



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103190/19

Held in Aberdeen on 15, 16 and 17 February 2021

Employment Judge: N M Hosie

Members: Mrs C A Jackson

Mrs D Massie

Mrs K Mutch

Claimant

Represented by

Ms L Neil - Solicitor

Ban-Car Hotel Limited

Respondent

Represented by

**Mr M W Anderson -
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that:-

(1) the claimant was a disabled person in terms of the Equality Act 2010; and

(2) the claim is dismissed.

REASONS

Introduction

1. Karen Mutch brought a number of disability discrimination complaints (direct discrimination in terms of s.13 of the Equality Act 2010; discrimination arising from disability in terms of s.15; a failure to make reasonable adjustments in terms of s.20; and harassment in terms of s.26. The respondent denied the claim in its entirety; they denied that the claimant was disabled in terms of the 2010 Act; they denied that they dismissed the claimant, as she claimed.
2. We heard evidence first from the claimant. We then heard evidence on behalf of the respondent from:
 - Christina Gibbins, Owner-Manager of Ban-Car Hotel
 - David Gibbins, Owner-Manager of Ban-Car Hotel
3. Each of the witnesses spoke to written statements.
4. A joint bundle of documentary productions was also submitted (“P”).

Disability Status

5. This was the first issue which we considered.
6. In terms of s.6(1) of the 2010 Act a person has a “disability” if he or she has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities.

7. Langstaff J, when President of the EAT, in ***Aderemi v London and South Eastern Railway Ltd*** [2013] ICR said this about the definition:-

“It is clear first from the definition of section 6(1)(b) of the Equality Act 2010, that what a Tribunal has to consider is an adverse effect, and that it is an adverse effect not upon his carrying out normal day-to-day activities but upon his ability to do so. Because the effect is adverse, the focus of a Tribunal must necessarily be upon which that which a claimant maintains he cannot do as a result of his physical or mental impairment. Once he has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, a Tribunal has then to assess whether that is or is not substantial. Here, however, it has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading “trivial” or “insubstantial”, it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other”.

8. When considering this issue we were also mindful of the “Guidance on matters to be taken into account in determining questions relating to the definition of disability” (2011) and the “Code of Practice on Employment (2015)” which has some bearing on the meaning of “disability” under the 2010 Act. While the Guidance and the Code do not impose legal obligations, the Tribunal must take into account any part that appears to be relevant to the issue of disability status.
9. So far as the present case was concerned, the “impairments” relied upon by the claimant were her “Stammer” and “Depression”.
10. While the respondent’s witness, Mrs Gibbins, said that when she worked for her the claimant’s stammer was much less pronounced than it was when she gave evidence at the Tribunal Hearing, it was clear that stress exacerbated her stammer.
11. The claimant’s solicitor took the claimant through her GP records (P8). Although these were somewhat historic and the claimant had not been prepared to engage

in speech and language therapy, we were satisfied that there had not been any material improvement in the claimant's impairments since then.

12. The claimant also referred in her evidence to a letter from her GP dated 29 May 2019 which recorded that the claimant, "*has a long history of ongoing depression and has been on anti-depressants, namely Venlafaxine since 2004 ...*" (P11). We had no reason to doubt the accuracy of that letter or indeed the medical records. Further, the claimant's evidence was consistent with these productions.
13. Having regard to the medical evidence in this case and the claimant's own evidence, the Tribunal is satisfied that the claimant had a physical impairment in the form of her stammer/speech impediment and a mental impairment in the form of her depression.

Adverse effect on day-to-day activities

14. The Tribunal accepted the claimant's evidence that her speech impediment had an adverse effect on her ability to communicate. She avoided using public transport and experienced difficulty using the telephone. That was why, she often had to use written means of communication such as Facebook messages.
15. We also accepted her evidence, in relation to her depression, that this was accompanied by lassitude and lack of motivation in respect of her personal care and dress and, as her solicitor submitted, "*poor sleep patterns, an avoidance of mixing with others, anxiety associated with shopping and using public transport, difficulty concentrating to mix with others and lack of concentration*".

Was the effect "substantial"?

16. In his submissions, the respondent's solicitor referred to the claimant's job application in which she advised the respondent that she had "a slight stammer". (P13/1). However, we accepted her evidence that she was fearful of not being

considered for the job had she advised that her stammer was more significant. Further, as we recorded above, it was clear that her stammer was exacerbated when she was under stress.

17. On the basis of the claimant's own evidence and the medical evidence, we were satisfied that her impairments had a significant effect on the way the claimant conducted herself and cannot be described as 'minor or trivial' (s.212(1) of the 2010 Act). On 27 December 2016 the medical records record that she had "a bad stammer" (P8/5); on 4 August 2013 she was recorded as having, "*communication difficulties and has written everything down on paper*" (P8/8); she was recorded as having a, "*severe speech impediment causing severe communication difficulties*" on 16 June 2011 (P8/10). As we recorded above, we were satisfied that there had been no material improvement in her stammer since then.
18. So far as her depression was concerned, she has continued to take medication (P8/3); medical records reveal that on 21 July 2011 she had, "*a moderately severe recurrent depressive illness with anxiety and that her presentation is greatly exacerbated by lots of social problems and personality/coping problems*" (P8/9); a "*recurrent depressive disorder – current episode moderate*" on 16 June 2011 (P8/10). Clearly she has a history of depression which is ongoing as she continues to be prescribed medication.

