



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss J Phillips

**Respondent:** Arden Maidstone Limited

**Heard at:** London South Employment Tribunal (by remote video hearing)

**On:** 7-8 July 2021

**Before:** Employment Judge Ferguson

**Members:** Ms H Bharadia  
Mr S Townsend

## Representation

**Claimant:** In person

**Respondent:** Mr J Tunley (counsel)

# JUDGMENT REASONS

The Judgment having been sent to the parties on 9 July 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## INTRODUCTION

1. By a claim form presented 9 April 2019 (following a period of early conciliation from 21 February to 6 March 2019) the Claimant brought complaints of unfair dismissal, disability discrimination and for unpaid wages. The unfair dismissal complaint was dismissed on 7 January 2020 on the basis that the Claimant did not have sufficient qualifying service.
2. A preliminary hearing took place on 29 October 2020 to determine whether the Claimant was disabled. Employment Judge Hyde found that the Claimant was disabled by reason of carpal tunnel syndrome at the relevant time (2 to 28 January 2019).
3. The issues were agreed at the start of the hearing as follows:

### Disability

The Tribunal found on 29 October 2020 that the claimant was disabled at the relevant time (2 to 28 January 2019) by reason of Carpal Tunnel Syndrome (“CTS”).

Direct disability discrimination (Equality Act 2010 section 13)

1. It is not in dispute that the respondent dismissed the claimant on 28 January 2019.
2. Was that less favourable treatment? The claimant relies on a hypothetical comparator. She says a person in the same circumstances who did not have CTS would not have been dismissed.
3. If so, was it because of disability?

Discrimination arising from disability (Equality Act 2010 section 15)

4. Did the following things arise in consequence of the claimant’s disability:
  - a. The claimant not being able to write a compliment slip by hand and having to use the laptop instead?
  - b. The claimant being slower at taking staples out of documents on 22 January 2019?
5. Did the respondent dismiss the claimant because of those things?
6. Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were: “running their accounts department efficiently and being able to supply the necessary stakeholders with accurate and up to date information.” [p.31 para 6.2.16]
7. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date? The claimant relies on the following disclosures of her condition:
  - a. In interview she said she was waiting for a referral to an orthopaedic consultant due to continued hand pain and swelling
  - b. She spoke to a lot of her colleagues about her hands, she would shake her hands to stop pins and needles, and her hands would look very swollen and red [p.16]
  - c. She told Rachel Sloan about 1.5 weeks into her employment that she had poor handwriting due to not being able to grip her pen correctly
  - d. She told Rachel Sloan on 22 January 2019 that the pain in her hands had put her behind in the task of extracting staples from paperwork
  - e. She told Anglea Ammor on 25 January 2019 that she had an orthopaedic appointment on 31 January regarding her hands

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

8. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?
9. A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP: requiring the Sales Ledger to remove staples from documents.
10. Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that took longer to for her to complete the task?
11. Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?
12. What steps could have been taken to avoid the disadvantage? The claimant suggests:
  - a. Giving the task to someone else
  - b. Allowing her more time to do it.
13. Was it reasonable for the respondent to have to take those steps [and when]?
14. Did the respondent fail to take those steps?

Unauthorised deductions

15. Were the wages paid to the claimant in January and February 2019 less than the wages she should have been paid? The claimant was paid on the basis of an annual salary of £18,000 but her agreed annual salary was £18,500. The respondent says the agreed annual salary was £18,000.
  16. How much is the claimant owed?
4. It was agreed that issues on remedy in relation to the complaints under the Equality Act 2010 would be considered if necessary after our judgment on liability.
  5. Because of restrictions relating to the Covid-19 pandemic the hearing took place by remote video hearing with the consent of the parties.
  6. We heard evidence from the Claimant. On behalf of the Respondent we heard from Lisa Wildish, Angela Ammor and Rachel Sloan. We also had statements from Helena Youngman, Lyndell Hamblen, Megan Kielty, Nigel Wates and Terry Groves. We had a bundle of 250 pages.

