second day they discussed her diabetes.

35. Mrs Jones said that she needed to have specific breaks to enable her to take her medication and ensure that her blood sugars were controlled.

36. As is confirmed again in that it statement at page 115 Ms Boucher agreed with Mrs Jones that she should have her breaks at 6:30 pm, 9:00 pm and 10:45 pm “to allow her to control her diabetes”. The break at 6:30 PM would also be for 45 minutes instead of the usual 30 minutes.

37. They also discussed the rule that there should be no food on the call centre floor. It is normally applied to all who handle calls from the public and Ms Boucher originally planned that Nita Jones would come off the call centre floor to get food from her locker whenever she needed it.

38. Her locker was a short walk from her desk and one day during the first week Mrs Jones arrived with a large bag of food. In it were biscuits, donuts, cookies and various other items. She was told that she could not have the large bag of food at her desk and Ms Boucher agreed that she could have a chocolate bar at her desk to enable her to manage any diabetic episode.

39. The chocolate bar or some other similar item would be kept on her desk in a small, clear wallet that the call centre operatives are allowed to bring to their desks.

40. The agreement resolved the matter and two other Managers, Ziyaad Shaikh and Nimesh Varia were told. Ms Boucher did not though send any e-mail to confirm the arrangements.

41. Maria Boucher was on holiday between 8 and 30 November and during this time an agreement was reached that Mrs Jones's break times could be changed to suit her diabetes.

42. During this period Mrs Jones had to be spoken to on several occasions about going on her break late and not advising the duty desk about this. As can be seen by the note dated 28 November 2018 (page 92) on that day she had taken her break which was due to take place at 10:30 pm at 11:08 pm. She was told that she should take her breaks at the correct time. That breaks were allocated to ensure call volume could be maintained and to keep lost calls down. She was told that if she was going to go on her break late she should let the duty desk know asap.

43. We are satisfied that Mrs Jones knew the reason why the break times were allocated and that it was important to take her breaks at the correct time. It did not mean that she could not change her breaks only that any changes had to be agreed with the manager on duty at the time to ensure that there was no disruption to service levels.

44. At the Claimant's request these breaks were changed so that she had a 45-minute break at 6:30 pm to allow her to take her insulin and then take some food and her breaks were also amended later to 8:45 pm and 10:45 pm.

45. It can be seen from the e-mail from Dianne Pywell dated 28 November 2018 at page 93 that the breaks had been adjusted as per the Claimant's request.

46. On 28 November 2018 the Claimant commenced a sickness absence which continued until 3 December 2018. The reason for the absence was "sickness and bad stomach".

47. At the return to work meeting (see page 96) she assured Ms Boucher that she still felt a bit queasy. She was fine now and her "diabetes appears to be fine" She was told any further absence during the probationary period would lead to termination in accordance with the Respondent's procedures.

48. When Mrs Jones arrived for work on 11 December 2018 Ms Boucher thought that she was unwell. She says that she looked poorly and had not started her shift on time and had been put on some administrative work so that she was not overly pressured. She was not required to take inbound calls. Was worried

49. Mrs Jones was worried that as this was her 2nd occasion of sickness in her probationary period that this could lead to the termination of her contract. She asked Ms Boucher about sickness absence during her probationary period and Ms Boucher explained to her that usually anyone who had two periods of absence during their probationary period ran the risk that they would fail their probationary period and be dismissed.

50. Mrs Jones then had a further discussion with Ziyaad Shaikh. He described what happened in an e-mail sent the following day to Daniela Schiliro (page 98). He described how the Claimant was feeling unwell with symptoms of coughing, shortness of breath and teary eyes and requested emergency holiday for Wednesday. He rejected this request because of operational needs and advised her that if she was unwell and unable to attend the next shift it would be treated as sickness absence.

51. Mrs Jones said that she had already had one occasion of sickness and asked if she would be released from her contract if she had a second absence. He advised her that no decision had been made at that moment.

52. He did authorise her to leave early for her shift that evening if she felt she needed to go to accident and emergency and see a doctor and this would not go down as sick. She requested him to call 111 which he allowed her to do. An ambulance was despatched and arrived later.

