EMPLOYMENT TRIBUNALS

Claimant		Respondent
DIANE BLOOMER	**v**	**LITTLE BUNDLES OF JOY LIMITED**

Heard at: **Birmingham Employment Tribunal**

On: **3, 4, 7, 8, 21 December 2020**

Before **Employment Judge McCluggage, Ms Linda Clarke, Ms Ilona Fox**

Appearances

For the Claimant **Mr Crumpton (lay representative)**

For the Respondent **Ms Amin (counsel)**

JUDGEMENT

1. The claim for direct disability discrimination is not well founded and is dismissed.
2. The claim for a failure to make reasonable adjustments is not well founded and is dismissed
3. The claim for victimisation is not well founded and is dismissed.
4. The claim for unlawful deductions is not well founded and is dismissed.

REASONS

1. We heard evidence over 4 days and received oral and written submissions on the fifth day. Reasons were reserved.

2. Ms Diane Bloomer, the Claimant, brought claims for disability discrimination and unlawful deduction of wages.

3. We were provided with an agreed bundle of documents which received a small number of additions during the course of the hearing. We received written witness evidence from the Claimant on her own behalf, and from the Respondent: Mrs Tahira Hussain (director), Mrs Kaljit Johal (director), Mrs Rusfshara Begum (current nursery manager), Mrs Rajviner Kaur Chagger (attendee at meetings) and Mrs Sukhbir Mann (parent). All witnesses gave oral evidence save for Mrs Chagger, whose witness statement was agreed by the Claimant.

4. The claim was received by the Tribunal on 18 April 2019. It was case managed by Employment Judge Flood on 15 November 2019 who defined the issues and gave directions. Judge Flood set out the issues at paragraph 13 of the Case Management Order which are as follows (without prejudice to the full particulars of the issues in the earlier Order):

    a. Time jurisdiction issues, relating to complaints about events prior to 23 November 2018.

    Direct discrimination claim:

    b. Did the Respondent directly discriminate against the Claimant within the meaning of section 13 of the Equality Act 2010 in the following respects:
        i. In June 2018 demoted and reduced the claimant's working hours following her first absence from work due to sickness.
        ii. Being sent an e mail from Ms Hussain on 5 June 2018 in which she was told that her sickness would have a detrimental effect on the nursery.
        iii. Being pressured to accept a new contract in June 2018, a zero-hours contract in September 2018.
        iv. In November 2018 reduced her hours to below 18 hours a week.
        v. Not offering her any hours work in the nursery since February 2019.

    c. Was that treatment "less favourable treatment", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances. The Claimant relies upon an actual comparator, Vicky Johns, and/or hypothetical comparators.

    d. If so, was this because of the Claimant's disability and/or because of the protected characteristic of disability more generally?

Reasonable adjustments claim:

e. Did the respondent not know and could it not reasonably have been expected to know the claimant was a disabled person?

f. A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP(s):
   i. Locating its staff lockers on the third floor;
   ii. Having a short sleeve polo shirt as its staff uniform; and
   iii. Having nursery workers sit on children's size chairs whilst performing their duties?

g. Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that:

   i. With respect to (i) above, the claimant found it difficult to go up and down stairs due to her mobility problems and her energy levels towards the end of the working day and needed her medical pack nearby at all times (she worked on the ground floor);
   ii. With respect to (ii) above, the claimant required her arms to be covered because of her condition of polymorphic light eruption;
   iii. With respect to c. above, the claimant found it difficult to sit on these chairs and it caused pain due to an existing back injury.

h. If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

i. If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows:

   i. In respect to (i) above, to agree to locate her locker in the manager's office on the ground floor;
   ii. In respect to (ii) above, to provide her with a long-sleeved version of the polo shirt (claimant alleges this was requested in March/April 2018 to be paid for by the claimant);
   iii. In respect to (iii) above, to make available an adult sized chair in the room the claimant worked in when she was performing her shifts?

j. If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

Equality Act, section 27: victimisation

k. Did the claimant do a protected act?. The claimant relies upon the following:
   i. Sending an e mail to Ms Hussain of the respondent on 4 June 2018 alleging a breach of ACAS rules and the EQA?;

ii. Informing Ms Hussain in January 2019 that she was getting in touch with her Unison representative regarding the matters of June 2018.

l. Did the respondent subject the claimant to any detriments as follows:

i. being stopped from doing shifts from 7 February 2019 onwards;
ii. not being invited to training events from 7 February 2019 onwards;
iii. not being invited to any meetings from 7 February 2019 onwards;
iv. being removed from the staff WhatsApp group.

m. If so, was this because the claimant did a protected act and/or because the respondent believed the claimant had done, or might do, a protected act?

Unauthorised deductions

n. Was the claimant, on or about 18 April 2019, paid less in wages than she was entitled to be paid, and if so, how much less?

5. The Respondent admitted that the Claimant was "disabled" within the meaning of the Equality Act 2010 through impairments caused by a number of different medical conditions including fibromyalgia, atypical polymorphic light eruption and benign hypermobility syndrome.

