EMPLOYMENT TRIBUNALS

Claimant: **Miss L Watkins**

Respondent: **Wickes Building Supplies Limited**

Heard at: **Cardiff (CVP)** **On: 29-31 March 2021 and 1 June 2021 (Chambers)**

Before: Employment Judge Brace
Mr David Ryan
Mrs Rhian Hartwell

Representation
Claimant: Mr Leong (Solicitor)
Respondent: Mr Foster (Employment Consultant)

RESERVED JUDGMENT

It is the unanimous judgment of the tribunal that the Claimant was unfairly dismissed by the Respondent and that her claims of discrimination arising from disability (section 15 Equality Act 2010) and failure to make reasonable adjustments (section 20/21 Equality Act 2010) were also well founded and succeed.

WRITTEN REASONS

Preliminary Matters

1. The claims before this tribunal were ones of unfair dismissal, discrimination arising from disability and failure to comply with the duty to make reasonable adjustments. That the Claimant was a disabled person at the relevant time, by reason of her depression and autism spectrum disorder has been conceded by the Respondent. Likewise, that the

Respondent had, at all material times, knowledge of disability was also not an issue in dispute.

2. There was an issue at the outset of the hearing with regard to whether or not time limits for making an unfair dismissal claim was in issue, the Respondent initially indicating that the Judge at the preliminary hearing on 13 February 2020 had allowed the Claimant's application to her amend her claim but subject to time issues.

3. After consideration by the Tribunal of the Early Conciliation dates (21 May 2109 – 4 July 2019) and the Respondent accepting that the ET3 reflected agreement to the effective date of termination of 26 August 2019, it was conceded by the Respondent that the claim was brought in time and jurisdiction was not a live issue.

4. After adjourning for the parties to agree the list of issues and considering the same with the parties it was agreed that the issues for determination by the Tribunal were as follows:

5. With regard to unfair dismissal

    a. What was the reason or principal reason for dismissal?
    b. Was it a potentially fair reason? The Respondent relies on some other substantial reason of a kind justifying dismissal or in the alternative, redundancy as the potentially fair reason for dismissal
    c. Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

6. With regard to discrimination arising from disability the issues are as follows:

    a. Did the Respondent treat the Claimant unfavourably by
        i. relieving the Claimant of one of her shifts after she declined the option of working Saturdays
        ii. dismissal
    b. Did the inability to work Saturdays arise in consequence of the Claimant's disability.
    c. Was the unfavourable treatment because of any of those things: did the Respondent relieve the Claimant of one of her shifts and /or dismiss the Claimant because of the Claimant's inability to work Saturdays
    d. Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says its aims were ensuring that the salary budget and quotas of the Newport branch were not exceeded.

7. With regard to the reasonable adjustments claim the issues are as follows:

    a. Did the Respondent had the following provision criterion or practices "PCPs"
        i. an insistence that they could rely on a flexibility clause of the contract of employment; and
        ii. imposing a requirement to work weekends including Saturdays.
    b. Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability?
    c. What steps could have been taken to avoid the disadvantage? The Claimant suggests maintaining the Claimant's set days and hours
    d. Was it reasonable for the Respondent to have to take those steps and when?
    e. Did the Respondent fail to take those steps.

The Evidence

8. The Claimant provided her evidence in the form of written witness statement as did the witness from the Respondent, Elisabeth Bevan, Regional Operations Manager. Both parties have had the opportunity to ask questions of witnesses, as did the Tribunal.

9. Whilst the Tribunal was satisfied that both witnesses gave their evidence honestly and to the best of their knowledge and belief, Elisabeth Bevan was not the manager who dealt with the Claimant and she was not the Claimant's manager. This person was Chris Rose who did not give evidence and had not been called by the Respondent having left the Respondent's employment.

10. Additionally the Claimant's recall of some of the matters proved to be difficult for her due to passage of time and the Claimant's own anxious state of mind at the time of the events in question. As such, heavy reliance was placed on the documentary evidence where that was available although even that evidence was in some areas sparse.

11. It was the Respondent's primary case that a reasonable adjustment had been made for the Claimant back in 2008 of allowing her to work regular hours on regular days. That this had been a "reasonable adjustment" for the Claimant was not a matter that the Claimant recognised. Rather the Claimant maintained the position, that following a nine-month period of sickness absence in 2008, it was agreed that she would not be required to work weekends, as weekend work made her unwell due to the increase of customers within the store,.