"Long term"

19. It was clear that her impairments had lasted for more than 12 months.

Conclusion

20. Thus, in conclusion, having addressed each of the elements of the definition of disability in s.6, we were satisfied that the claimant had demonstrated that she was a disabled person within the meaning of the 2010 Act. This meant that the Tribunal

was able to proceed to consider the merits of her discrimination claim against the respondent.

Discrimination Claim

21. Having heard the evidence and considered the documentary productions, we were able to make the following findings in fact, in relation to the various discrimination complaints which were advanced by the claimant.
22. We wish to record, at this stage, that both of the respondent's witnesses gave their evidence in a measured, consistent and convincing manner and presented as both credible and reliable. While it was clear that the claimant had communication difficulties due to her speech impediment, there were certain aspects of her evidence which we considered to be unreliable and in certain respects neither credible nor reliable.
23. Christina ("Tina") Gibbins and her husband, David Gibbins, are the "owners/managers" of the Ban-Car Hotel in Lonmay, Aberdeenshire ("the Hotel"). They have run the business together for over 20 years.
24. The claimant commenced her employment at the Hotel as a Chef with effect from 9 October 2018. Her employment ended on 1 December 2018.
25. The claimant worked in the kitchen with the Head Chef, Karen Allan, the "second chef", Teresa Kelsall, Levi Arthur, Susan Davidson (Levi's mother), Elaine Beagrie and Aiden".
26. When Mrs Gibbins interviewed the claimant for the job she told her not to worry about her stammer as she was being employed to cook and this was not an issue. Mrs Gibbins also agreed to provide the claimant with shifts which would suit her child care commitments.

27. The claimant appeared to fit in well when she started work and Mrs Gibbins was not aware of any problems within the kitchen. The kitchen staff all seemed to work well together. A friendship developed between the claimant and her fellow Chef, Teresa Kelsall.

Events of 26 to 29 October 2018

28. In the evening of Sunday 28 October 2018, the Head Chef, Karen Allan, approached Mrs Gibbins and told her that on Friday 26 October she had overheard the claimant telling her colleagues Levi Arthur and Elaine Beagrie that she didn't like working with her (Karen Allan) and that she (Karen Allan) had snapped at her for no reason. Ms Allan was upset. She was in tears. The claimant asked Ms Allan to send a message to the claimant to advise her that she would like to meet her the following day. Unfortunately, the message which Ms Allan sent to the claimant that evening was not one of the documentary productions. However, it was common ground between the parties that Ms Allan sent the message to the claimant on the "kitchen staff's WhatsApp group chat".
29. The claimant maintained that she received the message from Ms Allan on Friday 26 October. She believed at that time that it had been Levi rather than Ms Allan who had reported her conversation to Mrs Gibbins. She claimed that as she was worried when she received the message, she drove back to the Hotel that night to speak to Mrs Gibbins.
30. It was common ground that the claimant came into the Hotel at around 10 pm but it was clear to the Tribunal that that was on Sunday 28 October 2018 and not Friday 26 October 2018 as she maintained. We heard evidence from Mrs Gibbins that Karen Allan only raised the matter with her on the Sunday. We also had corroborative evidence from Mr and Mrs Gibbins that it was Sunday night when she came in and, as we recorded above, they both presented as credible and reliable witnesses.

31. Further, and in any event, there was included with the documentary productions “excerpts from Facebook exchanges between 2 October 2018 and 1 December 2018” (P13). These included exchanges between the claimant and Mrs Gibbins on Monday 29 October in which there was reference to “last nite” which was clearly a reference to this particular matter (P13/3).
32. The claimant alleged that she was dismissed when she came into the Hotel. We did not find that to be so on the basis of the evidence which we heard from Mrs Gibbins which was corroborated, to a large degree, by the evidence of her husband.
33. The claimant alleged that Mrs Gibbins called her, “*immature*”, said that she had been “*found out*”, and told her she was “*pathetic*” and a “*bitter child*”. She claimed that Mrs Gibbins also shouted at her “*get out, get out, get out the Hotel now*” which she assumed meant that she, “*had been sacked given her words and her demeanour*”. She also thought that Mrs Gibbins “*might have been drinking*”.
34. The claimant’s allegations were strenuously denied by both Mr and Mrs Gibbins and, as we recorded above, we were satisfied their accounts were to be preferred. We find in fact, therefore, that the claimant came into the Hotel, at around 10 pm on Sunday 28 October 2018, when Mr and Mrs Gibbins were, “*cashing up at the end of the night*”. Mrs Gibbins had not “*been drinking*”. She had been working in the bar all evening. She does not drink when working in the Hotel. The claimant asked about the purpose of the proposed meeting the following day and Mrs Gibbins told her that it had been alleged that she had spoken out of turn in the kitchen. The claimant then responded by saying that, “*Levi and Elaine were lying*”. In response, Mrs Gibbins advised the claimant that it had in fact been Karen Allan who had told her and that she had been in tears. She told the claimant that she wanted to speak to everyone. She then said that she expected the claimant, “*as a grown woman, to speak directly to her if she had a problem with anyone*”. At this point, the claimant started shouting at Mrs Gibbins. They were in the lounge at the time. Mr Gibbins was in the public bar getting ready to lock up. He overheard the shouting and heard his wife having to shout over the claimant to make herself

heard as the claimant kept shouting back. Mrs Gibbins then told the claimant that she would, *“sort things out tomorrow, that she wasn’t dealing with it tonight and that the claimant should go home”*. Mr Gibbins said that, *“in all the years I have been in business, I have never heard a member of staff shouting at their employer in the manner that Karen did”*.