**FACTS**

7. The Respondent is a car retailer. The Claimant attended an interview for the role of Sales Ledger on 4 December 2018. She was interviewed by Rachel Sloan and Angela Ammor. At the time Ms Ammor was the Dealer Accountant and Ms Sloan was Assistant Accountant.

8. The Tribunal found on 29 October 2020 that the Claimant was disabled at the relevant time (2 to 28 January 2019) by reason of carpal tunnel syndrome. That diagnosis was not given, however, until 31 January 2019, after the Claimant had been dismissed from the Respondent. The Claimant had attended her GP about her hands in October 2018 and a referral was made to an orthopaedic specialist. The record of the appointment on 2 October 2018 states that the Claimant reported finger pain and pins and needles affecting her right ring finger as well as the little finger. She said she had had these symptoms for the past two years and the pain was worse after typing for some time. The GP commented “probably repetitive strain with ulnar nerve irritation”.
9. We have limited evidence from the Claimant about the severity of her symptoms at the time of her interview, but the Claimant accepted in cross-examination that she could do all parts of her job at the Respondent without difficulty except handwriting and removing staples. This included counting cash, typing and general filing. She also completed a driving assessment. The Claimant produced an email from her previous employer, for whom she worked for five years in a similar role until around October 2018, which said that during the Claimant’s employment with them she occasionally complained of pains in both her shoulders and hands, and this was followed by numerous visits to the doctors for appointments and various forms of hand therapy at the hospital.
10. The Claimant said in her witness statement that at the start of the interview, before Ms Ammor arrived, she was talking to Ms Sloan and mentioned that she was waiting for an orthopaedic referral due to continued hand pain and swelling, but she had not had a confirmed diagnosis.
11. In her oral evidence the Claimant said gave a slightly different account of the conversation. She said that she told Ms Sloan she had a problem with her hands and Ms Sloan asked what the problem was. The Claimant said it was swelling and they ache a lot. Later in her oral evidence the Claimant also said that she mentioned to Ms Sloan it was suspected carpal tunnel syndrome.
12. Ms Sloan denies that this conversation took place. There is no reference to it in the notes of the interview.
13. The Claimant was offered the job by letter dated 10 December 2018. Both the offer letter and a contract of employment were uploaded onto the Respondent’s HR portal on 10 or 11 December 2018, for the Claimant to access and sign. The offer letter stated that the salary was £18,000 per annum. The contract stated it was £18,500 per annum. The Claimant signed both documents by electronic signature on or around 11 December 2018.
14. Ms Ammor’s evidence was that she created both documents and that the £18,500 salary in the contract was a mistake; it should have said £18,000. She did not realise the mistake until after the Claimant’s dismissal and the Claimant raising issues with her pay. In fact, when the Claimant queried her pay Ms Ammor confirmed in an email on 8 March 2019 that the Claimant’s salary was £18,500. She said in her evidence that this was also a mistake, and she had simply copied it from the contract.

15. The Claimant completed an employee information sheet, or new starter form, before or around the time she started in the job. This included the following questions:

“Are there any medical conditions we should know about in the case of an emergency? Are you taking any medication?”

“Are there any reasonable adjustments or provisions you require at work to accommodate your disability?”

16. The Claimant answered “no” to both questions.

17. In her particulars of claim the Claimant said that this was because she had not had a formal diagnosis. In cross-examination she said that it was because the first question only referred to medical conditions that were relevant to an emergency and she could not answer the reasonable adjustment question without knowing what the job involved.

18. The Claimant started her employment with the Respondent on 2 January 2019. Her line manager was Ms Ammor. Ms Sloan deputised for Ms Ammor and had some day to day managerial responsibility for the Claimant.

19. In her particulars of claim the Claimant said that during her employment she spoke to a lot of her colleagues about her hands, that she would shake her hands to stop pins and needles and her hands would sometimes look very swollen and red.