12. No documentary evidence was provided within the Bundle regarding any reasonable adjustment asserted to have been made, or the reasons for any asserted reasonable adjustment made in 2008. Indeed, no documentation was contained in the Bundle regarding any arrangements that had been put in place for the Claimant's working patterns. On that basis, the Respondent was directed on the afternoon of the second day of the hearing, to disclose to the Claimant and the Tribunal, documents relevant to the working arrangements of the Claimant from 2008. This was provided by way of Supplementary Bundle of 29 pages. References to the hearing bundle of 166 pages appears in square brackets [ ] below and references to any documents in the Supplementary Bundle appear in square brackets and referenced [SB] below.

13. Adjustments were made to the hearing in so far as the Claimant was afforded regular breaks of around 10 minutes every 30 minutes and Mr Foster adjusted his cross-examination to ask questions more slowly and repeatedly where necessary.

Facts

14. The Claimant was employed as a customer assistant by the Respondent from 22 May 2007 on terms and conditions dated and signed 23 of May 2007 [64]. Clause 2A of those terms provided the Respondent reserved the right to vary the number of hours that the Claimant was required to work each week further providing that in the event that it became necessary the Claimant would be given a minimum of one week's notice of change.

15. Clause 5A provided that the Respondent required all colleagues to be available for work on bank holidays and that if they were required to work on a designated bank holiday they would be entitled to equivalent time off in lieu. Clause 6 dealt with Sunday work and the ability as a shop worker to opt out of Sunday work.

16. The terms and conditions were sent to the Claimant under cover of an offer letter of 20 May 2007. Attached to that offer letter was a "Person Specification" that included essential criteria of flexibility in working bank holidays and weekends. A job description and person specification signed by the Claimant in May 2015 repeated this essential criteria [69].

17. For completeness, our attention has also been drawn to document entitled 'Manager Guideline – Changing Contractual Terms and Conditions dated 29th of January 2019 [84] which included a section related to how contracts could be varied that involved a two stage process of informal

agreement followed by formal consultation for 30 days and a minimum of three consultation meetings.

18. Within a few years of the Claimant working and by 2008, the Claimant was unwell, being unable to eat or sleep. She took a long period of sickness absence in 2008 through to 2009 due to anxiety and depression and prior to her return, a series of meetings took place for her return to work to accommodate her anxiety and depression [SB18]. Child care was an issue at that time in terms of the shift patterns that the Claimant was able to undertake. The Claimant returned to work in 2009 working regular shift patterns of Wednesday – Friday 9am – 4.30pm. She did not work weekends.

19. The shift patterns provided the Claimant with routine and she preferred to work weekdays and avoiding weekends as Saturdays and Sundays were the busiest days of the week. None of the documents provided reflect that it was agreed that the Claimant would not work weekends. However from this time onward the Claimant did not in fact work weekends and we accepted the unchallenged evidence from the Claimant that successive managers agreed that she would not work weekends to accommodate her depression.

20. On 22 of April 2014 the Respondent was provided with a letter from Dr Irene Jones, a speciality doctor, from within Aneurin Bevan University Health Board division of mental health and learning disabilities [70]. In that letter Dr Jones confirmed that the Claimant had a diagnosis of recurrent depressive disorder and had at times become seriously ill as a result. She indicated that the Claimant was highly motivated to live her life fully and normally as she could, and that she had a care plan regarding work which included part-time with regular known hours so that the Claimant's good mental health could be maintained.

21. The letter confirmed that irregular hours were detrimental to her mental health and extra stress involving disruption to routine and schedule could precipitate a relapse. A significant relapse indication was poor sleep which usually heralded as severe depressive episode.

Diagnosis of Asperger's

22. In June 2017, the Claimant received for the first time a diagnosis of Autism Spectrum disorder, more specifically Asperger's.

23. A supporting letter was prepared by her by Christine Fretwell, specialist practitioner within the integrated autism service of the Health Board and it is not in dispute that the Respondent received a copy of this letter [72]. It appears a generic letter with regard to the how individuals with ASD

Asperger syndrome are affected. It talks of struggling to function in usual social learning, community, leisure and employment situations.

24. By February 2018, a care plan for the care and treatment of the Claimant was prepared by Dr Jones in respect of the Claimant's depression and provided to the Respondent [73]. Whilst within that care plan it indicated that the Claimant had no issues with social outcomes within work, it was recommended that the Claimant's employer maintain her part time hours; to fix her hours and not press for further hours of work [74].

