



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss A Hague

**Respondents:** 1. Paul Sanders  
2. Kelly Park Limited

**Heard at:** Newcastle-upon Tyne (by CVP)      **On:** 29 and 30 September 2021  
1 October 2021

**Before:** Employment Judge Johnson  
Ms B G Kirby  
Ms D Newey

## REPRESENTATION:

**Claimant:** In person  
**Respondent:** Mr G Ridgeway of Counsel

## JUDGMENT

The claimant's complaints against both respondents of unlawful disability discrimination are not well-founded and are dismissed.

## REASONS

### Introduction

1. By a claim form presented on 9 October 2020, the claimant brought complaints of constructive unfair dismissal and unlawful disability discrimination. In its response form presented on 11 November 2020, the respondent defended those claims.

2. By order made by Employment Judge Gannon on 17 November 2020, the claimant was ordered to prepare a disability impact statement, setting out the nature of the impairment alleged by her to amount to a disability and giving examples of the adverse impact of that impairment on her ability to carry out day-to-day activities.

3. At a private preliminary hearing by telephone on 9 December 2020 the claimant accepted she did not have two years' continuous service as an employee with the second respondent and accordingly the complaint of unfair dismissal was dismissed upon withdrawal by the claimant.

4. The original claim had been brought against Mr Paul Sanders alone, but at the hearing on 9 December 2020 it was agreed that Kelly Park Limited should be added as a second respondent in its capacity as the claimant's employer. Accordingly, the complaint of unlawful disability discrimination would proceed against both respondents.

5. At that first case management hearing, the issue of the claimant's alleged disability was discussed in detail. It was agreed that the claimant would provide copies of her GP notes and records so that the respondent could consider whether or not the claimant's medical condition amounted to a disability as defined in section 6 of the Equality Act 2010.

6. A further case management hearing took place by video on 29 January 2021. By that time the appropriate medical information had been supplied by the claimant to the respondents. Case Management Orders were made with regard to documents and witness statements and a date was fixed for the final hearing.

7. On 4 February 2021 the respondents formally conceded that the claimant is and was at all material times suffering from a disability as defined in section 6 of the Equality Act 2010. That disability is a physical impairment, namely a back injury sustained in May 2013 whilst the claimant was a serving officer in the British Army.

8. The complaints raised by the claimant as acts of unlawful disability discrimination are as follows:

- (1) On 31 July 2020, the first respondent shouted across the car park at the claimant in front of her colleagues in an aggressive manner, asking why she was at work when she was meant to be off sick;
- (2) That, following the first incident, the first and second respondents blocked her access to the company computer apps and refused to provide her with further shifts, unless she agreed to work late shifts;
- (3) That on 3 August 2020, she made a formal complaint to the second respondent's HR department complaining about discrimination. The claimant says that on 20 August 2020, she was told she could return to work on condition that she withdrew her complaint, apologised to the first respondent and worked two late shifts;
- (4) On 10 September 2020, at a back to work interview, she was again asked to withdraw her complaint of discrimination;
- (5) That after the meeting on 10 September 2020, the respondents removed adjustments which had previously been in place, namely that she would not have to work late shifts;

- (6) By requiring her to work late shifts after 31 July 2020 the respondents failed to comply with the duty to make reasonable adjustments and also subjected her to indirect disability discrimination;
- (7) That the above acts of disability discrimination and victimisation amounted to a fundamental breach of her contract of employment which led her to resign and were therefore further acts of discrimination and/or victimisation.

### **Evidence**

9. The claimant gave evidence herself but did not call any other witnesses. Evidence was given on behalf of both respondents by Mr Paul Sanders himself and by Kirsty Armstrong, the second respondent's Deputy Manager.

10. The respondents had asked the Tribunal to issue a witness order securing the attendance at the video hearing of Ms Megan Ridley, who had at the relevant time been employed by the second respondent as its Care Coordinator. Ms Ridley had written to the Tribunal stating that she had not prepared the witness statement which had been sent to her for signature and did not agree with its content. Acting upon instructions from both respondents, Mr Ridgeway confirmed at the beginning of the hearing that neither respondent would call Ms Ridley to give evidence and that she may be released from the witness order. Ms Ridley did not attend the hearing and her statement was tendered in evidence.

