# EMPLOYMENT TRIBUNALS

***Claimant***
***Respondents***

Ms A Curry **AND** Ocado Central Services Limited

**HELD AT:** London South

**ON:** 5 January 2021

**BEFORE:** Employment Judge Pearl
Mr C Rogers
Mrs S Dengate

This was a hearing heard by full CVP video to which the parties consented. The bundle ran to 105 pages. There were 7 short video files.

***Representation:***

**For Claimant:** In person
**For Respondent:** Mr O Tahzib (Counsel)

## JUDGMENT

1 The Claimant's claim of disability discrimination fails and is dismissed.

## REASONS

1 By ET1 received on 17 December 2019 the Claimant claimed disability discrimination. She is a Customer Services Team Member, driver and deliverer for the Respondent. Her employment started on 27 February 2019. The terms of her ET1 are relevant. "22/8/19 - I made a reasonable adjustment [request]

in writing for an on-site parking space. To reduce my stress levels and allow me to put measures in place to support my disability."

2 The Claimant has an auto immune kidney disease and disability is conceded. In the ET1 the Claimant went on to say that a disabled parking space was provided in September 2019; she was told it was hers; all staff were told that disabled drivers with a blue badge could use it; another employee did just that and, in effect, took the space that the Claimant had asked for, because he either works longer hours than her; or, in any event, starts earlier. The Claimant then says that she asked for a second reasonable adjustment, namely a personal parking space, but this was refused.

3 On 18 February 2020 an Employment Judge defined the issue in very general terms: "whether it would be a reasonable adjustment to provide the Claimant with a designated parking space in the on-site car park (which is what the Claimant would like), as opposed to providing one in the overflow car park, which is between 300 and 500 yards away." As will be seen, there is a little more legal intricacy involved.

4 In resolving the issues, we heard evidence from the Claimant; and from Mr Rees and Ms Tudehope. We studied the bundle of 105 pages. The evidence was heard on 5 January 2021 on the CVP video platform and the parties subsequently put in closing written submissions. We have viewed the video footage.

*Facts*

5 It is not our function to resolve each and every factual conflict. What follow are the relevant findings. Mr Rees is Service Delivery Manager, and the Claimant's manager, at the Respondent's Merton 'spoke'. The parking facility for employees' cars at the site itself is relatively limited. Other than the designated spaces for delivery vans, there are only 9 spaces for cars, near the fence in our photographs. There are 20-25 employees working at the site. There is, additionally, a large number of drivers (350) who largely spend their time making deliveries. Although it is not referred to in any of the three witness statements, it transpires, as the parties agree, that there is a site rule that only employees based on the site (ie not the drivers) could park up by the fence. The ostensible rationale is that three or four of these nine spaces cover up manhole covers and the utility companies occasionally require access. Only employees working at the site can quickly move their vehicles.

6 On 22 August 2019 the Claimant sent a text to Mr Rees. "I am getting a blue badge on the 3rd of September. I wanted to know if we have site disabled parking and if we don't can I get an on site disabled bay as a reasonable adjustment?"

7 In February 2019 the Claimant had been referred to OH. The Advisor reported that the Claimant's disease was serious and described the symptoms that have to be managed. The advice was that she is disabled, but was fit for her duties and contractual hours. Those duties were described as taking

grocery orders to doorsteps, working 40 hours a week. She had to lift totes of up to 17 kg each, deliver to about 22 customers per shift and each delivery could involve up to 6 totes. A reasonable adjustment would be additional comfort breaks. There was a 'welfare catch-up' in February and there was a further discussion in June, but the Claimant accepts that she had no issues with mobility at this point.

8 The note of a discussion on 30 August (page 43) is evidence that from her manager's point of view, the proposed parking space was not reserved for her. She could use it "as and when available."

9 On 9 September 2019 the disabled parking space was painted in. A memo (page 86) shows that it was notified to staff as available on a first come, first served basis. This went on to note that there was further disabled parking outside 'Lookers' on the other side of the road. The Claimant says this was an old style disabled bay and that parking rules were not enforced there. It was, however, marked for disabled parking.