25. We have been provided with no evidence from the Respondent on how they addressed that fresh diagnosis of autism and/or whether there were any discussions regarding further adjustments required for the Claimant as a result of her autism. We accepted the Claimant's evidence that successive managers agreed for her not to work on a weekend as an adjustment as she found busy weekend work difficult with her depression and her autism.

26. At some point, and for a period over Christmas 2018/New Year 2019, the Claimant was again off work through ill health and on her return to work, the current store manager Chris Rose, conducted a back to work meeting. At that back to work meeting Mr Rose indicated that to the Claimant that he required her to work on Saturdays. No evidence has been heard from Mr Rose, and we have been told that he has now left the Respondent's employment, but we have accepted the evidence of the Claimant which was that it was a passing reference only at the end of that meeting.

27. Mr Rose subsequently sent the Claimant a letter dated 24 of January 2019 providing her with written notice of the requirement to worker Saturday with effect from 17 February 2019 and that the Claimant could be accommodated with either an early or late shift pattern that day [83].

6 February 2019 Meeting

28. On 6 February 2019, Chris Rose scheduled a 'Change of Work' meeting. This was the first meeting convened to discuss proposed changes. Whilst we do not have evidence from Chris Rose, we do have contemporaneous handwritten notes prepared by Monica Ridsdale, signed as an accurate record of the meeting that took place by the Claimant [84].

29. The notes were difficult to follow and at times it was difficult to decipher what in fact was being said. The Claimant was unable to recollect what issues were discussed and no evidence was provided from the Respondent save for the documented note of the meeting, neither Chris Rose nor Monica Ridsdale giving live evidence. However accepting the

responses from the Claimant to questions put to her on cross-examination, we found that at that meeting:

a. the Claimant was informed that her hours would change as the busiest day was a Saturday;
b. whilst the Claimant indicated that working weekends caused her problems with childcare, she also expressly stated that she could not work weekends because of her disability.

30. The Claimant was challenged that the focus of the Claimant's reasons for being unable to work Saturdays was because of childcare and not any underlying disability. Whilst the Claimant accepted in cross examination that she did respond in this way, we also accepted her evidence which was that this was because' *she didn't wear her disability as a badge'.*

31. Consideration was given to offering the Claimant to work stock control or Click and Collect. Thee Claimant did raise concerns about working on a Saturday in any role due to her childcare issues but she also raised her disability, raising concerns that working Saturdays would be a change in her schedule. The Claimant was asked if she could work Sundays and the meeting was left that the Claimant was discuss the possibility with her partner.

Letter from Dr Irene Jones - 12 February 2019

32. On 12 February 2019, a letter was sent to Chris Rose from Dr Jones repeating her concerns the Claimant's care plan regarding work included part-time work with regular known hours so that the Claimant's good mental health could be maintained. She stated that irregular hours were detrimental to the Claimant's mental health and extra stress involving disruption to routine and schedule could precipitate a relapse. She also confirmed that the Claimant was unable to manage flexible working hours which increased to levels of stress due to her condition and that "*particularly changes in working patterns cause significant distress because of her autistic disorder*".

Grievance - 18 February 2019

33. On the 18 February 2019, the Claimant wrote to Chris Rose setting out a grievance letter headed "Denial of reasonable adjustments amounting to discrimination under the Equality Act 2010" .

34. The letter informed Chris Rose that the Claimant suffered from recurrent depressive disorder and that previously, when the Claimant's previous manager, Ian Bundy, tried to make her work weekends the psychiatrist

had written explaining that irregular hours and additional stress could lead to a relapse and the Claimant becoming seriously ill.

35. The Claimant also reminded him that she had been diagnosed with Asperger syndrome since June 2017. She further stated the following: –

> *"This impacts my ability to interact socially, particularly when faced with large groups of people. Although I can get through normal weekdays in my job, I can only achieve this by adopting a different persona, which is difficult and tiring to sustain throughout the day, but manager. By Saturdays, I am exhausted and very depressed. Every year, I am required to work Good Friday, a busy day which I find particularly exhausting and stress. The thought of working a busy weekend day every week is making me feel ill, and I am sure I would not be able to cope with it."*

36. Within the letter the Claimant sought to remind the Respondent of the employer's obligation to make reasonable adjustments. The Claimant stated that she believed that the requirement for her to work the two busiest days of the week, namely Saturdays and Sundays, was discriminatory as it particularly disadvantaged her by causing her additional stress.