35. At 10:56, the following morning, Monday 29 October, Mrs Gibbins received a Facebook message from the claimant (P13/1/13/2). Although she said that she was *“still very upset about last nite”*, her message was fairly conciliatory.
36. Mrs Gibbins replied at 12:48 (P13/2). She advised the claimant again that she was surprised that she had not spoken to her direct. She further advised that she had spoken to everyone concerned that morning and gave some detail about what was being alleged. She suggested that they meet to discuss the matter should she wish to do so.
37. The claimant responded by saying that she thought the, *“whole thing was blown out of proportion”* (P13/2) and went on in another message to ask if she had, *“been sacked”* (P13/3). She then advised in a subsequent message that she had, *“been battling bad depression for 15 years but I fight it every day. I won’t let it beat me”*.
38. Mrs Gibbins responded as follows (P13/3):-

“I didn’t sack you Karen, I told you to leave the Hotel last night as I wasn’t willing to discuss at that time of night, when we were locking up. Levi was on veg last night not starters. No-one talks about each other Karen, we all get on fine, although like normal kitchens tensions can run high when busy, but everyone just gets on. Nothing was mentioned to me about depression Karen. When asked about your health and fitness you said nothing. I have asked you to come in and discuss with Karen (Head Chef) and myself therefore it’s up to you. We then will need to pull everyone in to discuss this further. Tina”

39. The claimant responded as follows:-

“I don’t see myself being unfit I am 100% fit.

So I'm working at 4

As you say I'm not sacked so I'll be in at 4 for my shift as if I don't work I don't get paid thanks"

40. Mrs Gibbins replied by advising the claimant that she would meet her at 4 pm, "to discuss further" (P13/3).

Meeting on Monday 29 October 2018

41. Mrs Gibbins met the claimant when she arrived at the Hotel for work at 4 pm. As Mrs Gibbins knew the claimant was friendly with Teresa Kelsall she asked Ms Kelsall to sit in on the meeting. The claimant agreed.
42. During the meeting, the claimant advised Mrs Gibbins that she suffered from depression and anxiety. That was not something that Mrs Gibbins was aware of. She also advised Mrs Gibbins of issues she had outwith work. At around 4.45 pm Karen Allan arrived and joined the meeting. The claimant apologised to Ms Allan for what she had said. She said that she was happy working at the Hotel and what she had said about her was wrong. The meeting ended with everyone agreeing that they should "move on" and not speak about it again.
43. In the circumstances, although the claimant was due to work that evening Mrs Gibbins advised her that she could go home and come back to work on her next shift. A few days later the claimant sent Ms Allan a bouquet of flowers by way of apology.
44. After that matters settled down and the claimant's employment was uneventful. A minor issue arose on 12 November when the claimant sent a message to Mrs Gibbins by Facebook to say that she did not like working on the carvery by herself (which she had done the previous day) (P13/4). Mrs Gibbins replied shortly thereafter to advise this would not be an issue and that she was, "managing to get the hang of starters now and you're doing fine" (P13/5).

45. Another minor issue arose on 17 November 2018 when the claimant sent a message to Mrs Gibbins to say that she had spoken to the Head Chef about her concern that one of her colleagues, Susan Davidson, had a problem with her. However, the claimant then advised, *“all sorted no drama ta like my job. We all have off days. Hopefully put to bed”* (P13/5).

Saturday 1 December 2018

46. Once again, we were faced with a conflict in the evidence which we heard. However, the claimant's evidence was inconsistent and unreliable and in one particular regard neither credible nor reliable. On the other hand, the respondent's evidence, principally from two credible and reliable witnesses was consistent, corroborative to a degree and convincing. We had little difficulty, therefore, in deciding unanimously, that the respondent's evidence was to be preferred.
47. We find in fact, therefore, that the day was uneventful until the claimant allegedly overheard “Susan” and the Head Chef, Karen Allan, “whispering”. She thought they were speaking about her. As she put it, she *“challenged Susan”* and *“told her not to speak about me behind my back”*. Susan then approached Mrs Gibbins when she was discussing that evening's menu with the Head Chef and complained to her that she had just been *“pulled up”* by the claimant and that the claimant *“then began slamming doors”*. Ms Allan also told Mrs Gibbins that the claimant had asked her what she was required to do that day and when she told her the claimant had *“banged the fridge door”*. Mrs Gibbins said that she would speak to the claimant. She approached her and asked what was wrong. Mrs Gibbins told her what Susan had told her. The claimant responded by saying that Susan *“was lying”*. Mrs Gibbins then asked Susan to join them. She was anxious to resolve the matter there and then as she had a busy evening ahead with some 160 “covers” for meals. As Susan started to speak the claimant kept interrupting saying, *“she's lying, she's lying”*. Mrs Gibbins had to tell the claimant to let her speak. However, the claimant then *“held up a cucumber and starting shouting that Susan was lying”*.