### **The Issues**

11. The issues to be decided by the Employment Tribunal were whether the 7 incidents described above had taken place in the manner described by the claimant, or whether they had taken place in the manner described by Mr Sanders and Ms Armstrong. The Tribunal would then have to consider whether, if the incidents occurred as described by the claimant, they amounted to unlawful disability discrimination i.e. direct discrimination, indirect discrimination, unfavourable treatment because of something arising in consequence of the claimant's disability, harassment or victimisation.

### **Findings of Fact**

12. The following findings of fact were made by the Tribunal on a balance of probability.

13. The claimant's employment with the second respondent began on 13 March 2020 and ended when she resigned on 14 September 2020. The claimant was employed as a healthcare assistant. The claimant had attended an interview on 25 February 2020, which interview was conducted by Mr Jake Sanders, the son of the first respondent and the second respondent's HR Manager. The claimant states that her health issues were discussed at this interview. The respondent does not challenge that evidence. Notes of the interview appear in the bundle and show that at page 85 in answer to the question, "Do you have any physical, mental or sensory illness or handicaps which might affect work performance or which should be considered in this job placement?" The claimant replies, "None to declare – broke back in the military, on regular pain medication".

14. At page 87 is a form indicating the claimant's preferred hours of work. The claimant has indicated on Tuesday 15:00-18:00 and 18:00-22:30, on Thursday 06:30-11.00, 11:00-14:00, 15:00-18:00, on Friday the same, on Saturday the same and on Sunday the same plus 18:00-22:30. In the margin next to Saturday and Sunday appear the initials "A/B". The claimant's evidence to the Tribunal was that this meant she would work alternate weekends of both Saturday and Sunday.

15. The respondent's Care Coordinator at the time was Megan Ridley, whom it was accepted was a friend of the claimant from before the claimant joined the second respondent. The claimant agreed with Ms Ridley that her shift pattern would be to work a late shift on a Tuesday, no shifts on a Wednesday and 7:00am-17:00pm on both Thursday and Friday. The claimant would work alternate weekends. The claimant's evidence to the Tribunal was that this arrangement was agreed with Megan Ridley as "reasonable adjustments" in respect of the claimant's disability. The Tribunal found that there was no such formal agreement by either respondent to provide the claimant with reasonable adjustments of the kind suggested by the claimant. What the claimant had was an informal agreement with Ms Ridley as to which shifts the claimant preferred to work. Certainly the request to work alternate weekends was, according to the claimant's evidence, "due to family living down south".

16. The claimant's evidence to the Tribunal was that she managed her back injury with pain medication and that she was "able to work my availability along with extra shifts during the pandemic without major effect on my life".

17. The claimant then recites that from May 2020 "working a full weekend became a struggle. I found it extremely hard working split shifts (07:00-13:00/15:00-22:00). It caused increased fatigue and pain. Also finishing work between 22:00 and 23:00 on a Saturday night then starting 07:00 on a Sunday morning was almost impossible as my body did not get the rest it needed resulting in sleepless and restless nights from pain and spasms, then extreme sickness from forcing my body to work". The claimant says that she spoke to Megan Ridley, who recommended that the claimant speak to Jake Sanders (HR Manager) to change her availability. The claimant did so, and her availability was changed with effect from June 2020. The claimant then asked if she could change her Tuesday late shift to a Tuesday early shift and was told she should try and agree a swap with a colleague. The claimant did so and informed Megan Ridley. All of this was done without any objection from the respondents.

18. On 22 June 2020 the claimant had a telephone probationary interview with Jake Sanders during which her availability and shift pattern were discussed. No concerns were raised, and the claimant was told that she had passed the probation period.

19. By this time the claimant had learned that she was pregnant. She informed Megan Ridley on 22 June after the probationary interview, and then informed Mr Jake Sanders on 23 June.