37. She informed the Respondent that she considered that this was very likely to cause a relapse of her recurrent depressive disorder and aggravate her Asperger Syndrome. She suggested that the situation could be overcome by continuing to allow the reasonable adjustment of weekday working only working, with a same working pattern each week as suggested by her psychiatrist.

Meeting - 6 February 2019

38. On 6 February 2019, Chris Rose sent a further letter to the Claimant inviting her to meet again on 20 February 2019, advising her that she had the right to be accompanied to that meeting [107].

39. The letter highlighted that the Claimant's objections raised to him in January and again in the formal meeting of 6 February 2019 were based on medical as well as childcare issues and stated that he had tried to accommodate the Claimant by offering a fixed early mid shift or late night shift and that they would also look at Sunday working.

40. The meeting on 20 February 2019 did not take place as the Claimant chosen companion had not been rostered to work and was unavailable.

41. However Chris Rose did speak to the Claimant later that day. Whilst expressed to be a brief conversation, simply to make arrangements for the further formal consultation meeting, not only did Chris Rose see it as an opportunity to discuss the management of the Claimant's grievance and referral to occupational health, he also took the opportunity to be accompanied by a note taker. A copy of the notes contained at page 108 of the bundle. It appeared to us that the note taker does not appear to be entirely comfortable with having to take the note.

Meeting - 6 March 2019

42. It appears that a meeting took place on 6 March 2019, however no notes have been made available to us. There appears to be no dispute that a meeting did take place on that date.

43. We accept the Claimant's evidence that the second meeting simply referred to the occupational health referral being arranged for later that month. The Claimant was not challenged on cross examination that at that meeting she was told by the Respondent that they could not maintain her correct shift pattern and that she needed to work Saturday, the busiest day of the week. We accepted that the Claimant had been told this.

Occupational Health Report - 2 April 2019

44. In the interim, the Claimant agreed to refer to occupational health A copy of the occupational health report is contained at [115] and we were satisfied that it reflected the matters that the Claimant discussed with the occupational health adviser in that consultation.

45. Within the 'Occupational History' section of the report, the occupational health advisor recites that it was proposed that the Claimant's hours of work would be amended to Thursday 9.00-16.30 Friday 9.00-16.30 and Saturday 14.15-20:15 weekly.

46. The Occupational Health report also included a section entitled 'History of Presenting Concern" which recited that the Claimant had had her first episode of depression 21 years previously and had since been diagnosed with recurrent depressive disorder having had four major episodes of depression, that her last severe episode of depression had been eight years previous but that she remained in the care of the mental health team and had a six monthly review appointments.

47. The occupational health report also confirmed, with regard to the Asperger's syndrome/autistic spectrum disorder the following

"Routine is a very important component of her daily living, any change to her usual routine can cause increased anxiety and low mood. Ms Watkins has become increasingly concerned regarding request for her to work weekend shift patterns, she reports that the store is very busy during weekends and the customers can be more demanding resulting in work-related stress. Ms Watkins is extremely concerned that she may risk a recurrence of a severe episode of depression."

48. In the section entitled "Summary and Recommendations" the occupational health advisor stated the following: –

"I would agree that there is a significant risk of worsening of her mental health should the proposed hours of work involving weekend working be introduced. It is likely that there will be future sickness absence which may be long-term due to a relapse of her mental health. If her hours of work can remain unchanged this would significantly reduce the risk of a deterioration in her mental health."

49. On 18 April 2019, the Claimant was invited to a further meeting for Friday, 26 April 2019 [117]. The letter confirmed that the Claimant's objection to a change in shift patters was based on her current medical condition.

Meeting - 26 April 2019

50. Notes of the meeting appear to reflect that the Claimant was told that the business could not support the Claimant not working Saturday as they required flexibility. The notes also appear to reflect that Chris Rose did not agree that the Occupational Health Report supported the Claimant's position that she could not work Saturdays and/or that the Respondent was obligated to follow the recommendations given [119/125].

51. The notes of the meeting reflect and we found it likely that Mr Rose remained inflexible that the Claimant would need to work a Saturday and offered the Claimant headsets and a fixed routine instead but was intransigent that the Claimant would need to work a weekend shift.