53. Mr Shaikh heard Mrs Jones discuss her work situation with the crew member of the ambulance and she advised the crew member that she would be sacked. The ambulance crew member checked Mrs Jones's condition and said that she may have a chest infection and would need to go to A&E to get this checked out and needed antibiotics and rest.

54. Mrs Jones did not attend work the following day and on 13 December 2018 her husband rang to say that she was in hospital.

55. On 16 December 2018 Maria Baker spoke to Mr Jones and he said that his wife was at home but she couldn't talk.

56. Further telephone calls were made on 17 and 18 December 2018 when they were unable to speak to Mrs Jones.

57. Finally, on 19 December 2018 Barbara Bowyer had a conversation with Mrs Jones which is recounted in her e-mail of 21 December 2018 at page 119d-e. The e-mail describes "a catalogue of concerns and what she felt was a lack of duty of care towards her".

58. Mrs Jones was clearly concerned that now having had two occasions of sickness absence her contract would be terminated.

59. She complained, for the first time, about her break allocations and as she

described not being allowed to eat at her desk unchallenged.

60. She recounted the details of what had happened on 11 December 2018 saying that she had been feeling unwell since the Sunday but had attended work because she was fearful of losing her job. She described how when she had been in hospital she had been diagnosed with pneumonia and after she had been released she had to be readmitted with swine flu. There was no mention that any of the events on 11 December 2018 included her suffering from a hypoglycaemic attack brought on by her diabetes.

61. Barbara Bowyer tried to reassure her saying that they would review everything and discuss it further when she was better.

62. She told Barbara Bowyer that she wanted to raise a grievance about the management of her. She wanted an apology and some financial compensation as she had not been paid for being on the sick. She was not entitled to any sick pay under the company's sick pay scheme.

63. Barbara Bowyer asked Amanda King, Assistant Operations Manager to conduct investigations and Amanda spoke to: -

63.1 Ziyaad Shaikh (pages 112-113).

63.2 Kulbinder Gill (page 114).

63.3 Maria Boucher (pages 115-117).

63.4 Nimesh Varia (page 118).

64. Ms King distilled the findings of her investigation into an e-mail that she sent to Barbara Bowyer on 21 December 2018 (pages 119a-c) and Barbara Bowyer then summarised what she had done to that point in an e-mail to HR also on 21 December 2018 (pages 119d-e).

65. They agreed that Barbara Bowyer would discuss all the issues with Mrs Jones at a meeting that they proposed to take place on 2 January 2019. They also agreed that her absence from the start of December would be exempted from their usual management procedures because she had been hospitalised.

66. Mrs Jones tried to send some e-mails to Mrs Bowyer and other managers in late December and early January but those e-mails were directed to incorrect e-mail addresses. Mrs Jones did not attend the meeting arranged for 4:00 pm on 2 January 2019 and did not contact Barbara Bowyer on that date.

67. A welfare meeting was arranged for 13 January 2019. Barbara Bowyer tried to follow up and resolve Mrs Jones's concerns by sending further e-mails on 8 and 25 January 2019 (pages 156-158). She still received no response and sent a letter to Mrs Jones at her home address on 29 January 2019 (page 159). In the meantime, Maria Baker conducted a welfare meeting with Mrs Jones on 13 January 2019 and the notes are at pages 132-135.

68. At an early stage of the meeting Mrs Jones indicated she was unhappy that Ms Boucher was taking the notes. She referred to having a difficult conversation with Ms Boucher about eating crisps at her desk. Mrs Baker said

that if she was uncomfortable with Ms Boucher taking notes she would get a different notetaker but Mrs Jones did not further object.

69. Mrs Jones said that she was feeling a lot better and explained about her diabetes saying that she was insulin dependent and had been for forty years but it was well managed.

70. They discussed the issues trying to align her breaks with the needs of her condition. She confirmed that these had been resolved. They had changed the timing of her 6:00 pm break and extended it to forty-five minutes which Mrs Jones had found acceptable.

71. Mrs Jones had two additional breaks each evening and those could be taken at any time and were not dependent on medication.