6. Generally, we noted that some of the evidence we read and heard was of limited relevance to the issues, in particular in relation to some attacks on the Claimant's capabilities as a nursery assistant. One point which concerned us was focus in some of the evidence in relation to some serious allegations made by 2 parents against the Claimant in September 2018, which had no substantiation in the evidence. This did the Respondent no credit. It is right that we record that our determination on the issues above does not reflect on the Claimant's competence as a nursery assistant.

7. The hearing proceeded remotely by video-hearing (CVP). It was perhaps not an ideal hearing for video hearing but despite some minor technical hiccups from time to time, overall the hearing proceeded reasonably smoothly.

Facts

8. After hearing the evidence and submissions we found the following facts:

8.1 Mrs Hussain and Mrs Johal were directors and owners of the Respondent company, which was incorporated to run an early years private nursery (ages 3 months to 5 years) which operated from 35 Wellington Road, Bilston in Wolverhampton.

8.2 The Claimant suffered from the various medical conditions described at paragraph 5 above. The nature of and interaction between her conditions were

complex. Symptoms experienced included sensitivity to light, fatigue and sinus problems.

8.3 Our task when finding facts was made considerably more difficult by the omission of both sides to call as a witness Ms Claire Allen who was the Nursery Manager at all material times during the Claimant's employment. Ms Allen suffers serious health issues herself and so this is in part understandable, but she would have been a critical witness. Ms Allen was a close friend of the Claimant, had worked with her before and was in fact recruited with her. Ms Hussain and Ms Johal were 'hands off' owners of the Nursery who delegated almost all responsibility for its day to day operation to Ms Allen. They had their own demanding jobs elsewhere and Ms Johal had suffered serious illness and a bereavement and so had other focuses than the nursery. Our conclusion was that almost all information about the day to day running of the nursery including matters pertaining to the Claimant received by Ms Hussain and Ms Johal was filtered through Ms Allen. In oral evidence, we heard answers on many occasions from Ms Hussain and Ms Johal that 'this was up to Claire' or that Ms Allen was the source of their information or belief on many issues.

8.4 The Nursery experienced numerous issues within the first year, as demonstrated by the number of problems raised at the few staff meetings contained in the bundle. We also note the Ofsted inspection in May 2019 that recorded difficulties in leadership and management. Ofsted's description of difficulties did not surprise us at all having listened to the evidence. While any Nursery might be expected to have teething issues, there was a clear lack of effective management within the Nursery. Human Resource management was poor. We noted that the Respondent relied upon various significant conduct and capability issues that were never formally raised with the Claimant. A potentially serious compliant was raised about the Claimant by a member of Agency Staff on 8 May 2018 as recorded by a memorandum prepared by that member of staff, but the oral evidence showed that Ms Allen did not report it to the directors. No terms and conditions of employment were issued to the Claimant until August 2018 and they were an inappropriate rehash of local government terms & conditions found by Ms Johal. The lack of contemporaneous recording of problems compounded the difficulty caused by Ms Allen's absence.

8.5 Ms Allen and the Claimant and some other staff were recruited from another larger nursery called CAP. The Claimant had a different role at CAP, which was helping as bank staff with art projects. She had not worked full-time for some years. On 18 May 2018 the Claimant attended a hospital appointment. Clinicians recorded that the Claimant had stopped regular work and socialising 2 years earlier.

8.6 What was said and who was present at the time of the Claimant's recruitment was disputed. It was agreed that a meeting took place at the Village Hotel in Dudley with Ms Hussain and Ms Allen on 17th February 2018. The Respondent's case was that Mrs Chagger and a Ms Zahed were present. In oral evidence the Claimant told the Tribunal that there were 2 meetings before her employment

commenced. However, the ET1 and her witness statement mentioned only 1 meeting, consistent with the Respondent's stance. We concluded that on balance of probabilities there was one meeting.

8.7 It was also disputed what was said by the Claimant about her disabilities to Ms Hussain, and further, what was agreed about her terms and conditions. We concluded that the Claimant did state her diagnoses to Ms Hussain, contrary to the Respondent's case. However, only limited information was given about the conditions. The Claimant said that it helped her condition to work. Ms Allen said that the Claimant's conditions were well managed. The Claimant did not raise that reasonable adjustments were required.

8.8 As to what was agreed in terms of hours and pay, the Claimant's case was that she was to be employed for 37 hours per week as Senior Room Leader for 51 weeks per year on a salary of £15,000/£16,000 per annum to rise with the number of children. The Respondent's case was that all staff were told they would be on probation and the hours available would turn on the success of the nursery and the number of children enrolled. There was a disputed account as to what was said at the February 2018 Village Hotel meeting. At paragraph 6 of Ms Chaggar's witness statement she said, "*Tahra said we would look at this and discuss opportunities, but it would all be probationary and dependent upon the nursery requirements/needs, performance*". The Claimant through Mr Crumpton expressly agreed Ms Chaggar's statement and did not require to cross-examine her. I checked with Mr Crumpton and the Claimant that they had read the statement over, observing that the contents would be considered agreed by the Tribunal. Mr Crumpton affirmed this. Given this agreed evidence, we concluded that the Respondent's case on issue was more probable and that while there may have been mention of pay and hours, this was aspirational.