Meeting - 13 June 2019

52. On 23 May 2019, Chris Rose again wrote the Claimant inviting her to a further meeting on Friday, 5 June 2019 [124]. The letter referred to the offer of fixed shifts.

53. Again no notes are available of the meeting of 13 June 2019 and we make no findings as to what actually was discussed at that meeting save for the following:

a. We accepted the Claimant's evidence that Mr Rose informed her at that meeting that they would be removing the Claimant's Wednesday shift so that another person could be paid for doing the Saturday shift; and
b. that the Claimant felt she was being punished by Chris Rose for failing to work agree to work weekends.

54. On 18 June 2019, as a result of stress the Claimant commenced a period of sickness absence from which she did not return [125].

55. On 19 June 2019 the Respondent wrote to the Claimant enclosing a copy of the notes from the meeting of 13 June 2019. These have not been provided within the Bundle and no explanation was given to us for their absence [126].

56. In that letter the Respondent confirmed that they were proposing to reduce the Claimant's contract from 21 hours a week to 14 hours. The letter further provided that if the Claimant chose not to accept the reduced working hours, that her current contract would terminate 'on the expiry of her contract'. Whilst this makes no legal or common sense in itself, the letter further provided that if at the end of the consultation process they had been unable to reach a solution with the claimant she would be served notice of six weeks.

Meeting - 11 July 2019

57. On 3 July 2019, the Respondent again wrote again to the Claimant inviting her to a meeting on 11 July 2019 [128] indicating that to prevent Saturday working affecting the Claimant's health, they were proposing to reduce her contract hours to 14 hours per again reminding her that if she chose not to accept that her contract would terminate.

58. On 11 July 2019, the Claimant met with Chris Rose and notes, signed by the Claimant as an accurate record of the meeting, have been provided to us which we accepted as a record of the matters discussed.

59. The Claimant again raised her disability and indicated that her nerves were poor. In response to Chris Rose's suggestion that the Claimant drop a shift so that they could recruit an additional person to cover a Saturday shift, the Claimant confirmed that she was not prepared to drop her hours or take redundancy, pointing out that the Respondent had recently taken on more staff. The Claimant was informed that every work colleague worked a weekend. The Claimant again indicated that she was unable to undertake stock taking on the Saturday and Chris Rose confirmed that being able to remain on her existing shifts was not an option. After a brief

adjournment the Claimant was informed that her employment would be terminated and that she would have a right of appeal.

60. On the same date the Claimant was provided with a letter confirming that they were not scheduling the Claimant to work a Saturday shift based on the Claimant's objections as this would affect her health, a position that had been confirmed by Occupational Health. They indicated to her that they were proposing as a result to reduce her contracted hours from 21 to 14 hours.

61. As the Claimant had continued to decline to work Saturdays. She was informed that they were terminating her employment on six weeks' notice during which period an amended contract would be available for her to sign. She was offered the choice of signing the new contract in that period or an alternative option of 'redundancy'. She was informed of a right of appeal to Elizabeth Bevan.

62. The Claimant did not appeal the termination and the Claimant's employment ended on 26 August 2019.

Respondent's Submissions

63. The Respondent has invited us to conclude that the Claimant was dismissed for redundancy in that the Claimant was employed on set days and the business need for her to work fixed days had diminished, that there was consultation and an appeal. They invite us to find that s.98(4) ERA 1996 has been met but that in the alternative there was some other substantial reason for the dismissal. If we were minded to find that there had been a failure on procedure, then the Respondent relies on **Polkey** that the dismissal would have arisen in any event and invite us to conclude that dismissal was not predetermined.

64. In terms of s.15 Equality Act 2010, the Respondent maintains that there was nothing in the medical evidence that indicated that the Claimant could not work Saturdays but in any event rely on the legitimate aim of meeting customer demand and budgeting wages, which the Respondent maintains was justification for their treatment of the Claimant in any event.

65. In terms of reasonable adjustments, the Respondent argues that the medical evidence supports adjustments of regular hours and part-time work which was afforded to the Claimant and invite us to consider the Respondent's resources and what the Claimant was prepared to consider in terms of alternative duties.

Claimant's submissions

66. The Claimant invites us to find that the Respondent hasn't shown that there has been a diminution in the requirement for employees to carry out work of the kind that the employee was engaged to undertake as they still required her to work three days and the termination by reason of redundancy was a sham. It was argued that the fact that the Claimant couldn't work Saturday cannot be a fair reason to dismiss the Claimant where the Claimant had limited options due to her disability and the Respondent failed to explore those options; that in those circumstances dismissal should have been last resort and that a reasonable employer would have considered the reasonable adjustments required before dismissing.