10 A small piece of evidence seized on by the Claimant is Mr Rees saying to her outside "I see you've found your bay." She says this amounts to her being given it for her sole use. He does not remember using these words, but we consider that it is entirely feasible he did. In normal conversation this does not amount to a guarantee that it was her bay. "Your bay" simply means 'the bay you can use.' It is evident from the page 86 and all the subsequent events that it was a disabled space available for all blue badge holders.

11 That is what happened, because another disabled member of staff at the premises who was disabled started to use the bay; and had an advantage over the Claimant because he worked longer hours, so could park his car before she arrived. She has characterised this as the Respondent 'taking away' her space, but that is not realistic. The Respondent, having provided a disabled space, was in no position to stop another holder of a blue badge from using it. All we know about this other employee is that his is a physical disability.

12 Up to the provision of this space, the Claimant told us that she had been using the overflow car park. She maintained that this meant she had to leave home 90 minutes earlier, but the reason for this was far from clear to the tribunal. The Respondents insist that there was abundant car parking there and there seems to be no rationale to the 90 minute time frame. We find this to be an unreliable piece of evidence from the Claimant.

13 She also told us, and we understand her position, that she did not want it broadcast that the parking space was hers. She was therefore not at this point asking for the on-site space to be publicly reserved for her and she wanted to preserve privacy.

14 The Claimant was ill in September and there was a first stage absence meeting held on 14 October, chaired by Mr Rees with Ms Long from HR in attendance. The Claimant had a union representative. The various topics and issues are outside the scope of this hearing, although we note that in August

the Claimant had been dismissed, and then was reinstated. She said this had caused her stress and trauma.

15 Parking was raised at the meeting. There had been an incident when Ms Curry had parked in one of the other places by the fence, had been taken to task for this, and was told it would be allowed just on that occasion. She asked at this meeting for a reasonable adjustment and Mr Rees said she was entitled to do so. The notes record she said the current situation "means when I get to work I have to explore 3/4 parking options. I need to come in and be[en] calm." She wanted her own parking space on site. She then said that before coming in to work she worried about finding a space, and that after work she would have to walk back to the overflow site. She wanted "fluid access" to her own parking space.

16 After speaking about other causes of stress in the workplace (which the Claimant said were significant for her) Mr Rees raised the topic of OH. The exchanges are relevant and we summarise them. (i) The Claimant asked for extended comfort breaks as a reasonable adjustment. (ii) This was the point when Mr Rees asked if she would go again to OH. (iii) The exchanges at the top of page 50 make clear that there was no resistance from the Respondent to a new report. (iv) After an adjournment, the Claimant and her representative said nothing to suggest she would not go to OH. The representative, on the contrary, said he felt that Mr Rees was doing his best to help her. He specifically said: "Regarding the blue badge space, AC did make it clear that there is a link between the stress which has a physical effect on her body." He reported this point before the meeting closed.

17 Thus, on 22 October the Claimant was sent the Medical Report Request Form and the OH form. She never returned these forms and, significantly, never had any communication with the Respondent about them. She agreed she did not reply and it seems her reason, as asserted now, is that there was no requirement to do so, even though she had agreed to the proposal at the meeting with Mr Rees. She also told us that there was no point in going to OH again and that she was exhausted.

18 There was then a further exchange: see Claimant's email of 22 November, page 56, and Ms Long's response of 26 November, page 55. In this latter, Ms Long drew a distinction between the adjustment that could be made on the basis of the first OH report and the adjustment sought (which had to be the parking space) for which the Respondent expected a further report (and which they had no reason to think would not occur.) What is clear from the Claimant's next email, page 57, is that she had decided not to go for a further examination. She said she did not need to. She shifted the argument a little by saying that the parking space request was a reiteration of her first request for a parking space. She said if the space was not provided, she would start tribunal proceedings.

19 The Respondent decided on a further meeting with the Claimant, on 16 December, chaired by Ms Tudehope, Service Delivery Team Manager, who had not previously been involved. The notes are at pages 60 to 65. The

Claimant again had a representative present. Ms Tudehope's summary at page 61 needs to be read. She records what she understood to be the current position and this was that the Claimant did not want to use the overflow carpark at night; and that the Respondent was prepared to give her a personalised space there. This would afford 3 places to park, namely (and probably in order of preference) the disabled bay at the site, the bay outside Lookers or the overflow space that would be hers.