8.9 A nursery on the premises was in fact already in operation run by a third party. The Respondent was taking the nursery over. The Claimant agreed with the Respondent that she would attend the Nursery with the agreement of the existing owners to work a few days weekly prior to the Respondent's start date to get to know the children and undertake other preparatory tasks. She did so and was paid for this.

8.10 The Nursery formally opened under the Respondent's control on 1 April 2018.

8.11 The Claimant was absent from work through illness on the first two days of operation due to illness and then on 4 April 2018 for some medical treatment. She was also absent for 4 days from 18 to 23 April 2018, so making a total of 7 days absence in the first 8 weeks of operation.

8.12 The Respondent perceived some problems with the Claimant's employment in the first few months of the Nursery's operation.

8.13 The Nursery's Open Day was on 12 April 2018. A parent raised a complaint about the Claimant's conduct towards a child in the baby room. This was about whether

the child was allowed cake and also as to the Claimant's tone when speaking to children on a bouncy castle. The Claimant's evidence to us was that this was a misunderstanding and that the child she spoke to was her own godson. We heard oral evidence from Mrs Sukhbir Mann who was the parent who raised the complaint. She told us that the child concerned was her own nephew and that her children were spoken to in an abrasive manner whilst playing on the bouncy castle. Mrs Mann made a complaint to Mrs Johal about this incident. Mrs Mann seemed to us a persuasive witness and we accepted that the Claimant's tone to the children was not appropriate.

8.14 Ms Johal gave evidence about her unhappiness with the Claimant's performance on a visit to the Nursery on 17 April 2018. We did not need to make findings as to whether the concerns were substantiated, but found that Ms Johal's concerns were genuine.

8.15 On or about 27 April 2018 the Claimant remonstrated with Mrs Hussain about her hours. The Claimant raised her voice with Mrs Hussain and did so in front of other staff. There was another such incident in late May 2018. No disciplinary action was taken, but we found that this was because the Nursery did not wish to lose staff and in particular an employee who had the confidence of Ms Allen, who was essential to the Nursery's running. Mrs Hussain raised the Claimant's health in this discussion.

8.16 On 8 May 2018 an agency staff worker made a complaint to Mrs Rufshara Begum about the tone in which she perceived the Claimant was speaking to the children. Mrs Begum wrote down the complaint. Ms Allen knew about this complaint but did not pass it on to the directors. We inferred that Ms Allen was protective towards her friend.

8.17 On 21 May 2018 there was a dispute between the Claimant and the mother of one of the children at the nursery. The mother made a complaint to Ms Allen, who prepared a typed summary. It does appear from the note as if the fault lay with the mother.

8.18 On 22 May 2018, Mrs Johal and Mrs Hussain held a meeting at which they decided that the Claimant's role needed to be adjusted. Mrs Hussain's evidence which we accepted was that Ms Allen agreed with this. They made notes as to the hours which they thought members of staff should be allocated in light of the experience of the first few months of the Nursery's operation. These were left in Ms Allen's office. The notes were left on the desk and when the Claimant went into the room, as she was entitled to do, she found and read the notes and was unhappy. The notes included a proposal that the Claimant should work 30 hours per week, down from the 37 hours she was currently working.

8.19 On 31 May 2018, a "Room Meeting" for staff disclosed various problems in the running of the Baby Room. The notes do not suggest that these were attributed

to the Claimant, but evidently some important aspects of the room were not running smoothly. Mrs Johal's evidence was that the notes demonstrated the Claimant was not up to acting as Room Leader in the room. She noted that one of the other employees, Vicky Johns, in effect led the discussion on improvements. We accepted that this was Mrs Johal's genuine contemporaneous view.

8.20 We concluded that the Claimant was struggling in the role of Room Leader. It was a new type of role for her and she did not have experience in such a position, albeit she was experienced with other aspects of working with children.

8.21 Matters came to a head at the end of May and early June. The Claimant was made aware her hours were to change. In discussion with Ms Allen she was informed that the Nursery wished her to work as an arts co-ordinator with 'bank staff' status. Though there was no direct evidence as to that conversation, we inferred it from the Claimant's email dated 4 June 2018 and the Respondent's letter dated 5 June 2018 (the third bullet point). This discussion with Ms Allen led to the Claimant writing a letter to Mrs Hussain and Mrs Johal on 31 May 2018, setting out her unhappiness and a detailed defence of her position. Notably, the Claimant now proposed only to work 6 hours per day.