67. He invites us to find that the dismissal was both substantively and procedurally unfair.

68. With regard to the failure to make reasonable adjustments , we are invited to place reliance on Dr Jones' occupational health report of 2 April 2019 with regard to the Claimant's ability to work Saturdays and conclude that the PCP, of being required to work Saturdays placed the Claimant at a substantial disadvantage compared to non-disabled employees as this placed her mental health at risk; that to retain her existing hours would have been a reasonable adjustment and that the time for this would have been January 2019 when the process of altering the Claimant's shifts started or at the latest after 2 April 2019, when the Respondent received the occupational health report.

69. With regard to the s.15 Equality Act 2010 claim, and specifically any justification relied on, the Claimant concedes that the Respondent had a legitimate aim, but the Claimant challenges the Respondent's means of achieving a legitimate aim; that the means was not proportionate. He invites us to conclude that there was no balancing exercise undertaken by Chris Rose and that the business needs took priority and that costs alone cannot be justification. He also invites us to conclude that if we concluded that the Respondent had failed to make a reasonable adjustment, they cannot rely on justification on s.15 claim.

Law

<u>Duty to make adjustments – s.20/21 EqA 2010</u>

70. (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

(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.

71. The Equality and Human Rights Commission's Code of Practice on Employment contains guidance on the Equality Act, on what is a reasonable step for an employer to take will depend on the circumstances of each individual case (para 6.29). The examples previously given in section 18B(2) DDA remain relevant in practice, as those examples are now listed in para 6.33 of the Code of Practice.

72. In **Environment Agency** v **Rowan** [2008] ICR 218, the EAT set out how an employment tribunal should consider a reasonable adjustments claim (p24 AB, para 27). The tribunal must identify:
    a. the provision, criterion or practice applied by or on behalf of an employer, or (b) the physical feature of premises occupied by the employer;
    b. the identity of non-disabled comparators (where appropriate); and
    c. the nature and extent of the substantial disadvantage suffered by the claimant'.

73. PCP is not defined within the EA 2010. EHRC Code of Practice (6.10) states that the phrase should be construed widely and could include informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions.

74. The burden of proving the PCP and the substantial disadvantage lies on the claimant (**Dziedziak** v **Future Electronics Ltd** EAT 0271/11).

<u>Discrimination arising from disability (s15 EA 2010</u>

75. Discrimination arising from disability is provided for within s15 EA 2010:

> (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) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

76. If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified (EHRC Code, para 5.21).]

77. As for the correct approach when determining section 15 claims we refer to **Pnaiser** v **NHS England and others** UKEAT/0137/15/LA at paragraph 31.

78. The relevant steps to follow are summarised as follows:

    a. the tribunal must identify whether there was unfavourable treatment and by whom – no question of comparison arises;

    b. the tribunal must determine the cause of the treatment, which involves examination of conscious or unconscious thought processes. There may be more than one reason but the "something" must have a significant or more than trivial influence so as to amount to an effective reason for the unfavourable treatment;

    c. motive is irrelevant when considering the reason for treatment;

    d. the tribunal must determine whether the reason is "something arising in consequence of disability"; the causal link between the something that causes unfavourable treatment and disability may include more than one link – a question of fact to be assessed robustly;

    e. the more links in the chain between disability and the reason for treatment, the harder it is likely to be able to establish the requisite connection as a matter of fact;

    f. this stage of the causation test involves objective questions and does not depend on thought processes of the alleged discriminator;

    g. knowledge is required of the disability only, section 15 (2) does not extend to requirement of knowledge that the "something" leading to unfavourable treatment is a consequence of disability;

79. When considering justification, the role of the Tribunal is to reach its own judgment, based on a critical evaluation, balancing the discriminatory effect of the act with the business/organisational needs of the Respondent.

Unfair Dismissal

80. With regard to the unfair dismissal, we first have to consider the reason for the dismissal and whether it was a potentially fair reason for the dismissal.