48. Mrs Gibbins said to the claimant that she, "*could not understand why Susan would be lying about something like this and Karen repeated that she was*". Mrs Gibbins then walked away and said that they would discuss the matter later as they had such a busy night ahead.
49. A short time later, Mr and Mrs Gibbins were both in the office when the claimant came in. She had her jacket on. She was shouting and "*highly agitated*". She slammed a scrap of paper on the desk in front of Mrs Gibbins. Mr Gibbins had seen her writing on the paper shortly before. It said:-

"See you in court Tina. You called me a liar. You forced me to leave – Bullying won't be for Christmas lunch. K Mutch" (P9)

50. In her written statement at para 18 the claimant said this:-

"The respondents have provided a handwritten note that is recorded on the index as being dated 1 December 2008 [doc 9]. I see no date on this document, so I do not know why they say this to be the case. I did not write this note. It is not my handwriting, nor my signature. I have provided a copy of my driver's licence dated 18 December 2013 to confirm this [doc 10]. It has my signature on it and shows my signature to be nothing like the writing on [doc 9]".

51. At first when she was giving evidence at the Hearing, the claimant maintained that position and her solicitor confirmed, for the avoidance of doubt, that that was so: that the note had been fabricated by Mr and Mrs Gibbins. However, when cross examined her position changed. She admitted that she had "*scribbled a rough note*" but continued to maintain that the document which had been produced was not the note which she had written. She also claimed that the note was "crumpled".
52. Mrs Gibbins was then able to produce the principal note, rather than the copy which had been included in the joint bundle (P9) and when this was presented to the claimant she accepted that it was the note she had written, even though it

wasn't "crumpled". However, she continued to maintain that it was not her signature on the note.

53. We had no difficulty, therefore, finding in fact that the document which had been produced at P9 was a copy of the note which she wrote on 1 December 2018.
54. So far as the signature was concerned, the claimant sought to draw a distinction with her signature on her driving licence (P10). However, given her change of evidence in this regard and the fact that we had corroborative evidence from Mr and Mrs Gibbins to the effect that this was the only the note which she had written and that it was her signature, we also find fact that it was her signature.
55. In addition to putting her jacket on the claimant also "*signed out*". She claimed that this was because she intended going outside "*for fresh air*". However, we accepted Mrs Gibbins' evidence that there was no need for her to sign out if that was so. We concluded that it was the claimant's intention to leave and not return to work.
56. When the claimant "slammed" the note on the desk in front of Mrs Gibbins she continued to "*shout and scream*" to such an extent that Mr Gibbins advised her that, "*there were cameras which could pick up her words and actions*". However, the claimant continued to shout, in an aggressive manner, and told Mr and Mrs Gibbins that she would "*see them in court*". Eventually, Mr Gibbins asked the claimant, politely, to leave the office and when she did not do so he stood up, said "*firmly*", "*get out of the office*". When she left, Mr Gibbins closed the office door.
57. The claimant did not return to work at the Hotel after that. She made no attempt to do so.
58. In all these circumstances, we had no difficulty deciding, unanimously, that the claimant was not dismissed, as she maintained. She left her employment voluntarily. She resigned. That was clear from the terms of her note (P9), what she said to Mr and Mrs Gibbins, the fact that she had put her coat on, signed out, left the Hotel before the end of her shift and took no steps to return to work..

59. After the claimant left the respondent's employment, Mr and Mrs Gibbins received further Facebook posts from the claimant threatening court action. They did not reply to these posts and Mrs Gibbins advised the staff to do likewise.

Claimant's Submissions

60. The claimant's solicitor spoke to written submissions which are referred to for their terms.

Disability Status

61. It is not necessary for us to summarise the claimant's submissions in respect of this issue as we decided that the claimant was disabled in terms of the 2010 Act and we have set out above, our reasons for that decision.

Discrimination Complaints

Credibility

62. In her written submissions, the claimant's solicitor first addressed the issue of credibility. She submitted that, "*it is evident that she (the claimant) finds pressurised situations, such as giving evidence to exacerbate her stammer*" and that she "*becomes confused often*". However, she submitted that this did not impact on her credibility.
63. While she accepted that Mrs Gibbins, "*comes across as assured and definite*" and while she accepted that it "*may be the case*" that she had never had the need to hold a disciplinary or grievance meeting she did not accept that such Hearings were not necessary, "*whether she viewed them to be or not*".
64. She confirmed that the claimant's position remained that the "*incident with Tina*" occurred in the evening of Friday 26 October, not Sunday 28 October and that this

“certainly calls into question whether the Facebook messages record the events accurately or in full”.

65. She drew to the Tribunal’s attention that Mrs Gibbins was not prepared to accept that her actions, including asking Karen Allan to text the claimant on the workgroup chat, *“were anything other than the correct course”*.
66. She also submitted that the accounts by David Gibbins and Christina Gibbins, *“are so similar that it appears to be a presented position”*.
67. She submitted that David Gibbins’ evidence that he did not have knowledge of the *“day-to-day dynamics of the kitchen staff and that he had never heard an employee shout at his wife in the way that the claimant did were, extremely unlikely and calls into question whether Mr Gibbins has more knowledge of the kitchen politics which he was not willing to divulge. In my view this undermines his credibility”*.