72. Mrs Jones explained that she liked to test her blood sugars at around 9:00 pm when she was at home but she was concerned about doing this in front of anyone in the workplace. Mrs Baker agreed that they should find an environment where she could do this and they suggested the HR room would be somewhere quiet and would be acceptable. Mrs Jones was happy with that arrangement.

73. They also discussed Mrs Jones having food at her desk. Mrs Jones said that she sometimes felt a “hypo” coming on and they had agreed she could keep a chocolate bar in the clear wallet on her desk. This did not appear to be an issue. There was no suggestion from Mrs Jones that the arrangement was unclear.

74. Mrs Bowyer explained that it was important for her to tell her managers if she was feeling unwell so she could be supported.

75. Mrs Jones raised a concern that she did not feel people were fully aware of her diabetes. Ms Boucher confirmed that she knew about the condition before Mrs Jones joined the team but they were still waiting for the GP letter to be received to explain what specific support they needed to provide to Mrs Jones. In the absence of the medical evidence they had had to learn as they went along. They then talked about the incident on 11 December 2018 and the reporting procedure and they discussed Mrs Jones phoning in on the wrong number and sending e-mails to the wrong addresses.

76. Mrs Jones was keen to return to work at the end of her existing sicknote on 20 January 2019 and she was told that any other concerns that she had could be raised through the process that was currently in place with Barbara Bowyer.

77. Mrs Baker explained that when Mrs Jones returned to work she would be given time to catch up on any changes or briefs she had missed while out of the business so she was comfortable doing her job before she took her first call and her return to work conversation would take place at the start of her shift.

78. A copy of the notes were sent to Mrs Jones after the meeting and on the following day she e-mailed Mrs Baker to ask for some amendments to be made to the meeting notes (page 149).

79. We were satisfied that there was no indication given to the Respondents that Mrs Jones was uncomfortable during the meeting about Ms Boucher’s

presence. After that discussion had taken place about the appropriateness of Ms Boucher taking the notes. It was, as Mrs Baker described, no more than “a very low-level grumble” and after that discussion it is clear that the meeting continued in a positive way with Mrs Baker making every effort to accommodate the needs of Mrs Jones. It was a positive meeting and we are satisfied resolved any issues Mrs Jones had at her work place. She had been reassured that she would not be dismissed because of her second absence, that the Respondent were aware of her requirements in relation to her diabetes and that all necessary adjustments were in place.

80. Mrs Jones did not return to work on the expiry of her sicknote on 20 January 2019. She provided a sicknote dated 17 January 2019 to say that she was suffering from a chest infection and on 21 January 2019 raised a formal grievance (page 154).

81. In her e-mail she claimed that she had been persistently reprimanded for having food at her desk and she complained about her treatment on 11 December 2018 which she said had not been looked into. That was not correct.

82. She said that she was too unwell to return to work and did not feel well enough or comfortable to be able to return to work until her grievance had been dealt with.

83. On 22 January 2019 Daniela Schiliro from HR wrote to her about the meeting on 13 January 2019 and referred to her sicknote now provided which expired on 30 January 2019. She told Mrs Jones that if she did not return to work by 10 February 2019 a further welfare review meeting would be conducted.

84. Having not heard anything from the Claimant in response to her e-mails Barbara Bowyer wrote to the Claimant at her home address on 29 January 2019 (page 159). It said:

“I am really keen to support your wellbeing and would not want anything that you raise with me to remain as a concern for you being comfortable returning to work. I am confident that we can overcome any concerns.

I am happy to wait until your return. However, I would encourage you to phone or e-mail me to arrange an early meeting to get together and discuss the concerns raised.

Please let me know what you would like to do? I hope you are feeling better soon.”

85. Mrs Jones responded to this letter by e-mail dated 4 February 2019 (page 160). It was sent again to the wrong email address.

86. She then provided a further sick note to 20 February 2019 for a chest infection (page 161).

87. Mrs Bowyer wrote to Mrs Jones on 5 February 2019 in response to her e-mail. She asked Mrs Jones to let her have a copy of her grievance because she still had not received it. Mrs Jones then responded by sending her a copy of the e-mail that she had sent on 21 January 2019 (page 165).

88. On 6 February 2019 Allison Bagshaw from HR wrote to Mrs Jones asking her to attend a grievance hearing on 15 February 2019 (page 170-171).