81. Section 98 of the Employment Rights Act 1996 provides:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it:

(a) 'relates to the capability or qualifications of the employee for performing work of the kind which he was employed… to do;

[(b) relates to the conduct of the employee']

(3) In subsection 2(a) 'capability' in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

Conclusions

Failure to comply with duty to make reasonable adjustments (s.20/21 EqA 2010)

82. Dealing firstly with the reasonable adjustments claim, that the Claimant was a disabled person and that the Respondent had knowledge of the Claimant's disability was not in issue, both having been conceded by the Respondent.

83. We concluded that the Respondent had applied both PCPs relied on, of insisting that they could rely on the flexibility clause in the contract of employment and, in turn, that they imposed a requirement to work weekends, including Saturdays. To an extent this too had been conceded by the Respondent in any event, save that its position was that this had not been applied until January 2019 and that the requirement was not to work Saturdays but any weekend day.

84. This PCP was evident from the correspondence from Chris Rose dating back to the very first letter sent to the Claimant on 24 January 2019 in which he provided notification to the Claimant '*of a requirement to work a Saturday'* and providing her with 4 weeks notice of the change.

85. This was a requirement that applied to the Claimant and was, at least in principle, an action that was applicable to others employed by the Respondent.

86. We also concluded that a requirement to work weekends, whether a Saturday or a Sunday, as a PCP placed the Claimant at a substantial disadvantage compared to others without the Claimant's disability of depression and / or autism.

87. Section 212(1) EqA 2010 defines 'substantial disadvantage' as one which is more than minor or trivial and whether such a disadvantage exists in a particular case is a question of fact to be assessed on an objective basis (EHRC CoP 6.15).

88. We concluded from the matters contained in the report of the occupational health therapist, Dr Jones, of 2 April 2019 that a change in working hours to proposed hours of work involving weekend working would give rise to a significant risk of the worsening of the Claimant's mental health and that this disadvantage was because of the Claimant's disability.

89. We concluded that a non-disabled person would not have been affected by the PCP in the same way as the Claimant as disabled person had been or would be affected. Whilst we accepted that many employees, particularly those with childcare responsibilities, would not wish or want to work weekends, it could not be said that they had the same comparative risk of having their mental health worsen if they were so required to work weekends.

90. It followed that the Respondent, having received that report from Dr Jones also had knowledge that the Claimant was likely to be placed at the disadvantage claimed.

91. The duty, to take such steps as it was reasonable to have to take to avoid the disadvantage, therefore arose at that point. We concluded, taking into account para 6.28 of the Employment Code and the examples that we might take into account, that a reasonable adjustment would have been to

maintain the Claimant's set days and hours and that this could have been undertaken immediately on receipt of that report i.e. from 2 April 2019.

92. We did not accept that the Claimant was not prepared to look at alternatives. Rather those alternatives were only lightly mentioned and did not address the disadvantage to the Claimant of weekend work.

93. In any event we concluded that allowing the Claimant to continue working her weekday shift patterns would have been an effective and practicable step for the Respondent to take which would have prevented the disadvantage for the Claimant.

94. We did not accept that the cost of employing someone to undertake weekend work was a prohibition to taking such a step. The Respondent had only recently taken on additional staff and we were not persuaded that it was reasonable simply to consider the wage costs and budgets at the Cardiff site at which the Claimant worked, particularly taking into account the size and substantial financial resources that a national organisation, such as the Respondent, would have at its disposal.

95. On that basis we concluded that the claim, that the Respondent had failed in its duty to make a reasonable adjustment, succeeded and that the failure arose from 2 April 2019 rather than from the earlier date when Cris Rose started to process a change in working pattern.

Discrimination arising from disability (s15 EqA 2010)

96. Turning to the s.15 EqA 2010 claim, we also concluded that the Claimant succeeded in that claim.

97. The Claimant had been subjected to unfavourable treatment in having one of her shifts removed from her, with the resultant reduction in working hours and pay, and in being dismissed.

98. We also readily concluded that both claims of unfavourable treatment; the reduction in hours and dismissal, were because of something arising in consequence of her disability i.e. the Claimant's inability to work weekends. As Mr Leong put it, Dr Jones could not have made it clearer that weekend work would result in a worsening of the Claimant's mental health.

99. The focus of the submissions from the Respondent and the s.15 claim, turned on the issue of justification which required the Respondent to justify the treatment as a '*proportionate means of achieving a legitimate aim',* with the onus on the Respondent to establish justification.

100. Whilst the legitimate aims of meeting customer demand and budgeting of wages were conceded by the Claimant, we were not persuaded that the means by which the Respondent sought to pursue those aims was reasonably necessary and proportionate.