Burden of Proof

68. She submitted that the “two-stage approach” which requires a claimant in the first instance to establish a *prima facie* case, *“is not a rigid one”* and that, *“the burden of proof provisions may be less important than they first appear”*. In this regard, she referred to ***Hewage v Grampian Health Board*** [2002] UKSC37 in which the Supreme Court observed that, *“It is important not to make too much of the role of the burden of proof provisions”* (endorsing Underhill J’s remarks to that effect in ***Martin v Devonshires Solicitors*** [2011] ICR 352 (EAT). *The Court went on to say that the provisions “will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other”* (***Hewage***, paragraph 32).

Direct Discrimination

69. The claimant's solicitor then went on her submissions to assert that the claimant was "*subject to 7 incidences of direct discrimination due to his (sic) disabilities*". These related to the events of Friday 26 October 2018 (as maintained by the claimant) and 1 December 2018. In support of her submissions in this regard she referred to the following cases:-

Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 (HL)

Famy v Hilton UK Hotels Ltd UKEAT/0639/05

Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 332

Chamberlain Solicitors and another v Emokpae [2004] IRLR 592

Durrant v Chief Constable of Avon and Somerset Constabulary [2017] EWCA Civ 1808

70. The claimant's solicitor invited the Tribunal to accept the claimant's evidence about the remarks which Mrs Gibbins allegedly made to her on 26 October and 1 December.

71. She claimed that Karen Allan, "*wrote her instructions to the claimant rather than saying them aloud*", that this was done because of the claimant's disability, that it was "*demeaning*" and was "*less favourable treatment*".

Discrimination arising from disability

72. The respondent's solicitor also relied upon the events of 26 October 2018 and 1 December 2018 in support of this complaint. She also relied upon the events of Monday 29 October 2018 when it was alleged that Mrs Gibbins, "*verbally attacked the claimant and did not permit her the opportunity to rebut or express her opinion during a meeting*".

73. In support of her submissions, in this regard, the claimant's solicitor referred to the following cases:-

Basildon & Thurrock NHS Foundation Trust v Weerasinghe
UKEAT/0397/14
City of York Council v Grosset [2018] EWCA Civ 1105

Failure to make reasonable adjustments

74. The claimant's solicitor submitted that the "provision, criterion or practice" ("the PCP") relied upon was, "*not holding disciplinary hearings*".

75. She submitted that two occasions were relied upon, "*the first in October 2018 and the second in December 2018*".

76. She submitted that it was clear from Mrs Gibbins' Facebook message on 29 October 2018 that she, "*pre-judged the claimant's involvement in this incident without receiving her account*".

77. So far as December 2018 was concerned, it was submitted that, "*no procedure was followed whatsoever on the claimant's dismissal. It was assumed that a negative report from the claimant's colleague, Susan was accurate and the claimant was berated by Tina once again, who told the claimant to leave the Hotel, just as she had before, without following any process.*

Had the claimant been provided the reasonable adjustment of a full disciplinary process, which included an adequate and fair investigation on both occasions, she would not have been judged as a "troublemaker". This characterisation led to the claimant's dismissal. Had the reasonable adjustment been provided the truth of each of the matters would have been established and the claimant would not have been dismissed".

Harassment

78. The claimant's solicitor referred to, *"several acts of harassment, including:*

- "(a) Referring to the claimant as having been "found out", "childish", "immature" and "pathetic".*
- (b) Verbally abusing the claimant as being a "bitter child".*
- (c) Characterising the claimant as a "liar" and a "troublemaker".*
- (d) Informing the claimant that she was "sick of her" in front of other employees".*

79. The claimant's solicitor also submitted that:-

"Karen Allan engaged in two acts of harassment including:

- (a) Reporting and exaggerating the claimant's views to Tina.*
- (b) Drawing on paper rather than speaking to the claimant".*

80. The claimant's solicitor submitted that these were, *"examples of the harassment to which the claimant was subject".* She also submitted that, *"the claimant was subject to hypercriticism by Tina for acts which she had not engaged in. As described within the direct discrimination section, Tina formed a view of the claimant during October 2018 that the claimant caused trouble within the workplace. This was evidenced by the fact that she was assumed to be in the wrong following Karen Allan's report that she had been speaking about her behind her back. Despite the matter being minor and the claimant doing her best to rectify the issue, the view of her as a "troublemaker" persisted. When further issues arose in the workplace and further conflict occurred, the claimant was assumed to have caused the issue. The claimant advises that she was scolded for these matters. This matter is further evidenced by the fact that the claimant was told to "get out" of the Hotel on two occasions, each time reasonably assuming herself to have been dismissed. It is noted that the Facebook messages produced by the*

respondent show Tina's anger towards the claimant and the claimant's assumption that she had been dismissed following the first incidences of harassment".

81. In conclusion, so far as this complaint was concerned, the claimant's solicitor submitted that:-

"All of the above created a hostile working environment. The claimant was put on edge. She advised Teresa Kelsall to "trust no-one" and this was indicative of how she felt in the workplace. Due to the incidences of harassment she experienced, she did not feel safe in the workplace. Her depression exacerbated the impact of the hostile working environment on the claimant."

Time-bar

82. Finally, the claimant's solicitor addressed the possibility that the respondent's solicitor would maintain that a number of the complaints were subject to time bar. However, that was not the case and this was not an issue for the Tribunal.