89. The script and notes of that meeting are at pages 172-211. The meeting was lengthy and Mrs Jones explained her grievance to Mrs Bowyer.

90. Mrs Bowyer then spoke to the following: -

90.1 Rakhee Patel (pages 213-217).

90.2 Sophie Norris (pages 218-226).

90.3 Dianne Pywell (pages 227-237).

90.4 Laura Hargrave (pages 238-244).

90.5 Ziyaad Shaikh (pages 245-274).

90.6 Nimesh Varia (pages 275-294).

90.7 Louise Shephard (pages 295-298).

90.8 Toni Walker (pages 303-305).

90.9 Maria Boucher (pages 306-361).

90.10 Laura Hargrave (pages 362-367).

90.11 Luke Hall (pages 368-380).

90.12 Helen Greensmith (pages 381-395).

90.13 Amanda King (pages 396-410).

90.14 Nicola Kell (pages 411-412).

90.15 Riah Colford (pages 420-422).

91. On 1 March 2019 an update was sent to Mrs Jones by Daniela Schiliro saying that they should be able to write to her with the outcome on week commencing 11 March (page 417).

92. Before they could conclude the grievance findings Mrs Jones resigned in an e-mail of 1 March 2019 (pages 418-419). Her explanation for leaving was:

“I can no longer work under the conditions created by certain management, and I do not feel comfortable returning back after the traumatic event I suffered on 12 December 2018. I feel returning to such a working environment and therefore do not feel able to put myself at risk again of being subjected to such discriminatory treatment and lack of care.”

93. Barbara Bowyer wrote back immediately expressing regret that Mrs Jones felt that way. She had been working hard to investigate those concerns that had been raised. She said that she was very confident that she would be able to

support Mrs Jones coming back into work and said that if she wished to discuss matters further to let her know.

94. By now the Claimant had clearly decided not to return and had started work with an agency.

95. Having concluded her investigations Barbara Bowyer wrote to Mrs Jones with the outcome of the grievance in a letter dated 15 March 2019 (pages 429-435). In summary she was satisfied that the Respondents were aware of her diabetes and that they had taken appropriate steps to try and understand more about that condition so they could make appropriate adjustments to her working practices.

96. It pointed out that Mrs Jones had not provided any medical evidence which had not helped and that they had done their best to understand her requirements and support her without any formal medical guidance on the issue. Mrs Bowyer did not feel it was reasonable for Mrs Jones to criticise her managers for not fully understanding diabetes as a condition. They are not medically trained and they had taken appropriate steps to try and support Mrs Jones as best they could.

97. They had taken steps to make sure that Mrs Jones received breaks as and when she needed them. They had changed her break times at various points and no one had prevented Mrs Jones from taking breaks as required in relation to her condition and taking her medication.

98. Mrs Bowyer was also satisfied that they had taken appropriate steps so that Mrs Jones could eat at her desk in the event of a hypo situation. Whilst it seemed unlikely that Mrs Jones would not have been able to get to her locker which was only a short distance away from her desk, they had agreed that she could have a chocolate bar and that that arrangement had been put in place.

99. Mrs Bowyer understood why other team managers had questioned Mrs Jones for eating other things at her desk. At various times she had been seen eating a sandwich and crisps and various other things including offering cakes to other members of staff. They were well beyond the adjustment that they had put in place and were the cause of any confusion.

100. Mrs Bowyer endorsed the right for management to challenge Mrs Jones in circumstances where she appeared to be breaching the general practice of not eating at her desk rather than utilising the adjustment that had been put in place. She accepted that perhaps they could have more widely distributed the knowledge about her condition but they were in a difficult position trying to make sure people understood without breaching her confidence or privacy.

101. In respect of the incident on 11 December 2018 she did not accept that they way that they had treated Mrs Jones was inappropriate. She had been allowed to call 111 and the only criticism that she made was that management should have checked that she was comfortable to complete the call and she could have been supported more closely in that respect. With that exception the management team had supported Mrs Jones appropriately.

The law

Discrimination arising from disability

102. Section 15 of the Equality Act 2010 (EQA) provides: -

- “(1) A person (A) discriminates against a disabled person (B) if:-
- (a) A treats B unfavourably because of something arising in consequence of B's disability, and
 - (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.”