20. The claimant was advised by her GP to stop taking the pain medication for her back injury, because she was pregnant. This meant that the claimant had to gradually reduce the amount of opiate medication she was taking, and as a result

she became ill and on 23 July 2020 she emailed to Megan Ridley a self-certification sickness form for a period of 7 days. That was sent to Mr Jake Sanders. On 27 July the claimant informed Ms Ridley that she would be ready to return to work on her normal shift on Tuesday 4 August, working from 8:30-15:00.

21. Ms Ridley asked the claimant to attend a training session at work on 29 July. The claimant declined, but agree to attend the session which was to take place on 31 July 2020. The Tribunal was satisfied that the request for the claimant to attend the training course was made by Ms Ridley. That was even though the claimant's period of self-certified sickness would not end until 4 August.

22. Mr Paul Sanders is a director of the second respondent, whose duties include overseeing the administrative department heads within the company. Part of Mr Sanders' duties is to ensure compliance with the CQC regulations in terms of safe systems of work. Mr Sanders' evidence to the Tribunal was that he examines on a daily basis the various rotas showing which members of staff are undertaking work on behalf of the respondent, which members of staff are unavailable due to sickness/illness and which members of staff may be attending training courses.

23. On 31 July 2020, Mr Sanders noted that the claimant was recorded as being absent due to illness, but was also down as attending the training course. At this time the claimant was not known to Mr Sanders, and Mr Sanders was not known to the claimant.

24. At the end of the training course, the claimant was stood outside the building in the car park with a number of colleagues. Mr Sanders approached this group, intending to enquire as to whether any of them was the claimant and if so, why she was attending a training course when she was recorded as being absent due to illness. There was a difference in the evidence given to the Tribunal about the manner in which Mr Sanders approached the claimant and the manner in which the claimant responded to Mr Sanders. The claimant's version was that Mr Sanders had approached the group shouting and demanding to know which one was Abbie Hague. When the claimant identified herself, the claimant says that, "Paul continued to interrogate me in front of Kelly Park Limited about my medical issues and telling me I should be at work if I was at training". The claimant admitted that she shouted back to him saying, "Who the f... are you talking to?". Mr Sanders then returned to the building.

25. The Tribunal found that the claimant's version of this exchange was more likely to be correct. The Tribunal found that it was inappropriate for Mr Sanders to have approached the claimant in this way, particularly when it would have been quite simple for him to politely ask which of the group was the claimant and then either to take her to one side or back into the building to enquire as to why she was on a training course when she was on self-certified sick leave. The claimant accepts that she spoke to Mr Sanders in the manner set out above, but says that she only did so because Mr Sanders did not identify himself as a director of the company. The claimant's evidence was that if she had known who Mr Sanders was, she would not have spoken to him in that manner. The claimant accepted in cross-examination that it was inappropriate of her to speak to a director of the company in that way.

26. The Tribunal found that Mr Sanders did not know who the claimant was and did not know the reason for her absence. Mr Sanders did not know and could not have reasonably been expected to know that the claimant suffered from a back injury which amounted to a disability. The reason why Mr Sanders spoke to the claimant in the manner he did, was because she was on a training course when she had self-certified as being unfit for work. The Tribunal found that Mr Sanders would have spoken to any other employee who was absent from work due to illness, but who was also attending a training course, in the same manner. Mr Sanders' treatment of the claimant on this occasion was in no sense whatsoever related to her disability.

27. The claimant telephoned Ms Ridley immediately after this exchange, as she was leaving the car park. She explained what had happened in her exchange with Mr Sanders. The claimant's evidence to the Tribunal was that during this telephone exchange Mr Sanders (who was in the room with Ms Ridley) took the telephone and "continued to speak to me horrendously and argue, saying that he had not agreed to my availability pattern and that I would not receive any more hours of work until I agreed to work night shifts and until I apologised to him".