Respondent's Submissions

Credibility

83. The respondent's solicitor submitted that the claimant's evidence was neither credible nor reliable. He referred in particular to paragraph 18 of her witness statement, where she claimed that she did not write the note (P9). He submitted that this was, "*blatantly and patently untrue*". He claimed that she had "*lied under oath*" and this meant that it was difficult to accept any of her evidence as credible.
84. He also maintained that, "*the claimant's stammer in these proceedings is in marked contrast to her stammer when she worked for the respondent*".
85. The claimant also alleged inconsistencies in the Facebook messages and that they had been "*doctored*". However, there was no evidence of this and he submitted that it was "*unacceptable that this continues to be alleged*". The allegation that the

respondent had invented the Facebook posting on 4 December 2018 (P13/10) was, "*wholly without foundation and completely denied*".

86. The respondent's solicitor submitted that the claimant was not dismissed on 1 December 2018, but rather that she, "*quit her post*".
87. He submitted that the claimant's stammer and depression played no part in the way the respondent treated her. He submitted that the only adjustment the respondent was required to make was to allow her not to work on the carvery on her own.
88. The respondent's solicitor also invited the Tribunal to reject the claimant's evidence about what Mrs Gibbins in particular had called her. He submitted that the allegations of discrimination were "*an after the event feeling*".
89. So far as any workplace issues which arose among the employees were concerned, Mrs Gibbins tried to "*nip them in the bud*" and that was what she achieved following the incident on 26 and 28 October 2018. No formal disciplinary action was required, the issue was resolved and "*everyone moved on*".
90. So far as the Head Chef writing instructions was concerned, the respondent's solicitor submitted that she only did so to "*label the dishes*" and this was not directed at the claimant alone.
91. So far as the events of 1 December 2018 were concerned, Mrs Gibbins intervened again. It was submitted that there was no need for any disciplinary procedure. Her intervention was not discriminatory. The claimant's issue that day was that she thought people were talking about her.
92. So far as the claimant's exit from work that day was concerned, it was submitted that the respondent's position was "*clear and consistent*". That was in contrast to

the claimant's oral evidence which was at variance with her written statement. He submitted that the claimant was not dismissed.

Direct Discrimination

The respondent's solicitor submitted that the claimant's allegation that she was, "*mocked and demeaned because of her disability*" was ill founded. He invited the Tribunal to prefer the respondent's "*clear and consistent evidence*". He submitted that there was no evidence of discriminatory conduct either on 29 October or 1 December. Mr Gibbins when giving evidence had described the issues amongst the kitchen staff as "*tittle tattle*". That was an apt description. These were "*day to day issues*". There was no evidence that the claimant had been treated less favourably because of her disability.

Discrimination arising from disability

The respondent's solicitor also invited the Tribunal to dismiss this complaint. He submitted that the allegations by the claimant that she was verbally abused by Mrs Gibbins were "*untrue*". He submitted that if Mrs Gibbins had "*said these things*", the claimant would have mentioned them in her Facebook postings. In any event, "*name calling is not discrimination*".

Failure to make reasonable adjustments

The respondent's solicitor submitted that there was no evidence of a PCP not to use a formal disciplinary process. In any event, so far as the present case was concerned, there was no need to use disciplinary procedure.

Harassment

93. The respondent's solicitor submitted that this appeared to relate to the events of 26 and 28 October and 1 December. He submitted that the claimant's contentions "*totally fly in the face of the evidence*". He submitted that there was no evidence

that the respondent's conduct related to the claimant's disability. There was no evidence that the claimant's "*dignity*" had been violated.

94. In conclusion, he submitted that the claim should be dismissed. He submitted that the claimant terminated her own employment on 1 December 2018, without notice, and that Mrs Gibbins, in particular, had been trying to defuse matters.
95. The claimant's speech impediment was never an issue. There was no detriment to her.
96. It was also significant that prior to her leaving her employment the claimant had never made any allegation of discrimination. "*The fundamental facts she relies upon are misplaced*".

Discussion and Decision

Credibility

97. It was significant that we were able to make "*positive findings in fact on the evidence*" (**Hewage**). These findings and our clear, unanimous, view that the respondent's two witnesses were credible and reliable, whereas the claimant was not credible and reliable, in respect of certain material aspects of the case, were pivotal to our decision.
98. We arrived at that view mindful of the claimant's speech impediment and her obvious difficulty communicating. However, she had no such difficulty when it came to recording her evidence in her written witness statement. This was prepared at her leisure, with the assistance of her solicitor, when under no pressure and with sufficient time to gather her thoughts and record her evidence. Despite this, para 18 of her written statement, relating to the handwritten note (P9), a material aspect of the case, was untrue, by her own subsequent admission.

99. Also, the claimant continued to maintain, steadfastly, that the signature on the note was not her signature. That made no sense and we accepted the clear, consistent, corroborative, evidence from the respondent's witnesses that it was her signature.
100. She also continued to maintain, despite clear documentary evidence to the contrary, in the Facebook messages, and Mr and Mrs Gibbins' evidence, that she returned to the Hotel to confront Mrs Gibbins on Friday 26 October, when it was abundantly clear that it was Sunday 28 October, as both Mr and Mrs Gibbins maintained. Her position in that regard was also neither credible nor reliable. We had no difficulty finding in fact that it was Sunday 28 October 2018.
101. Further, the claimant's very serious allegation that Mrs Gibbins had been drinking alcohol when on duty; the contention that Mr and Mrs Gibbins' evidence was a "presented position" which we took to mean that there had been collusion; and the allegation that some of the Facebook posts which were produced had been "*doctored*" and some were missing were without foundation. These were scurrilous allegations.
102. Nor was there any evidence of the claimant alleging when she worked at the Hotel that she was being, or had been, discriminated against because of her disability.