20. The Respondent obtained statements on this issue from three of the Claimant’s colleagues in August 2019, Jade, Helena and Megan. Megan, who according to the Claimant worked closely with her and helped her during her first couple of weeks in the job, said the Claimant did not mention any issues with her hands. Helena said that the Claimant would use moisturiser on her hands and that the Claimant told her that otherwise they caused her pain. Jade said that the Claimant would use moisturiser on her hands and said it was because she has very dry hands. Helena gave a statement for the Tribunal proceedings confirming the same account, but did not attend to give evidence. We did not have a statement for these proceedings from Jade. The Claimant has not challenged the Respondent’s evidence on this issue and in her oral evidence only alleged that she mentioned her hand problems to Helena and Jade. She said that it was not in fact moisturiser, but tiger balm.

21. Sometime in mid-January 2019 Ms Sloan asked the Claimant to write a note on a compliment slip for a customer.

22. The Claimant said in her witness statement that she asked Ms Sloan if it was okay to type the note on the computer, and Ms Sloan asked loudly if the Claimant had a problem with spelling. The Claimant said no, that wasn’t the problem, that she had poor handwriting due to not being able to grip a pen correctly. Ms Sloan then confirmed that the Claimant could type it on the computer.

23. Ms Sloan's account of this incident is that she was sitting with the Claimant at her desk to help her with the task. She said:

“The Claimant did not say anything when I sat down, but she picked up her pen and moved it closer towards me — implying that I was to write the compliment slip. Again I explained that she would be the contact in the first instance. The Claimant then told me that she did not like her handwriting and I replied that I'm sure that it's perfectly fine, but it wasn't a problem, you can type a letter instead. The Claimant proceeded to type a letter, with me now retrieving headed paper along with locating a template for her to use.”

24. Ms Sloan denies that the Claimant said anything to her about not being able to grip her pen, or there being any issue with her hands.

25. On or around 22 January 2019 the Claimant was engaged in the task of removing staples from a large number of documents, so that receipts, invoices etc could be filed. The Claimant says that Ms Sloan walked over to her and in a violent manner said “Jamialeigh this has taken you almost an hour to complete”. The Claimant says that she tried to explain to Ms Sloan that the pain she was experiencing in her hands had put her behind. Ms Sloan confirmed that she had 10 more minutes to finish the task.

26. Ms Sloan's evidence was that she did not remember this incident, but she was sure that the Claimant had not said anything to her about pain or any other problems with her hands.

27. On 25 January 2019 Ms Ammor held a one-to-one meeting with the Claimant. It is not in dispute that Ms Ammor raised at that meeting that the Claimant had not been interacting much with others in the team and that the Claimant's accuracy and attention to detail needed to improve. Ms Ammor referred to rounding errors and missing transactions in the sales ledger that Ms Sloan had told her about. The Claimant does not dispute that there were such errors, but says that they were not a major issue because she would always correct them. Ms Ammor also mentioned the importance of deadlines. The Claimant does not dispute that the banking was sometimes late, but says that it was not always her fault. Ms Ammor's evidence to the Tribunal was that as at 25 January she and Ms Sloan had “serious reservations even after 4 weeks whether the Claimant's basic accuracy and errors would allow her to continue in the role”. The Claimant was given an action plan with deadlines to achieve certain pieces of work, covering the next couple of months.

28. The Claimant says she complained to Ms Ammor in the meeting about the way Ms Sloan had spoken to her on 22 January. Ms Ammor did not remember this discussion in any detail, but said she remembers getting the impression that the Claimant did not like being told what to do by Ms Sloan. The notes record “RS – tonality?”.

29. The Claimant said in her witness statement that during the meeting she confirmed to Ms Ammor that she had her orthopaedic appointment on 31 January regarding her hands.