8.22 The Claimant then wrote a further letter on 4 June 2018 alleging a breach of employment legislation and the Equality Act 2010 asserting a link between her medical conditions and the proposed change of hours. The Respondent argued that the tone and content of the Claimant's correspondence was distinct from the Claimant's approach in person. We agreed that the Claimant's correspondence was likely written by her mother and were able to compare it to other correspondence within the bundle.

8.23 On 5 June 2018, Mrs Hussain and Mrs Johal responded to the 4 June letter stating that the Claimant's absence had caused problems for the nursery and that they did not have in-depth information about her medical conditions. They said that a discussion with Ms Allen had led to the conclusion that the Claimant acting as Room Leader and "in ratios" (that is, being one of the minimum number of staff to children) was not the best way forward. It was apparent from this letter that a decision had been made in conjunction with Ms Allen that the Respondent was intent on a change of role for the Claimant. The letter proposed that the Claimant would work as a sessional worker on an 'as and when needed' basis.

8.24 A meeting took place on 6 June 2018. Ms Allen took the minutes in writing, which appeared as a two-page document in our bundle. The Claimant disputed the contents and did not accept that Ms Allen had prepared the typed document. The Claimant was not provided with minutes at the time. She did not take her own note. We agreed with the Claimant that there were curious stylistic features of the minutes – the word "highlighted" is (over)used 14 times over 2 pages. The point that troubled us most was that there was a mention that the Claimant did

not want to work more than 18 hours because that would affect her benefits. The Claimant was not at that time on benefits, but was awarded Personal Independent Payment on 31 August 2018. Much was made of this by the Claimant at the hearing. Nonetheless, the award letter [page 168] shows that the award was backdated to 14 March 2018, prior to the meeting. Thus, we find that the application had been made by the time of the meeting as we are aware that such payments are backdated to the date the DWP acknowledge receipt of a completed claim form. We did not feel that the Claimant had been frank about this in her evidence. The better point she made was that PIP was not a benefit dependent upon working hours and so argued that it did not make sense for her to have said she wanted hours restricted to preserve her benefits.

8.25 We concluded that Ms Hussain or Ms Johal had typed up the minutes and reworded them and we approached them with caution as to their accuracy.

8.26 The difference between the parties as to the content of the meeting was that the Claimant alleged it had been agreed she would receive a *minimum* of 18 hours per week term-time (paragraph 37 of Claimant's Witness Statement). The Respondent's case was that the Claimant had agreed to working as "bank staff" in effect on a flexible zero hours contract, though it was envisaged she would work for 2 or 4 days per week in the short-term.

8.27 The minute of the 6 June meeting supported the Respondent's position and while we were cautious as to the weight to be attached to that, it was consistent with the Respondent's email from the day before, which expressly stated a proposal that, "you will work as a sessional worker on a 'as and when needed basis' and as Claire had discussed with you, you will be needed for the next 3 weeks for 3 days a week as a practitioner within the downstairs room". Therefore, the Claimant's position was that an agreement had been reached which changed the Respondent's stance coming into the meeting.

8.28 Unfortunately, no contract of employment was immediately produced which might have solved this dispute, but we were provided with emails surrounding the provision of a written contract in late August 2018. On 29 August 2018 Mrs Johal emailed Mrs Hussain and Ms Allen with a draft contract which she had evidently obtained from the local council, as it was a NJC contract. Critically, Ms Johal asked Ms Allen to amend salary information and terms of employment. On 29 August 2019, Ms Allen agreed to look at the contract and amend it. The contract given to the Claimant was at pages 71 to 76 of the Bundle. Many aspects of it are unsuitable for a private nursery as it refers to the Local Government Pension Scheme; however, it had been amended and Ms Allen's name appears at the end together with the Claimant's.

8.29 We found it likely that Ms Allen amended the draft contract on the basis of what she had understood to be the agreement at the 6 June meeting. On balance of probabilities this led to the conclusion that the Respondent's position at the

meeting was more probable. Our conclusion was supported by the fact that though the Claimant said in evidence she had protested about the contract, there was no contemporaneous email or letter to that effect. The next email of complaint from the Claimant was not until 16 January 2019 and it does not expressly say that the written terms did not reflect the agreement made on 6 June.

8.30 Pay records show that the Claimant in fact continued to work not dissimilar hours than before. She had worked 117 hours in the month to 31.5.18, 104.25 hours in June, 83.5 hours in July, did not work in August, but worked 103.5 hours in September.

8.31 In September 2018 a parent made an allegation that the Claimant had hit their child in the nursery. This was denied. In a meeting held with the parents in early September, the Claimant alleged she had been assaulted. In due course, this led to police involvement and one of the parents being charged, though the prosecution in the magistrates' court led to an acquittal. This led to a reduction of hours in October 2018 as the Claimant had time off. She was not paid for this absence and there was no contemporaneous complaint.

8.32 In October 2018 the Claimant applied for and was interviewed for a 30 hours Nursery Assistant job with the Respondent but was unsuccessful.

8.33 In November 2018 the Claimant worked 73.25 hours, in December 2018 50 hours, in January 2019 34.75 hours and in February 2019, 41.25 hours.