20 She said that an OH report was needed to explore the link between the request for the parking space on the basis of stress and the dark. This is a rather precise formulation; it comes, therefore, as no surprise to be told that legal advice had been taken. It "is absolutely your choice." If the Claimant did not agree to a report (or, it is inferred, putting in a GP report) the Respondent would use "all other information available to us" to deal with the request. Taken shortly, the Claimant maintained that the company had done nothing and she would go to the tribunal.

21 In the remaining discussion, we note the Claimant making her point that she would have to leave for work 90 minutes earlier. The Respondent said that they would in any event consider the request further for the parking space, but that it was reasonable to refer the Claimant to OH. Again, the rationale for the adjustment that was being offered was that "not knowing where you will park is a stressor." The additional factor Ms Tudehope identified was the additional stress of walking in the dark. She was a little sceptical about this because the Claimant worked at night in dark areas.

22 The Claimant never used the overflow space and she was unfortunately ill after 20 December, with various conditions, including mumps.

23 In evidence, she told us that the overflow space was not acceptable because it would take 8 minutes to walk back there from the site after the shift and this could be exhausting. It would also be more difficult because of lack of energy, flexibility in joints or muscle power. She said she had mentioned swelling of joints in the meeting, but this was not a confident assertion and we do not make that finding. We have concluded that this reasoning for not wanting to walk back to the overflow carpark after a shift was not before the Respondent at the meeting of 16 December. In a passage at the conclusion of her evidence she told us: "I don't think I argued with them about the overflow carpark. I didn't have it in me to argue. I'd asked and they had failed. I felt I was owed much more by my employer."

*Submissions*

24 We are grateful to the Claimant and Counsel for the final, written submissions. Where relevant, we refer to them below.

*The Law*

25 Section 20(3) of the Equality Act 2010 provides:

"(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."

Para 20, Schedule 8 provides:

"(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know - … (b) [in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."

*Conclusions*

*(I) 'Comparative disadvantage'*

26 The provision, criterion or practice ('PCP') are the parking arrangements at the time, which included the provision of 9 on-site parking spaces, one of which was a disabled space allocated on a first come first served basis. The disadvantage the Claimant relies on is that this obliged her to park elsewhere. On our findings, she would sometimes have to park at the overflow car park some 350 yards away, which was part of those arrangements, and at which there was always a free space. It was this, and the walk involved, that she says put her at the substantial comparative disadvantage in comparison with non-disabled employees ('the comparative disadvantage'.)

27 Our first question is whether the Claimant has shown that the PCP put her at the comparative disadvantage. She is entitled to rely on all and any evidence and is not limited, for this question, to the evidence available at the time. What is important to note is that her case is that she was disadvantaged by the distance to that overflow car park. That she might have to walk there in the dark is immaterial, because that is not related to the disability. She says that her auto-immune condition caused her difficulties in walking that distance, difficulties that were not experienced by non-disabled people. For shorthand, that was referred to during the case as the 'mobility' point. Thus, Mr Tahzib says in the written submission that the first OH report of 18 February 2019 did not suggest that the condition had any impact on her mobility.

28 Our conclusion is that the Claimant has not established to our satisfaction, on the balance of probabilities, how her condition put her at this claimed comparative disadvantage. We accept Mr Tahzib's submission at paragraph 14, although we need to comment further. He contends:

"The Claimant has failed to establish how the PCP puts her at a substantial disadvantage as a result of her disability. As far as the Respondent understands the Claimant's position, the Claimant contends that the prospect of walking from an offsite carpark to the Ocado site places the Claimant under stress, which exacerbates her autoimmune disease. However: a. The Claimant has not

provided any medical evidence to suggest that this is the case. The Respondent repeatedly encouraged the Claimant to undertake a further OH referral … "

29 This was the position that the Respondent understood in December 2019. The position has now changed: see paragraph 23 above. The argument that the condition causes physical difficulties that hindered her in undertaking the 350 yard work remains at the level of assertion. It is not clear to the tribunal if this is said to be the case at the beginning of a shift, at the end, or both. The best inference we can draw is that it was a problem at the end of the shift.[1] The Claimant does not say that the condition prevented her from walking there; we understand the case to be that tiredness and joint and muscle problems made it difficult or uncomfortable to walk to the overflow car park. The evidence is relatively slight. We do not know, for example, the extent of the difficulty or the frequency. We do not know how often she would find herself able to park on-site or at Lookers. In our view, the Claimant's oral evidence is an insubstantial basis for finding that she establishes the comparative disadvantage.