103. Mr Gordon referred us to the cases of: -

- **Williams v Trustees of Swansea University Pension and Assurance Scheme and Another** [2019] ICR 230
- **Basildon and Thurrock NHS Foundation Trust v Weerasinghe** [2016] ICR 305

104. He also referred us to the Equality and Human Rights Commissions Code of Practice on Employment.

105. Mr Gordon contends that unfavourable treatment is to be construed widely and that a Claimant is simply required to show that he or she has suffered something broadly akin to a detriment without having to show that somebody else who does not suffer from the same disability would have been treated differently. This is because no comparator is required under the section.

Indirect discrimination

106. Section 19 EQA provides: -

- “(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.”

107. Again, Mr Gordon referred us to the EHRC Employment Code.

Failure to make reasonable adjustments

108. Section 20 EQA provides: -

“(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.

(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.”

109. Section 212(1) EQA confirms “substantial” means more than trivial and is not a high threshold to consider.

110. Again, Mr Gordon referred us to the EHRC Employment Code.

111. He also referred us to the following cases: -

- **Royal Bank of Scotland v Ashton** [2011] ICR 632
- **Abertawe Bro Morgannwg University Local Health Authority v Morgan** [2018] ICR 1194

Our Conclusions

112. It is not in dispute that the Respondents were aware of the Claimant's disability, namely her diabetes, from the time that she commenced her employment with the Respondents.

113. They had taken steps to try to obtain further information from the Claimant's GP but during the Claimant's employment they had not received that information from the Claimant. They had taken steps to try to obtain that report by chasing the Claimant and the fact that they did not have that medical evidence did not help the situation in understanding Mrs Jones's requirement and providing support for her.

114. We are satisfied though that it was not reasonable for Mrs Jones to criticise her managers who are not medically trained and do not understand diabetes as a condition and that they tried their best to support Mrs Jones.

115. What happened here needs to be seen in that context.

116. Mrs Jones had told Rakhee Patel that she needed a chocolate bar at her desk during training and this had been accommodated. Similarly, when she told Maria Boucher about her need again this had been accommodated.

Discrimination arising from disability

117. We are satisfied that the matters arising from the Claimant's disability in this case are:

- (a) The need to eat if she feels that she has a hypo attack. It is not a need to eat "when required" as described by Mr Gordon.
- (b) She has a need to take medication and a need to test her blood sugars and the need to test her blood sugars cannot arise outside her set lunchtimes and breaks.
- (c) We accept that there is a need because of her disability for adjustments to her working arrangements.

118. We do not accept that the Claimant has suffered unfavourable treatment in this case.

119. The Respondent have a policy that employees are not allowed to keep food at their desks. In view of the work they undertake i.e. dealing with customers over the telephone that is perfectly sensible. Employees have a locker in which they can keep food and they have breaks when they can consume their food. As a rule, it is not necessary for employees to eat outside their breaks.

120. We are satisfied that it was not reasonable for Mrs Jones to criticise her managers for not fully understanding diabetes as a condition. They are not medically trained and we are satisfied that they were trying to do their best to support Mrs Jones when they knew about her condition.

121. Appropriate measures were taken so that Mrs Jones could eat at her desk in the event of a "hypo" situation. Management had agreed that she could have a chocolate bar and that arrangement had been put in place.

122. We are satisfied that the only time that team managers questioned Mrs Jones for eating other things at her desk it was when she was consuming such matters as a sandwich and crisps and cakes. This was outside the agreement and what was necessary to put in place to cope with the possible "hypo" situation.

123. It was perfectly reasonable for management to challenge Mrs Jones if she appeared to be breaching the policy about eating at her desk rather than utilising the adjustment that had been put in place.

124. We do not criticise management about widely distributing knowledge about Mrs Jones's condition. It was important that they did not breach her confidence or privacy.

125. We are satisfied that team managers questioning the Claimant as they did, did not amount to a challenge or reprimand as the Claimant describes.

126. We are satisfied that the Claimant was not challenged or reprimanded about taking breaks outside her set time to administer medication and/or test her blood levels.