8.34 On 9 January 2019 the Claimant sent information in relation to her health conditions to the Respondent, mainly consisting of links to NHS websites.

8.35 On 16 January 2019 the Claimant sent an email to the Respondent saying, "Just to inform you that I eventually managed to talk to Unison about the email dated June 5th 2018, and they will be investigating the matter". This email did not develop what the problem was. On 22 January 2019, Mrs Hussain responded saying that they had considered the meeting on 6 June 2018 had concluded amicably and they thought it unreasonable to raise a matter 7 months after it had been resolved. She said they would respond appropriately to any queries from Unison.

8.36 Another 30 hours Nursery Assistant post became available in February 2019, which Ms Allen invited the Claimant to apply for, but she did not do so.

8.37 The Claimant's last day worked in the Nursery was 5 February 2019.

8.38 The Claimant's evidence was that her fibromyalgia was flaring up about this time and she had warned Ms Allen that her back might give way (paragraph 68,

witness statement) in context of providing cover work for another member of staff who had recently left. From medical records in the bundle it was evident that in late 2018 and 2019 the Claimant was seeking further medical treatment for widespread pain and fatigue and was formally diagnosed with fibromyalgia by Dr Panchal, a Consultant Rheumatologist, on 11 March 2019.

8.39 On 6 February 2019 the Claimant phoned in early on 6 February 2019 saying she was unable to work as agreed in order that Ms Allen could get agency cover at short notice.

8.40 Mrs Hussain's evidence was that the Claimant was refusing shifts at short notice and the Nursery had other staff available to work hours who were more reliable. She says Ms Allen told her that the Claimant was not getting on with other staff and so they stopped calling her when needed. Mrs Begum's evidence was that the Claimant was becoming less reliable after December 2018 in the sense that she was not accepting shifts. She said that Ms Allen was telephoning the Claimant, who was refusing the work and so Mrs Begum had to cover these shifts.

8.41 We concluded that the Respondent stopped offering shifts because the Claimant was perceived as being less reliable due to her health, being apt to cancel and so lead to a need for more expensive agency staff to be called upon at short notice.

8.42 Later in February 2019, the Claimant contacted ACAS as part of the early conciliation process. The Respondent wrote to the Claimant on 18 March 2019 treating the ACAS contract as a grievance and inviting her to a formal grievance meeting. The Respondent also sought to commission a medical report on the Claimant's health at this time. The Claimant refused these invitations.

8.43 Thereafter the tribunal process started.

8.44 The Claimant raised a complaint within these proceedings about her difficulty with stairs at the Nursery. While we accepted that staff lockers were located on the third floor, we also found the Claimant was able to leave her valuables in the Manager's Office, within which there was a safe. The Claimant said in her witness statement that she had kept her belongings in the office until the lockers were provided upstairs. We found she could have continued to store belongings in the Manager's Office despite the lockers being moved. The Claimant stored medication in a blue tin box in the room where she worked and other medication could be stored in the Manager's Office. The Manager's Office door was only 8 feet or so from the baby room.

8.45 The Claimant raised a complaint about being provided with a short sleeve polo shirt. Because of her polymorphic light eruption condition, exposure to the sun on her arms could aggravate her health condition. The Claimant was allowed to

wear a long-sleeved top under her branded Nursery polo shirt. There was a photograph showing this in the bundle. The Claimant did tell us that on a very hot day wearing a long-sleeve T-shirt under a polo shirt could be uncomfortable. There was no evidence that on a very hot day that the Nursery prevented the Claimant from wearing only a 'non branded' long sleeve shirt. We concluded that Ms Allen would highly likely have shown common sense towards her friend in such circumstances.

8.46 There is also a complaint about chairs. The Claimant's case is that nursery workers had to sit on children's sized chairs whilst performing their duties. She said that this would cause her back pain, to which she was vulnerable due to her medical conditions. We found that adult chairs were available from the manager's office, but that they could not be kept in the baby room permanently because they could cause a risk to the children. There were no records of complaints about an absence of or an inability to bring a chair from the office into the children's room when needed. The Claimant accepted that Ms Allen or another nursery worker would stand in for her or any worker who needed to leave the room for a short time, if that was necessary to preserve a staff ratio to the number of children.

8.47 Another complaint is that the Claimant was excluded from a staff WhatsApp group. WhatsApp is a popular text messaging service that allows messages between individuals or within a group. The evidence was that the group became defunct at a much earlier stage. The print-out of the texts shows that both Ms Allen and the Claimant were removed from the group on 13 April 2018. There was at some point a new WhatsApp group set up which the Claimant was not part of, but we did not have evidence of when this was.

8.48 The Claimant's complains that she was not invited to training or meeting events after February 2019. We did not hear evidence of what training or meeting events may have been held after that time.

Law

Disability Discrimination

9. Section 39(2) of the Equality Act 2010 (EQA) requires that an employer must not discriminate against an employee in the terms of employment, by dismissing an employee, or subjecting her to any other detriment.