30 For completeness, these points are reflected in Counsel's submission at paragraph 14, where he refers to other factors, such as the work she undertook, to cast doubt on the Claimant's case under this head. In any event, we are not persuaded that she has established that the PCP placed her at the comparative disadvantage required by the statute.

*(2) Did the Respondent know or ought the Respondent reasonably to have known that the Claimant was likely to be placed at the disadvantage?*

31 This question has to be answered if we were wrong in our above conclusion. The Respondent knew at the material time that the Claimant was saying that her condition led to stress that non-disabled people, without her disability, would not experience.

32 The Respondent's submission at paragraph 19 picks up on some of the inconsistent points made by the Claimant at the 16 December meeting and comments: "It is ... entirely unclear why the Claimant would have to leave an hour and a half early to find a space. The Claimant was not able to provide any credible explanation in response. The Claimant suggested that the overflow car park is sometimes full. This was denied by the Respondent's witnesses. In any event, the Claimant was given by the Respondent her own allocated space … "

33 We consider these points to be fairly made. In addition, the Respondent at this meeting wanted some further medical evidence and suggested that the Claimant go to OH. This was a course she resisted. We refer to the findings we set out in paragraphs 20 and 21 above.

34 There was, therefore, a generalised case put by the Claimant at the meeting that she was stressed or more stressed because of the condition, but

[1] At the beginning of the shift, there is the evidence about having to leave home 90 minutes earlier, which we have found unconvincing.

she failed to address the case that she has advanced before us and augmented substantially in her closing submission. This was that she was *physically* unable or less able to undertake the walk because of her condition. It is possible that, had she gone to the further OH referral, this may have come out. But the Respondent is entirely correct to submit that the Claimant had by 16 December seemingly decided on a tribunal claim, as she told her employers. She presented this ET1 the next day (which also referred to stress.)

35 Clearly, the Respondent did not know the way in which the Claimant now says the comparative disadvantage arose. We conclude that, based on what they were being told, they could not have known of it. The Claimant stresses the word 'likely' in the statute. To find that the Respondent ought reasonably to have known that the Claimant was likely to be placed at the disadvantage requires a leap of logic. They wanted some further evidence that would establish the likelihood, as well as the reason for the disadvantage. Perhaps the two factors – likelihood of disadvantage and the reason for the disadvantage – are one and the same on these facts. Put simply, there was an evidential gap. The Claimant was not engaging with OH and it would be unreasonable to conclude that the Respondent should either have guessed or assumed the disadvantage, in so far as they could appreciate how that was being put. We conclude that they lacked the necessary knowledge, actual or constructive.

*(3) Did the Respondent take such steps as it was reasonable to have to take to avoid the disadvantage?*

36 This question arises if we were wrong in both the above conclusions. In this case, where the Respondent has the requisite knowledge, it would be obliged to remove the disadvantage provided it could do so by taking reasonable steps. As we are not persuaded that the remaining 8 on-site parking places all cover utility covers (and do not think that the Respondent is saying this) it could create a disabled space reserved for the Claimant. Therefore, she would succeed.

37 In essence, the Respondent's argument is that it had taken sufficient reasonable steps and should not have to take more. That is less than compelling. If the earlier two issues had been decided against the employer, the provision of the overflow space would not meet the disadvantage. There would be no reason not to create the second on-site disabled place for the Claimant's sole use.

*Summary*

38 For the reasons set out above the Claimant fails in her claim because she has not established that she was put .at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. Even if she had been, the Respondent establishes a lack of actual or constructive knowledge under the terms of para 20 of Schedule 8.

Employment Judge Pearl

Date 7 March 2021