28. The respondent operated a computer application, which its staff could access via their smartphones. That application permitted members of staff to access details of work rotas, shift patterns etc. Mr Sanders' evidence to the Tribunal was that access to the app was available to all members of staff once they were registered as available for work or unless they were on certified sick leave. The app was however programmed so that employees who left or whose sickness absence had expired and not been renewed, would no longer have access to the system. The Tribunal accepted Mr Sanders' evidence that this was an automated system which was programmed so that when an employee submitted a sick note, then access would immediately terminate at midnight on the day the sick note expired. The Tribunal accepted Mr Sanders' explanation that this was because staff frequently went on the sick and simply did not return to work thereafter. The Tribunal accepted Mr Sanders' evidence that it was important that persons who were no longer members of staff could not access what amounted to confidential information relating to patients.

29. The claimant's allegation to the Tribunal was that her access to the app was deliberately removed because of her exchange with Mr Sanders in the car park and because thereafter she refused to apologise and refused to work late shifts. The Tribunal accepted Mr Sanders' version in this particular matter, namely that the claimant's access to the app ceased automatically on the expiry of her certificate of illness. Access to the app would have been granted again once the claimant had completed a return to work interview, which was supposed to take place on Tuesday 4 August.

30. The claimant raised a formal complaint by email on 3 August 2020 (pages 163-164 in the bundle). The claimant sets out what happened in the car park and what happened in the subsequent telephone call. The claimant says, "Paul took the phone off Megan and continued to talk aggressively. Paul stated that he hasn't agreed to my availability and until I come and apologise for the way I spoke to him I wouldn't be getting any more hours from Kelly Park". On the second page of the letter the claimant states, "I feel this is bullying and completely unacceptable. Paul's whole approach from beginning to end has been extremely unprofessional and his

whole demeanour as a company director needs to be addressed. I should never have been confronted and humiliated like that and if he knew the background of my case I feel I would have been treated better. I now feel I am being discriminated against therefore I feel I have no choice but to take this further and I will consider taking legal advice”.

31. There following an exchange of text messages between the claimant and Megan Ridley, copies of which appear in the bundle. It is clear from those that Ms Ridley wanted the claimant to return to work and was prepared to permit the claimant to continue working the pattern which she had worked prior to being absent through illness. The messages from Ms Ridley appear to indicate that the claimant may be put on the rota to work a late shift, but would not be required to do so.

32. By a letter dated 7 August, the claimant was invited to attend a formal grievance hearing to consider her letter of grievance. That hearing was arranged for Friday 14 August before Ms Kirsty Armstrong. However, neither the claimant nor Ms Armstrong set out in their evidence details of whether that meeting took place and if so what was said or what was the outcome. The claimant did attend a meeting with Ms Armstrong on 10 September, which Mrs Armstrong described as a “return to work meeting”. Ms Armstrong’s evidence was that the claimant was “clearly ready to return to work and confirmed she could do so the next day”. Ms Armstrong agreed with the claimant that she would be able to attend such hospital appointments as she had arranged, and that the claimant should “block off those times or days”. Ms Armstrong recites that and the claimant had not contacted the second respondent to arrange a return to work meeting nor had she completed any further self-certification form since the expiry of the first one at the beginning of August. Ms Armstrong’s evidence was that, at this meeting, they also discussed the claimant’s grievance and that those issues relating to the claimant’s hours of work were resolved amicably. Ms Armstrong records at paragraph 16 of her statement that the claimant agreed that both she and Mr Sanders had been at fault for the incident in the car park on 31 July. Ms Armstrong records, “She did not wish to pursue her allegation that she had been bullied by Paul by this incident”. Ms Armstrong goes on to record that the claimant acknowledged that, while she had informed the respondent that she had a back injury, she had never indicated that this amounted to a disability which would require reasonable adjustments. Ms Armstrong denies in her statement that the claimant was ever pressurised to withdraw her complaint.

33. Ms Armstrong goes on to say that any arrangements which the claimant may have made with Megan Ridley could only be regarded as temporary arrangements and that if the claimant wished to have a permanent change to her shift pattern then she would have to complete a flexible working request. That would mean the claimant would have to revert to her original availability until that request was dealt with.