30. Ms Ammor does not expressly dispute that the Claimant mentioned a medical appointment the following week and that she needed to take time off. The dispute is about whether the Claimant said what the appointment was for and explained about problems with her hands. Ms Ammor does not accept that the Claimant said anything more than that she had a medical appointment.
31. There is no reference to the medical appointment or anything about the Claimant's hands in the notes of the meeting.
32. Also on 25 January an issue arose relating to missing cash. The Claimant had collected the cash from the safe and while she was doing the banking with a colleague it was noticed that there was £500 missing. Cash is put into the Respondent's safe in "pods" and it was also noticed there was an empty pod, which was very unusual. The Claimant went back to the safe three times to look for the money, on each occasion accompanied by a different colleague. On the third occasion a pod was found on the floor next to the safe with the missing money.
33. Ms Ammor's evidence is that she reflected on this over the weekend and on the Monday, 28 January, she and Ms Sloan looked over the CCTV but it did not help to work out what had happened. She and Ms Sloan felt there were now trust issues with the Claimant, and together with the performance issues they had identified, they decided to terminate the Claimant's employment straight away.
34. Ms Sloan called the Claimant into a meeting at about 5pm on 28 January and told her that she was sorry, but they would have to go their separate ways. The Claimant asked why and Ms Sloan said she did not have to give a reason. The Claimant got up and left. Ms Sloan's evidence is that the Claimant said "I know why this is", but the Claimant denies saying that.
35. Ms Sloan and Ms Ammor have both given evidence about a reference received from the Claimant's former employer, in the week before the Claimant's dismissal, which mentioned that the Claimant "needs to pay more attention to detail and working to tight deadlines". Ms Ammor's evidence about this was somewhat vague; she was not sure whether she had seen it prior to the meeting on 25 January and did not know whether it featured in her decision to dismiss the Claimant. Ms Sloan on the other hand said that she and Ms Ammor had both seen the reference and discussed it prior to the Claimant's dismissal.
36. Ms Ammor informed HR on 28 January that the Claimant was no longer employed. A colleague responded asking what happened. Ms Ammor replied "Had a bit of an odd situation on Friday with missing money!! Will explain tomorrow".
37. In a letter to the Claimant dated 29 January 2019 Ms Sloan confirmed the decision to dismiss and said it was due to "time management, lack of accuracy, poor attention to detail and general demeanour within the office". The Claimant was paid in lieu of one week's notice.
38. The Claimant sought to appeal against her dismissal on 1 February 2019. She alleged disability discrimination, saying:

“Disability discrimination: I have been subjected to harassment, less favourable or unfavourable treatment because of , No adjustments were made to my role. This is a breach of the Equality Act 2010. - Carpal tunnel Syndrome, low self esteem and lack of confidence, In new environments”

39. Ms Ammor responded the same day saying that the Claimant did not have a right of appeal. As for the allegation of disability discrimination, she said “Unaware of any disability as nothing was disclosed on your medical form, therefore we were unaware of any reasonable adjustments we ought to have made for you.”
40. In a further document seeking to appeal the decision the Claimant set out more detailed reasons. Referring to the one-to-one meeting on 25 January, she said “I also confirmed I am awaiting a second appointment from osteopath to do a final assessment of my hands”. She again referred to disability discrimination, but largely talked about the loss of her father and low self-esteem. The Claimant accepted she had not mentioned any disability on the medical form, but said “you have failed to note that I did advise both on two separate occasions regarding possible diagnostic of cable (sic) tunnel”.
41. In its response to this Tribunal claim the Respondent did not mention either the missing money issue or the reference. It said that the reason for the Claimant’s dismissal was as given in the dismissal letter. In response to a Tribunal order for further particulars, in November 2020 the Respondent submitted a further document outlining both issues and saying that the Respondent reflected on the discussion on 25 January and the incident with the cash, and decided to dismiss the Claimant on 28 January.

## THE LAW

42. The Equality Act 2010 (“EqA”) provides, so far as relevant:

### 13 Direct discrimination

- (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
- (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

...

### 15 Discrimination arising from disability

- (1) A person (A) discriminates against a disabled person (B) if—
  - (a) A treats B unfavourably because of something arising in consequence of B's disability, and



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

(2) 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.

### **39 Employees and applicants**

...

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

...