101. The Code makes it clear that whilst business needs and economic efficiency may be legitimate aims, an employer simply trying to reduce costs cannot expect to satisfy the test (para 4.29) and that cost can only be taken into account as part of the employer's justification for the PCP if there are other good reasons for adopting it (para 4.32).

102. Having concluded that the Respondent had not complied with its duty to make a reasonable adjustment for the Claimant, in allowing her to remain on set weekday shifts, we were not persuaded by arguments of meeting customer demand within the wage budget. We concluded that this was a case whereby cost was essentially the sole justification for not allowing the Claimant weekday work, driven by the need to ensure that the wages costs in Cardiff were balanced and that this was not reasonably necessary nor proportionate.

103. The Claimant's claim for discrimination arising from disability is therefore also well founded and succeeds.

Unfair Dismissal

104. Turning finally to the unfair dismissal claim and the issues identified at the outset, we needed to consider the reason for dismissal and whether it was potentially a fair reason for dismissal.

105. The Respondent has asserted that the reason for the dismissal was redundancy and/or some other substantial reason.

106. We were not satisfied that the Respondent had proven that the reason for dismissal was redundancy. There had been in our view no diminution in the requirement for employees to carry out work of a particular kind and we were not persuaded that a reduction in hours, whereby the Claimant was essentially going to undertake the same role working the fewer hours, met the definition of redundancy under s.139 Employment Rights Act 1996. For the avoidance of doubt, we did not accept that the definition of redundancy had been met on the alternative basis of the requirement to work weekdays and weekends.

107. We concluded that the employer's reason for dismissal was because the Claimant refused to work the reduced hours of 14 hours per week, after refusing to work Saturdays.

108. We were persuaded that a refusal by the Claimant, to work weekends was a potentially fair reason for dismissal on some other substantial reason grounds, accepting that it is not for the tribunal to make its own assessment of the advantages of the employer's business decision to change employee's working patterns, and that the Respondent had demonstrated some business reason, which they considered sound, for doing so namely meeting customer demand within its wage budget.

109. However, we concluded that the Claimant had not been dismissed for refusing to work weekends, but for refusing a reduction in hours by a third; a reduction from 21 hours to 14 hours per week. Even on that basis, we concluded that the Respondent had just managed to persuade us that they had the same business reason for dismissing, which was a potentially fair reason for dismissal on 'some other substantial reason of a kind justifying dismissal'.

110. We then turned to the reasonableness of the change and of the dismissal which involved consideration of whether, in all the circumstances of the case including the employer's size and administrative resources, the Respondent acted reasonably in treating the business reason as a sufficient reason to dismiss.

111. We concluded that that it was not and that dismissal fell outside the bands of reasonable responses.

112. The Respondent had, prior to the Claimant's termination of employment, employed additional staff and we were not persuaded that those additional staff could not have been employed on the Saturday allowing the Claimant to retain her weekday shift patterns.

113. Whilst we accepted the Respondent had a need to increase cover on the weekend to accommodate increased customer demand and seek to work within the Cardiff store/s wage budget, we concluded that the manager had focussed on the advantages to the store and had not taken into account the obligation to consider the disadvantages caused to this particular employee and in turn the obligations to make reasonable adjustments in relation to working weekends.

114. We concluded that the Respondent had not reasonably explored all alternatives to reduction in hours and dismissal before dismissal and had not considered reasonable adjustments to take into account the April occupational health report.

115. Whilst various consultation meetings appeared to have taken place in accordance with the Respondent's own internal processes, the crux of the Claimant's concern as set out in her grievance, was not addressed in substance and that as a result dismissal fell outside the range of reasonable responses.

116. We were not persuaded that there should be any reduction on Polkey grounds. Had the Claimant's concerns regarding the failure to make reasonable adjustments been addressed, either as part of a separate grievance or as part of the consultation meetings, it is possible that the Claimant would not have been dismissed at all.

117. In overall terms therefore the Tribunal's conclusion is that the dismissal was unfair and the Claimant's claim for unfair dismissal should succeed.

118. A hearing on remedy will be listed for one day and will be held by video (CVP). A separate Notice of Hearing will be sent to the parties.

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Employment Judge R Brace

Date **1 June 2021**

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
2 June 2021
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FOR EMPLOYMENT TRIBUNALS Mr N Roche