Direct Discrimination

103. The relevant statutory provision is s.13 of the 2010 Act:-

"13 Direct Discrimination

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

104. The protected characteristic relied upon by the claimant, of course, was disability. We found that she was disabled in terms of the 2010 Act.

105. In her submissions, the claimant's solicitor alleged "*7 incidences of direct discrimination*". It was alleged that the incidences 1–3 occurred on Friday 26 October 2018. We did not find that to be so. We found, in fact, that the Head Chef, Karen Allan, reported to Mrs Gibbins on Sunday 28 October 2018 that she had been upset when on Friday 26 October 2018, she overheard the claimant speaking to others in the kitchen about her; that Mrs Gibbins instructed Ms Allan to send a message that evening to the claimant to advise her that she wanted to meet her the following day; and that on receipt of the Facebook message the claimant made her way back to the Hotel that evening and confronted Mrs Gibbins around 10 pm.
106. So far as "incident 1" was concerned, we did not find in fact that Mrs Gibbins made the alleged comments to the claimant.
107. So far as "incident 2" was concerned, it was Karen Allan who reported her concerns about what she had heard to Mrs Gibbins, not "Levi". We did not find in fact that she had "*misrepresented the claimant's views*". In any event, matters were resolved at the meeting on Monday 29 October which the claimant had with Mrs Gibbins, with Teresa Kelsall, the claimant's colleague and friend, in attendance, as invited, helpfully and supportively, by Mrs Gibbins, and Karen Allan later. Also in a supportive and sympathetic manner, Mrs Gibbins did not require the claimant to work her shift that day. The claimant apologised and sent a bouquet of flowers to Karen Allan. The claimant continued to work, as normal, thereafter until 1 December 2018, consistent with a satisfactory resolution for all concerned.
108. While, with the benefit of hindsight, it might have been preferable for Mrs Gibbins to have contacted the claimant herself, privately, about meeting her, asking Karen Allan to do so had nothing to do with the claimant's disability. Nor did it amount to less favourable treatment. This was a minor matter, not uncommon at the Hotel or indeed in many workplaces. Formalising the matter was not required. Mrs Gibbins acted in a sensible, sympathetic and supportive manner and achieved her aim of "nipping it in the bud" by informal discussion.

109. So far as “incident 3” was concerned, we did not find in fact that Mrs Gibbins “*verbally abused the claimant, calling her a bitter child*”, either on 26 October 2018, as the claimant alleged, or at any other time.
110. So far as “incident 4” was concerned, Karen Allan only “*drew on paper*” when labelling food. What she wrote was not directed at the claimant. The claimant was treated no differently from any of the other employees at the Hotel. There was no evidence to suggest that what she did was in any way tainted with discrimination.
111. So far as “incident 5” was concerned, once again we rejected the contention that Mrs Gibbins had “*characterised the claimant as a liar and troublemaker*”. We made no such finding in fact. Nor did we find in fact that “*Karen Allan and Susan Davidson had been discussing the claimant behind her back*”. That was no more than supposition on the claimant’s part. She did not know what they were speaking about.
112. So far as “incident 6” was concerned, yet again we rejected the contention that Mrs Gibbins told the claimant that she was “*sick of her*” in front of other employees. We made no such finding in fact. Further, we did not find in fact that Karen Allan and Susan Davidson, “*had been discussing the claimant behind her back*”. This was no more than supposition on the claimant’s part. We sensed an element of oversensitivity, generally, on the claimant’s part and an inclination to jump to conclusions and overreact.
113. So far as “incident 7” was concerned, in our unanimous view there was no requirement for Mrs Gibbins to “*comply with disciplinary procedure*”. That would have formalised and elevated the issues which arose on 26 October 2018 and 1 December 2018, which were relatively minor, described aptly by Mr Gibbins as “*tittle tattle*”, to an extent which was not merited and not proportionate, in the circumstances.
114. Mrs Gibbins dealt with the issue which arose on 26 October 2018 in an informal manner and this led to a satisfactory resolution. Mrs Gibbins has over 20 years’

experience of dealing with such issues at the Hotel which arise inevitably, from time to time amongst the staff, as they do in any workplace. As we recorded above, in our unanimous view, Mrs Gibbins addressed the issue in a sensible, sympathetic and proportionate manner which was fair to all those involved. Her actions were not tainted with discrimination, in any way.

115. So far as the issue which arose on 1 December 2018 was concerned, once again we were satisfied that there was no suggestion of any discrimination. Mrs Gibbins endeavoured to address the issue in a sensible, fair and reasonable manner with those concerned. However, there was a complete and unjustified overreaction by the claimant and it did not prove possible to resolve the matter there and then due to customer demands that evening and the claimant's demeanour. We were in no doubt that Mrs Gibbins would have addressed the issue, satisfactorily, in due course when there was time to do so. However, she was not afforded that opportunity as the claimant acted in a precipitate and wholly unjustified manner. She put her jacket on, wrote a note which amounted to a resignation, shouted at Mr and Mrs Gibbins, threatened them with "*court*", and left the Hotel when Mr Gibbins told her to leave the office.
116. We might add, for the sake of completeness, that although it appeared surprising, we accepted Mrs Gibbins' evidence that in over 20 years in business she had never had to conduct disciplinary proceedings or hear a grievance. That, in our view, was to her credit and testament to the manner in which she addressed workplace issues.
117. We decided, therefore, unanimously, that this complaint was not well- founded and should be dismissed.