### **136 Burden of proof**

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) 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 hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

43. Disability is a protected characteristic under the EqA.

44. Pursuant to section 20 EqA, where an employer has a provision, criterion or practice ("PCP") that puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, it has a duty to take such steps as it is reasonable to have to take to avoid the disadvantage. The duty does not apply if the employer does not know, and could not reasonably be expected to know that the disabled person has a disability and is likely to be placed at the disadvantage referred to (paragraph 20 of Schedule 8 EqA).

45. Section 21 provides that an employer discriminates against a disabled person if it fails to comply with a section 20 duty in relation to that person.

## **CONCLUSIONS**

### Knowledge

46. The principal dispute of fact is whether the Respondent knew of the Claimant's hand condition at the time of her dismissal. This impacts all three types of disability discrimination claimed.
47. The Claimant relies entirely on her account of having mentioned it to Ms Sloan and other colleagues orally, and mentioning the medical appointment to Ms Ammor in the meeting of 25 January. The Claimant accepts that it was not mentioned in writing, and nor is there any written evidence of the Claimant having mentioned it verbally to anyone during her employment.
48. The Respondent has consistently said that it did not know about any issue with The Claimant's hands until she raised it after her dismissal.
49. The Respondent in closing submissions places reliance on the fact that the Claimant has given different explanations for why she did not mention it on the new starter form, and the fact that she has given slightly different accounts of exactly what she said to Ms Sloan at interview. We do not place much weight on that. It was a long time ago. We do, however, agree with the Respondent that there is some inconsistency in the Claimant's case that she says she mentioned it to Ms Sloan at the interview and yet did not mention it on the form. If it is right that she told Ms Sloan she had suspected carpal tunnel syndrome and described the problems it can cause with her hands there would have been no reason not to mention this on the form. The Claimant's explanation that she did not know what reasonable adjustments would be required until she started the job is not credible given that she had been doing a very similar job within another company for five years.
50. We also note that the Claimant has never given any evidence of what Ms Sloan's response was to her disclosing this information on the day of the interview. That is somewhat surprising. One would expect that if the Claimant had mentioned it, Ms Sloan would at least want to know what effect it might have on the Claimant's ability to do the job. One would also expect it to be mentioned in the interview notes.
51. There is also the logical difficulty in the Claimant's case: she says she was dismissed because of her hand condition, but if she told the Respondent about it at interview and they had that attitude towards it, why would she have been offered the job?
52. We note that there is little evidence of the Claimant having major problems with her hands at this stage. The medical evidence suggests that the problem was quite limited as at October 2018 and the Claimant accepted in her evidence that she could do most things required of her in the job.
53. Taking all those matters into account we find on the balance of probabilities that the Claimant did not mention anything to do with her hand condition to Ms Sloan on the day of her interview.
54. As for whether she mentioned it to colleagues, on the Claimant's own case all she said was that she used a product on her hands otherwise they would cause her pain. She says she mentioned this to two colleagues, not to any manager. She claimed in her submissions that Ms Ammor and Ms Sloan must also have

picked up on it because it is a small office and Ms Ammor sat near to her. That is not a sufficient basis to find, on the balance of probabilities, that Ms Ammor and Ms Sloan knew the Claimant had a medical condition that affected her hands. Using hand cream or moisturiser is not unusual, and even if the Claimant mentioned pain that would not necessarily indicate a physical impairment as opposed to something to do with dry skin.