34. Following the meeting, the claimant was reinstated to the rota and was due to return to work on 11 September 2020. The claimant’s access to the computer app was reinstated and the claimant would from then have been able to see the next 7 days on her rota, including Tuesday 15 September.

35. Ms Armstrong's evidence to the Tribunal was that she received a telephone call from the claimant on 10 September, stating that she would be unable to undertake the shift on Tuesday 15 September, as she was going away with her boyfriend.

36. In her evidence to the Tribunal, the claimant accepted that she had booked a holiday in Turkey with her boyfriend. The booking had been made before the claimant asked the respondent for permission to take holiday at that time. When the claimant asked for permission, her request was refused. The claimant's evidence to the Tribunal in cross examination was that she intended to take that holiday, regardless of the refusal of permission for her to do so.

37. The Tribunal found that the claimant had failed to discharge the burden of proving that she was told to withdraw her complaint and apologise to Mr Sanders. The Tribunal found that the claimant would, upon her return to work, be required to work two late shifts. However, the claimant had been working two late shifts each week before her sickness absence. Because the claimant's letter of 3 August does mention the words "I am being discriminated against", the Tribunal was satisfied that it could amount to a protected act. However, the Tribunal was not satisfied that the requirement to work the late shift was because of that protected act. What the respondent was doing was requiring the claimant to work to the shift pattern as set out in her original availability, until such time as she made a formal application for flexible working.

38. The Tribunal found that the claimant at the interview on 10 September had not been asked to withdraw her complaint about discrimination and bullying. The whole purpose of the grievance hearing was to consider those complaints set out in the claimant's letter of 3 August. It was pointed out to the claimant that she had not followed the respondent's policy in that she had failed to arrange the return to work meeting herself and had failed to submit a further sick note to cover her period of absence. The Tribunal found that the burden of arranging the return to work interview fell equally upon the respondent and the claimant. However, the notes of the grievance meeting kept by Ms Armstrong include the following passage:-

"Kirsty asked AH how she wanted to proceed with this, given that she had not followed company policy and had not booked her back to work interview or read her staff handbook. AH advised that it had been miscommunication on her behalf and that she should have read her staff handbook, also that she did not want to pursue her claim for loss of hours and now she understands that she should read her staff handbook and the contract of employment."

39. Further down in the minutes on page 183 it is recorded as follows:

"Kirsty asked AH if she agreed we had covered the flexible working element of the grievance. AH advised that she was happy with the outcome and she was happy to leave it. She was happy to fill out the flexible working form after the meeting so she could get back to work as soon as possible."

40. What Ms Armstrong was doing was discussing with the claimant how she wished to proceed with the grievance. It was perfectly reasonable for Ms Armstrong to ask the claimant whether, as a result of their discussion, she wished to proceed with the grievance. That is not the same as making it a condition of allowing the



claimant to return to work, that she must withdraw the grievance. The Tribunal preferred Ms Armstrong's version of this exchange.

41. The claimant alleges that following this meeting the respondent removed adjustments relating to late shifts, which had been put in place by Ms Ridley to accommodate the claimant's disability. The Tribunal found this not to be the case. The respondent did not know that there was any such arrangement, as it was not formalised by the claimant and Ms Ridley. It was an informal arrangement between friends, granted by Ms Ridley by the claimant so as to accommodate the claimant's requests. Ms Ridley had told the claimant that she would make sure the claimant did not actually have to work night shifts. However, Mr Sanders was simply saying that the claimant had to make herself available to work night shifts as and when required. The Tribunal was not satisfied that any change in the arrangement amounted to the removal of reasonable adjustments implemented to accommodate the claimant's disability.

42. The claimant alleges that, by requiring her to work late shifts after 31 July, the respondent failed in its duty to make reasonable adjustments and that Mr Sanders subjected her to indirect disability discrimination. The Tribunal found that the claimant had failed to establish facts from which the Tribunal could infer that any of these matters were related to her disability. The claimant was not in fact required to work any late shifts and did not in fact work any late shifts. The claimant resigned before she returned to undertake any work for the respondent.