10. Disability is a protected characteristics as set out at Section 4 of EQA.

11. Allegations of direct discrimination are raised. Direct discrimination is defined by Section 13 of EQA. It reads:

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

12. It is important to compare like with like in a direct discrimination case and we are required to do so by Section 23 of EQA which states:

> "(1) On a comparison of cases for the purpose of Section 13, there must be no material difference between the circumstances relating to each case."

13. Proof of discrimination is often difficult to adduce and hence section 136 of EQA alters the nature of the burden of proof in discrimination cases. Section 136(2) states:

> "If there are facts from which the Court could decide in the absence of any other explanation, that a person (A) contravened the provision concerned the Court must fing that the contravention occurred."

Subsection 3 provides:

> "Subsection 2 does not apply if A shows that A did not contravene the provision."

14. We have had regard to the way in which Section 136 has been set out as a two-stage process by the Court of Appeal in Igen v Wong [2005] IRLR 258, Madarassy v Nomura International Plc [2007] IRLR 246 and Amnesty International -v. Hannon [2009] IRLR 864. The first stage is to consider whether the claimant has adduced evidence to allow for findings of fact that would allow an inference of discrimination based on the protected characteristic to be made in the absence of an adequate explanation. If so, we must ask whether the respondent has provided an explanation showing the different treatment was not because of the protected characteristic. This approach has more recently been confirmed by Ayodele v. Citylink [2017] EWCA Civ 1913 and Efobi v. Royal Mail Group [2019] EWCA Civ 18.

15. We also had regard to the Supreme Court's decision in Hewage v, Grampian Healthcare [2012] UKSC 37. This case holds that the burden of proof provision may have limited contribution to make to a tribunal's decision-making process where we are in a position to make positive findings as to the reasons for treatment one way or the other. The "reason why" question may be the fundamental one capable of an answer without the need to resort to burdens of proof at all.

16. Importantly, to establish direct discrimination in a disability case, the less favourable treatment must be because of the disability itself, not because of something arising in consequence of it. That is the difference between section 13 and section 15 of EQA: see Ahmed v. The Cardinal Hume Academies (2019) EAT. There is a difference between an impairment (in this case, fibromyalgia, atypical polymorphic light eruption and benign hypermobility syndrome) and the adverse effects of those impairments, such as fatigue, back pain and time-off work because of symptoms. The abilities of the comparator must be the same as those of the Claimant. For purposes of section 13 EQA, we must decide whether any alleged less favourable treatment is based on the

disability and not because of the effect of disability on her abilities. This approach is also summarized at paragraphs 261 to 263 of *Harvey on Employment Law* which pronounces that the appropriate claim for treatment based on adverse effects of a disability lies under section 15 of EQA.

17. Where the reasonable adjustments case is concerned, the relevant statutory provision is section 20 EQA:

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

18. We had regard to Smith v. Churchills Stairlifts [2005] IRLR 1220 (CA) and the analysis of the objective nature of adjustments and 'substantial disadvantage' contained therein. We also had regard to the potential scope of adjustments as decided by the House of Lords in Archibald v. Fife Council [2004] IRLR 651.

19. An employer is not required to choose the best adjustment or the employee's preferred one, but rather what was reasonable: Linsley v. Revenue & Customs Commissioners (2018) EAT.

Victimisation

20. Victimisation is a concept defined in section 27 of EQA as follows:

> (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
>
> (a) B does a protected act, or
> (b) A believes that B has done, or may do, a protected act
>
> (2) Each of the following is a protected act—

(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

21. The Claimant must prove she suffered a detriment. A detriment exists where in all the circumstances a reasonable employee might take the view that the treatment was to her disadvantage: Shamoon v. Chief Constable of the Royal Ulster Constabulary [2003] ICR 337. That is also relevant for direct discrimination.

22. There was no dispute that the 'protected acts' the Claimant relied upon held that status so we did not need to explore the detail of the law on that point.

Time limits

23. Section 123 of EQA states so far as relevant for the disability discrimination allegations:

(1) Subject to section 140B, proceedings on a complaint within section 120 may not be brought after the end of—
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—
(a) the period of 6 months starting with the date of the act to which the proceedings relate, or
(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Unlawful deductions

24. We must determine what the terms of the Claimant's contract were at the beginning of the employment in terms of hours and pay and then determine whether the

contract was varied by agreement or acquiescence at the June 2018 meeting and/or by provision of the written terms in August/September 2018.

25. We will then have to determine whether the Claimant was paid less than the wages properly payable to her, so constituting a breach of section 13 of the *Employment Rights Act 1996*.