Discrimination arising from disability

118. The relevant statutory provision is s.15 of the 2010 Act:-

“15 Discrimination arising from disability

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

(a) A treats B unfavourably because of something arising in consequence of B’s disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Sub-section (1) does not apply if A did not know, and could not reasonably have been expected to know, that B had the disability.

119. In her written submissions, the claimant’s solicitor relied upon “4 acts” which she listed in support of this complaint. All of these “acts” related to allegations of what Mrs Gibbins had said to the claimant. It was alleged that each of these “acts” amounted to “*less favourable treatment*”. In our unanimous view, that submission was not well-founded.

120. We did not accept the allegations about what Mrs Gibbins said to the claimant. We made no such findings in fact. So far as “act 4”, in particular, was concerned, the claimant was not dismissed on 1 December 2018. She left of her own accord. Mr Gibbins did have to tell the claimant to leave but that was entirely reasonable and understandable, given the claimant’s behaviour and her refusal to leave the office. The claimant left the Hotel before the end of her shift and never returned.

121. We decided, therefore, unanimously, that this complaint was not well-founded and should be dismissed.

Failure to make reasonable adjustments

122. The relevant statutory provision is s.20 of the 2010 Act:-

“20 Duty to make adjustments

- (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
- (2) The duty comprises the following three requirements.*
- (3) The first requirement is a requirement, where a provision, criterion or practice of A’s puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*
- (4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*
- (5) The third requirement is the requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.*
- (6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format”.*

123. It was the *“first requirement”* which was relevant to the present case. The PCP relied upon by the claimant’s solicitor was, *“not holding disciplinary hearings”*. Once again, the claimant’s solicitor relied upon *“two occasions”* in October 2018 and December 2018. However, as we recorded above, in our unanimous view there was no requirement for the respondent, and Mrs Gibbins in particular, to

formalise and escalate matters to a disciplinary hearing. It was entirely appropriate for her to address the issues in an informal manner.

124. Further, and in any event, we did not find that the respondent applied such a PCP. Although the respondent had never conducted a disciplinary hearing in over 20 years, that is not to say they would not have done so had the need arisen.
125. So far as October 2018 was concerned, as we recorded above, Mrs Gibbins addressed the issue in a sensible, sympathetic and entirely proportionate manner. We were not persuaded, as the claimant's solicitor alleged, that she had "*prejudged the claimant's involvement in the incident, without receiving her account*". She arranged a meeting with the claimant on 29 October 2018. Helpfully, she arranged for the claimant's friend and colleague, Teresa Kelsall, to attend the meeting and at a later stage Karen Allan, the other person involved in the "incident" on 26 October joined them. The fact that Mrs Gibbins dealt with the matter in an appropriate manner was evidenced by the fact that the matter was resolved satisfactorily. The claimant even apologised, and thereafter continued to work as normal, until she left voluntarily on 1 December 2018.
126. So far as December 2018 was concerned, once again, there was no requirement to elevate what was a relatively minor workplace issue to a formal disciplinary process. Mrs Gibbins endeavoured to address and resolve the matter there and then but was unable to do so due primarily to the claimant's conduct. There were pressing business needs, not the least of which was preparing dinner for a number of customers that night. It was entirely understandable that Mrs Gibbins should decide to leave the matter to be addressed when there was more time available. However, as it transpired, the claimant, for whatever reason, remained dissatisfied and overreacted. She put her jacket on, signed out, wrote a note which was tantamount to a resignation, confronted Mr and Mrs Gibbins aggressively in the office, shouted at them, left the Hotel before the end of her shift and never returned.

127. We had no difficulty, in these circumstances, in rejecting the contention that by not *“engaging in formal investigation and disciplinary proceedings”* the respondent had failed to make reasonable adjustments.

128. We decided, therefore, unanimously, that this complaint was not well-founded and should be dismissed.

Harassment

129. The relevant statutory provision s.26 of the 2010 Act:-

“26 Harassment

(1) A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of –

(i) violating B’s dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B

130. In her submissions, the claimant’s solicitor referred to, *“several acts of harassment”*. These comprised allegations of what Mrs Gibbins had said to the claimant and the words used. We did not find in fact that any of these words had been used by Mrs Gibbins; nor did we find in fact that Karen Allan had *“misreported and exaggerated the claimant’s views to Tina”*; or that *“drawing on paper rather than speaking to the claimant”*, constituted harassment.

131. There was no *“hypercriticism by Tina for acts which the claimant had not engaged in”*. Nor was Mrs Gibbins unfavourably disposed to the claimant. Indeed, on occasions, she was sympathetic to the claimant and supportive of her. There was no evidence whatsoever to even suggest that anything Mrs Gibbins said to the claimant was discriminatory in nature.

132. We decided, therefore, unanimously, that this complaint was not well-founded and should be dismissed.

133. For all these reasons, therefore, the Tribunal is of the unanimous view that the claim should be dismissed in its entirety.

Employment Judge N M Hosie

Dated: 26th February 2021

Date sent to parties: 26th February 2021