43. The claimant alleges that she resigned in response to the manner in which she had treated by the respondent and that this amounted to constructive dismissal. The fundamental breach of her contract was the alleged acts of unlawful disability discrimination.

44. The Tribunal found that the principal reason for the claimant's resignation was more likely to be the fact that she intended to go on holiday to Turkey with her boyfriend despite the fact that she had been refused permission by the respondent to take that leave. The Tribunal considered whether there had been a series of incidents, amounting to acts of disability discrimination by the respondent, the last of which amounted to a "last straw" which caused the claimant to resign. The Tribunal could find no such evidence. Following her meeting with Ms Armstrong, the claimant appeared to have accepted that all issues had been resolved and that she was ready to return to work. The claimant then took exception to being put on the rota to work a late shift, even though she knew that she was highly unlikely to have to do so because of the informal arrangement she still had with Megan Ridley.

### **The Law**

45. The claims brought by the claimant of unlawful disability discrimination engage the provisions of the Equality Act 2010.

46. Section 6 of the Equality Act 2010 relating to disability states:-

- (1) A person (P) has a disability if –
  - (a) P has a physical or mental impairment, and

- (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.
  - (2) A reference to a disabled person is a reference to a person who has a disability.
  - (3) In relation to the protected characteristic of disability –
    - (a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
    - (b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.
  - (4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section) –
    - (a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and
    - (b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.
47. Section 13 Equality Act 2010 states relating to 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.
  - (3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.
  - (4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.
  - (5) If the protected characteristic is race, less favourable treatment includes segregating B from others.
  - (6) If the protected characteristic is sex –
    - (a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;

(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

(7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).

(8) This section is subject to sections 17(6) and 18(7).

48. Section 15 of the Equality Act 2010 relating to discrimination arising from disability states:-

(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.

49. Section 19 of the Equality Act 2010 relating to indirect discrimination states:-

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are –

age;

disability;

gender reassignment;

marriage and civil partnership;

race;

religion or belief;

sex;  
sexual orientation.

50. Sections 20 and 21 of the Equality Act 2010 relating to failure to make reasonable adjustments state:-

Section 20: Duty to make adjustments

- (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
- (2) The duty comprises the following three requirements.
- (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
- (4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
- (5) The third requirement is 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.
- (6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.
- (7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.
- (8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.
- (9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to –
  - (a) removing the physical feature in question,

- (b) altering it, or
  - (c) providing a reasonable means of avoiding it.
- (10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to –
- (a) a feature arising from the design or construction of a building,
  - (b) a feature of an approach to, exit from or access to a building,
  - (c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or
  - (d) any other physical element or quality.
- (11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.
- (12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.
- (13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

<b>Part of this Act</b>	<b>Applicable Schedule</b>
Part 3 (services and public functions)	Schedule 2
Part 4 (premises)	Schedule 4
Part 5 (work)	Schedule 8
Part 6 (education)	Schedule 13
Part 7 (associations)	Schedule 15
Each of the Parts mentioned above	Schedule 21

Section 21: Failure to comply with duty

- (1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
- (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
- (3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

51. Section 26 of the Equality Act 2010 relating to harassment states:-

- (1) A person (A) harasses another (B) if –
  - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
  - (b) the conduct has the purpose or effect of –
    - (i) violating B's dignity, or
    - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (2) A also harasses B if –
  - (a) A engages in unwanted conduct of a sexual nature, and
  - (b) the conduct has the purpose or effect referred to in subsection (1)(b).
- (3) A also harasses B if –
  - (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
  - (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
  - (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –
  - (a) the perception of B;
  - (b) the other circumstances of the case;
  - (c) whether it is reasonable for the conduct to have that effect.
- (5) The relevant protected characteristics are –
  - age;
  - disability;
  - gender reassignment;
  - race;
  - religion or belief;
  - sex;
  - sexual orientation.