Analysis and Conclusions

Disability Discrimination

26. It was of some importance that the Claimant had brought her claim primarily as one of direct discrimination under section 13 EQA rather than under section 15 EQA. The latter section prohibits "Discrimination arising from disability" which relates to unfavourable treatment not because of the disability itself but because of something in consequence of her disability such as taking disability related absence leave. We were troubled by the fact that the Claimant had brought her claims under what we think most lawyers would say was the wrong provision (or less suitable provision) of the EQA for the facts. However, it was not our role to point that out or encourage an amendment. The issues had been specifically laid out by Employment Judge Flood at the case management hearing and we did not feel we could go behind that.

27. The first 3 (or rather 2 ½ allegations) in the list of issues concerning direct discrimination referred to the change in the nature of the Claimant's job and its terms in June 2018.

28. We concluded that the Respondent had demoted the Claimant in June 2018 by removing her from the Room Leader role and so there was a detriment. We found that her hours in time reduced in fact though not immediately.

29. The email from Mrs Hussain on 5 June 2019 raised the issue of the Claimant's health in this context.

30. The Claimant did accept a new contract. The word "pressured" in the list of issues is pejorative. We accepted that the Claimant agreed to a variation in her contract, though against the backdrop that her employment would otherwise likely not last beyond its probationary period.

31. We concluded that Vicky John was not an appropriate comparator. Ms John did not share the material characteristics of the Claimant which related to her capabilities to perform the Room Leader role in the baby room, perceived behavioural problems with some parents and Mrs Hussain, and also sickness absence (which we accepted was related to her disability).

32. The first stage of the *Igen v. Wong* enquiry was fulfilled, as the mention of illness in the letter dated 5 June 2019 permitted an inference of discrimination based on the protected characteristic in the absence of an adequate explanation.

33. However, we concluded that the Respondent established that the treatment was not due to the Claimant's disability. Rather, the Respondent decided (in conjunction with Ms Allen) that the Claimant was not right for the Room Leader job in combination of her abilities, her absence record, and her temperament. The Respondent satisfied us that they would have treated a non-disabled hypothetical comparator with the same issues exactly the same way.

34. The Respondent's letter dated 5 June 2018 reflected Mrs Hussain's state of mind at the time. This was a new business, they knew that the Claimant had health conditions but had limited information about them, and sickness absence had made running the nursery in this important opening period more problematic. The problem was not the Claimant's disability or her medical conditions *per se* but rather the adverse effects of the conditions so far as it affected the Respondent's decision-making. That is the important distinction made in the Ahmed v. The Cardinal Hume Academies case.

35. Though the 'zero hours' contract in September 2018 is listed distinctly in the list of issues, it follows from our findings of fact that this was merely reflective of the change agreed in June.

36. We concluded again that Stage 1 of *Igen v. Wong* was satisfied, as a tribunal might be able to draw an inference that the reduction in hours was disability-related, but the Respondent persuaded us that the reasons for treatment did not relate to the Claimant being disabled but rather a combination of the employment of permanent 30 hour assistants (one in October 2018 and a replacement in February 2019) and in part due to the inconvenience of disability-related absences. As before, we considered the illness related issues to be an adverse effect of her condition.

37. The final allegation of direct discrimination was that the Claimant was not offered more hours after February 2019. Our conclusion is that the Claimant was not offered more shifts because she was no longer considered reliable enough to call upon because of unavailability or cancellations due to illness. Was the Claimant treated less favourably? The characteristics of the comparator here had to be changed. We took the view that the appropriate comparator here was a non-disabled person who was cancelling shifts at short notice because of sickness or who was often unavailable. We found that the burden was again shifted onto the Respondent under *Igen v. Wong.* However, we again concluded that there was not less favourable treatment than the comparator. The reason for treatment were factors related to disability but not the fact of disability itself and the comparator would also not have been offered additional work.

Reasonable Adjustments

38. We concluded that the Respondent ought to have known that the Claimant was a "disabled" person within the meaning of EQA. The Respondent may have had limited knowledge of the Claimant's conditions, but we are confident that Mrs Hussain knew the names of the conditions and that the various mentions of illness on the WhatsApp messages at [147-149] of the Bundle related to these conditions. Mrs

Hussain asked the Claimant in the first month, "You have to be honest about how they [the conditions] affect you" (as confirmed by the 5 June 2018 letter) but made no effort to find out about the conditions until that summer, when the Claimant did pass on information.

39. On the issue of staff lockers, we found that there was a PCP of staff lockers being located on the third floor and that this did place the Claimant at a substantial disadvantage due to mobility problems and low energy levels. The Respondent was aware of the Claimant's difficulty with stairs. However, we found that the Respondent made a reasonable adjustment sufficient to remove the disadvantage by permitting the Claimant to store her belongings in the Manager's Office. We were confident that Ms Allen permitted the Claimant to do so. It might have been preferable to provide a dedicated locker for the Claimant on the ground floor, but we concluded that allowing the office to be used was reasonable and sufficient.