55. As already noted, the Claimant has accepted she could type, count cash and do filing. She relies on two incidents involving Ms Sloan where she said she mentioned her hands, the discussion about the compliment slip and the incident involving removal of staples.
56. There is a straight dispute of fact in relation to both, and no documentary evidence to assist. We do note, however, that the Claimant did not allege in her appeal document that she told Ms Sloan of any problems with her hands on those two occasions.
57. Given our finding that the Claimant did not mention the issue in her interview, we consider that her account is not wholly reliable. We found Ms Sloan to be a straightforward and honest witness. In the absence of any evidence to support the Claimant's account, we prefer Ms Sloan's evidence that the Claimant did not mention anything to do with her hands on either occasion.
58. Finally, dealing with the 25 January meeting, we find on the balance of probabilities that the Claimant did mention the medical appointment on 31 January, but did not say it was about her hands or give any more information about her hand condition. On the Claimant's case she had not discussed this issue with Ms Ammor at any stage before 25 January. As far as the Claimant would have been aware, Ms Ammor did not know anything about it because she was not there when it was discussed at interview and it was not mentioned on the new starter form. If the Claimant had been raising it with Ms Ammor for the first time, one would expect her to have explained in more detail and for there to have been a discussion about it, including how it was affecting the Claimant's work. That is not the Claimant's evidence. Ms Ammor said straight away when the Claimant raised it on 1 February that she did not know about any disability. We accept that that was true.
59. We also do not find that the Respondent could reasonably have been expected know of the Claimant's disability before her dismissal. We accept the Claimant mentioned having a medical appointment during the meeting on 25 January, but it is not unusual for employees to ask for time off for medical appointments. In the absence of any indication from the Claimant that it was causing her issues at work, or any other reason for the Respondent to suspect that she had a physical impairment that was causing problems, there was no obligation on the Respondent to make further enquiries.

#### Direct disability discrimination

60. In accordance with section 136 EqA we must consider whether the Claimant has established facts from which we could conclude, in the absence of any other explanation, that the Respondent dismissed her because of disability. Such facts must include, as a matter of logic, the decision-maker(s) having

knowledge of the disability. Given our findings on that issue, we do not consider the Claimant has proved facts that would shift the burden of proof to the Respondent. Neither Ms Ammor nor Ms Sloan knew of the Claimant's disability at the time they decided to dismiss her so it cannot have been a factor in the decision to dismiss.

61. We should say that, had we found the burden shifted, the Respondent may have been in some difficulty in proving a non-discriminatory reason for the treatment. What the Respondent's evidence amounts to now is that the missing money was the trigger for the Claimant's dismissal. Not only was that not mentioned to the Claimant at the time, but it was not mentioned in the defence to these proceedings until after Tribunal's judgment on the disability issue. Further, the Respondent has referred to the reference from the Claimant's former employer, but the oral evidence on this was somewhat evasive and contradictory. We accept that the email from Ms Ammor to HR which mentions the missing money issue is good evidence of that being the principal reason for dismissal, but the Respondent's changing stance on this issue would have made it difficult for us to find that the Respondent had discharged the burden of proving the dismissal was in no sense whatsoever because of the Claimant's disability.

#### Section 15 EqA

62. A claim under section 15 can only succeed if the Respondent knew or could reasonably have been expected to know that the Claimant had a disability. Given our findings on the knowledge issue above, this claim must fail.

63. It is unnecessary for us to make findings on the other issues under s.15.

#### Reasonable adjustments

64. Similarly, the duty to make reasonable adjustments does not arise if the Respondent did not know and could not reasonably have been expected to know that the Claimant had a disability, and that she was likely to be placed at the claimed disadvantage. Given our findings above, this claim also fails.

#### Unauthorised deduction from wages

65. The issue for us to determine is whether the Claimant's agreed salary was £18,000 or £18,500. The signed contract states it was £18,500. It is well established that where there is a signed contract of employment, that supersedes all other documents or prior correspondence and discussions about the agreement. We would need strong evidence that it was a mistake, and the Claimant must have realised it was a mistake, in order to find that the actual agreement was for £18,000. Given Ms Ammor's email after the Claimant left, in which she still thought that the salary was £18,500, we do not accept that it was such an obvious mistake.

66. We find that the agreed salary was £18,500.

67. The parties agreed that the difference in pay for the period of the Claimant's employment was £31.98 net. We find that the Respondent made an unlawful deduction from the Claimant's wages of that sum.

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Employment Judge Ferguson  
Date: 22 July 2021

Sent to the parties on:  
Date: 4 August 2021