52. Section 27 of the Equality Act 2010 relating to victimisation states:-
- (1) A person (A) victimises another person (B) if A subjects B to a detriment because –
    - (a) B does a protected act, or
    - (b) A believes that B has done, or may do, a protected act.
  - (2) Each of the following is a protected act -
    - (a) bringing proceedings under this Act;
    - (b) giving evidence or information in connection with proceedings under this Act;
    - (c) doing any other thing for the purposes of or in connection with this Act;
    - (d) making an allegation (whether or not express) that A or another person has contravened this Act.
  - (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
  - (4) This section applies only where the person subjected to a detriment is an individual.
  - (5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.
53. Section 136 of the Equality Act 2010 relating to the burden of proof states:-
- (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”.

### **Conclusions**

54. Throughout the 3-day hearing, the Tribunal took time to explain to the claimant how those statutory provisions may apply to the factual allegations she has raised. It is for the claimant to prove facts from which the Tribunal could infer that the respondent’s conduct may amount to unlawful disability discrimination. If the claimant is able to prove those facts, then the burden of proof will pass to the

respondent to prove that what was done, or not done, did not amount to unlawful disability discrimination.

55. In terms of the 7 issues set out above, the Tribunal's findings are as follows:-

- (1) The Tribunal accepted the claimant's version of the exchange which took place in the car park. However, that did not amount to harassment contrary to S.26 as it was not related to the claimant's disability.
- (2) The Tribunal found that the claimant's access to the computer app was an automated response to the expiration of her self-certified illness certificate and was not conduct related to the claimant's disability and thus not a breach of S.26.
- (3) The claimant has not proved facts from which the Tribunal could infer that she was required to apologise and withdraw her complaint as a condition of being allowed to return to work. The requirement to be available to work late shifts was not unwanted conduct related to her disability nor was it detrimental treatment because she had made a complaint. It therefore could not be harassment contrary to S.26 or victimisation contrary to S.27.
- (4) The claimant has failed to establish that she was required to withdraw her complaint about discrimination and bullying. Accordingly, there was no detrimental treatment because she had done a protected act and thus could not be an act of victimisation contrary to S.27.
- (5) The claimant has failed to establish that there were any reasonable adjustments in place, nor that any such reasonable adjustments were removed. The claimant did not actually work any late shifts. The Tribunal found it likely that Ms Ridley tried to ensure that the claimant did not work any such shifts in any event. Accordingly, there was no detrimental treatment because the claimant had done a protected act and therefore this could not amount to a breach of S.27. Furthermore, the reason why the claimant was required to be available to work a late shift was because she had indicated that availability at the beginning of her employment. She was not required to work late shifts because of her disability. It could not therefore be direct discrimination contrary to S.13.
- (6) Again, the claimant has failed to prove that she was required to work late shifts after 31 July 2020. The Tribunal found that the respondent did implement a provision, criterion or practice which required the claimant to be available to work those shifts indicated by her at the beginning of her employment. However, the Tribunal found that it would be highly unlikely that the claimant would have to do such a shift due to the nature of her arrangement with Megan Ridley. Accordingly, the claimant was not put at any disadvantage because of her disability. The claimant has not established that she was unable to work a late shift in any event. What the claimant did not want to do was to work a series of late shifts or to work an early morning shift following on from a



late shift. Accordingly, there was no breach of the duty to make reasonable adjustments contrary to Ss.20-21. Similarly, the claimant has failed to establish that the respondent had committed an act of indirect disability discrimination.

- (7) The Tribunal found that the claimant has failed to prove that the respondent committed acts of unlawful disability discrimination which amounted to a fundamental breach of her contract of employment. Furthermore, the Tribunal found that the principal reason why the claimant resigned was because she intended to proceed with the pre-booked holiday to Turkey, and not because of any alleged behaviour by the respondent which amounted to a fundamental breach of contract.

56. For those reasons the claimant's complaints of unlawful disability discrimination are not well-founded and are dismissed.

G Johnson

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Employment Judge Johnson

Date: 20 October 2021

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