40. On the issue of a short sleeve polo shirt, we found that there was a PCP of providing short-sleeved polo shirts which the Claimant and other staff were required to wear, to ensure uniform branding. This placed the Claimant at a substantial disadvantage in that if she had to wear it outside with nothing more on her upper body, it would have caused distressing symptoms from her polymorphic light eruption condition. The Respondent had actual knowledge of this given at one point the Claimant had asked about a long-sleeved top. However, we found that the Respondent did take the reasonable step sufficient to remove the disadvantage by permitting the Claimant to wear long-sleeved T-shirts underneath the polo-shirt. There was no evidence that the Claimant was disadvantaged by wearing a long-sleeved T-shirt in conjunction with the polo shirt in very hot weather outside. We were confident that the Respondent through Ms Allen would have permitted the Claimant to take off the polo shirt in such circumstances, just as staff could of course wear a sweater or similar over the polo shirt in colder weather (as the photograph at [146] of the Bundle demonstrated).

41. On the issue of the adult sized chair in the baby room, we found that there was a PCP of requiring nursery workers to sit on children's sized chairs whilst performing some of their duties. This would put the Claimant at a substantial disadvantage if she was required to do so for prolonged periods at times when she was symptomatic due to body aches from fibromyalgia. The Respondent should have known of this. However, we concluded that the Claimant was permitted to bring an adult chair into the room for use from the Manager's Office as long as it was not kept in the baby room permanently. This was sufficient to avoid the disadvantage and balanced the issues of the Claimant's health and the babies' safety.

Victimisation

42. We found that the Claimant did perform protected acts within the meaning of section 27 of EQA by:

    a. Sending her letter dated 4 June 2018.

b. Informing Mrs Hussain by email in January 2019 that she was getting in touch with her Unison representative regarding the matters in June 2018.

43. The question was whether the Respondent subjected the Claimant to a detriment in consequence of these protected acts.

44. The allegation primarily related to the termination of shifts in and after February 2019.

45. We thus had to consider causation of the ending of shifts. This was part and parcel of our consideration of whether the end of offering shifts constituted direct discrimination.

46. Our conclusion remained that the termination of shifts was due to perceived unreliability of the Claimant as a bank worker.

47. We did not think that the two protected acts formed part of the Respondent's decision-making. It was significant that the letter in June 2018 which was a protected act was followed by a meeting at which agreement was reached and the Claimant continued to get significant numbers of shifts until the end part of 2018.

48. The email on 16 January 2019 led to the response from the Respondent on 22 January 2019 which seemed to us demonstrated some degree of annoyance, but we thought this understandable given there had been such a long lapse of time since the Claimant had raised her initial complaint. However, the Respondent agreed to deal with any queries from Unison and we found that this was a genuine response. We did not conclude that the Respondent stopped shifts for this reason. Had the union's involvement been in their thought process then their decisions would have been self-defeating, as it would have been obvious to the directors that stopping the shifts would likely lead to further queries from Unison.

49. It is unfortunate that Unison took some 6 months to respond to the Claimant's request for assistance and did not in fact raise any queries or act on the Claimant's behalf at any stage prior to the commencement of the tribunal proceedings.

Unauthorised deductions

50. This issue was framed in terms of the Claimant being paid less than she was entitled to be paid on or about 18 April 2019. From the ET1 it could be gleaned that the substance of the complaint was that the Claimant argued she was entitled to be paid a minimum of 18 hours per week from the agreement/variation of contract on 6 June 2018 and she did not receive wages in line with that.

51. Our conclusion, from the facts found, is that the Claimant had in fact agreed to act as bank staff from this time and there was no agreement as to a minimum number of hours.

52. Both parties agreed that the Claimant's employment was technically ongoing as at the date of the ET1 (see the box ticked at 5.1) and so any accrued holiday pay would not yet be owing. The Claimant in effect remained 'on the books' though the reality was that the Claimant would not be called upon to do further work.

Time limits

53. Insofar as the Respondent's actions would have amounted to direct discrimination, our view is that the acts would be taken as extending over a period of time and would constitute a continuing act of discrimination which would enable the Claimant to rely upon section 123(3)(a). There would have been an ongoing discriminatory regime involving the Claimant having regard to the principles set out in Hendricks v. Metropolitan Police Commission [2003] IRLR 96. The same analysis applies to the alleged failure to make reasonable adjustments and also the victimisation allegation. In our view, all allegations of disability discrimination would have formed part of the same "regime".

54. That might still put events out of time since no hours were offered after 5 February 2019. This would put the case about 13 days out of time. In our view however, the continuing act would have continued until 8 March which was the date the Claimant said the Claimant could collect her belongings from the nursery as Ms Allen said she had been told to use only new bank staff (see ET1).

55. Were we wrong about that, we would anyway exercise our discretion to extend time under section 123(1)(b) of EQA on the just and equitable basis. This is because the omission to offer further hours would not have become immediately apparent but only when the Claimant realised that no further hours were forthcoming. It was only then that matters came to a head.

56. Given our decisions on the substantive issues, our conclusion on time limits does not ultimately assist the Claimant. Hence the various claims are dismissed for the reasons given.

Employment Judge McCluggage

Signed on: 04/03/2021