127. The only time that she was reprimanded in respect of breaks was on 28 November 2018 when she was spoken to after her breaks had been adjusted at her request. Breaks needed to be taken at agreed times to manage the workload in the team and it was necessary for her to inform her line manager when she was taking her break. At that time the Claimant did neither of these. We are satisfied that taking her breaks late had nothing to do with her administering medication or testing her blood levels. She made no mention of it at the time and it is clear from all the evidence that we have heard that when she requested the accommodation to test her blood sugars she was accommodated by her manager who even suggested that they would provide a private room so that she could deal with this matter.

128. We do not agree that the Claimant was given less or insufficient break time or that she was forced to use her set breaks to administer medication and/or test her blood sugar levels. We are therefore satisfied that there was no detriment to the Claimant's health by not being able to test her blood sugar levels when she felt it was required. There was no problem with the Claimant being able to do her tests whenever she felt it was necessary.

129. There was no refusal to give Mrs Jones additional breaks. She had three breaks that were set and the Respondents adjusted the times of those breaks and extended her lunchbreak by 15 minutes. When she said that she might need additional breaks to test her blood sugars this was not refused either.

130. For these reasons the claim of discrimination arising from disability fails.

Indirect discrimination

131. It is not in dispute that the Respondents have certain PCP's that affect the Claimant. We do not agree that the PCP's in this case are as described by Mr Gordon.

132. The Respondent's policy is that staff members in the department where the Claimant worked were not allowed to eat food or keep food at their desks. Food needs to be kept in a locker.

133. The Respondents also have a policy that during a shift the employees have three breaks, one for 30 minutes and two further breaks of 15 minutes each.

134. As with our findings for the claim of discrimination arising from disability we find that: -

(a) The Claimant was not reprimanded or challenged for eating at her desk. She was only spoken to when she stepped outside the adjustment that had been agreed with her.

(b) Mrs Jones was not reprimanded or challenged when she took a break outside her allotted time other than the event on 28 November 2019 when she was spoken to quite reasonably about taking her breaks late and without informing management. That was nothing to do with the Claimant taking a break to administer medication and/or carry out tests to her blood sugar levels.

(c) Mrs Jones did not have to use her breaks to administer medication and/or check her blood sugars. She did administer her insulin at the 6:00 pm break. Insulin should be administered at regular intervals and we were told that she required two doses of insulin each day. The Respondents had adjusted her break as per her request so that she could administer her insulin and then have time to eat 15 minutes after the insulin had been administered. She was never prevented from taking her blood sugars and if she wished to take them outside her normal break times we are satisfied she would have been allowed to do so.

(d) We are not satisfied that the Claimant's health suffered any detriment because of the PCP's and the way that they were applied to her. She could eat at her desk if she was having a hypo and she was able to check her blood sugars and administer insulin when she required.

Failure to make reasonable adjustments

135. The PCP's are the same as above namely: -

(a) The Respondent's policy to not allow any food to be kept at employee's desks or for them to be able to eat at their desk.

(b) The policy that employees had set breaks.

136. We are satisfied as described above that: -

136.1 The Claimant was not reprimanded or challenged for eating at her desk.

136.2 She was not reprimanded or challenged when she took a break outside her allotted time where it related to her disability.

136.3 She did not have to use her break times to administer medication and/or check her blood sugar.

136.4 She was provided with a private/safe place to test her bloods and inject insulin when she requested it.

136.5 There was no detriment to the Claimant's health due to the reasonable adjustments that have been put in place for the Claimant. Her sickness absence had nothing to do with her diabetes.

137. We are satisfied: -

137.1 That the Respondents did allow the Claimant to keep a chocolate bar on her desk which was necessary in respect of her condition.

137.2 That they did allow the Claimant to change her break time and also take additional breaks if she needed to check her blood sugars.

137.3 When requested they provided her with a safe and private place for her to test her blood sugars.

137.4 That they did conduct welfare meetings with her to discuss those concerns and to take appropriate measures.

138. Her claim that the Respondents have failed to carry out reasonable adjustments therefore fails.

139. The claims therefore of disability discrimination all fail and are dismissed.

Employment Judge Hutchinson

Date 18 February 2021

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