RESERVED JUDGMENT

EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT		**RESPONDENT**
MRS A WHITTALL	**V**	**CITY FACILITIES MANAGEMENT (UK) LIMITED**

HELD REMOTELY ON: 22 – 26 NOVEMBER 2021

BEFORE: EMPLOYMENT JUDGE S POVEY
MS A BURGE
MS T LOVELL

REPRESENTATION:
FOR THE CLAIMANT: MS COLLINS (COUNSEL)
FOR THE RESPONDENT: MS BEATTIE (SOLICITOR)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is:

Discrimination Arising From Disability

1. The Respondent contravened section 39(2)(d) of the Equality Act 2010 by withholding company sick pay, marking the Claimant's performance down in appraisals, refusing to provide support and refusing to allow the Claimant a permanent change in contract.

2. So far as applicable, the claims that the Respondent contravened section 39(2)(d) of the Equality 2010 by withholding company sick pay, marking the Claimant's performance down in appraisals, refusing to provide support and refusing to allow the Claimant a permanent change in contract, constituted conduct extending over a period and were brought in time (per section 123 of the Equality Act 2010).

3. The Respondent did not contravene section 39(2)(d) of the Equality Act 2010 by demoting the Claimant, making deductions from her salary, amending her salary range, withholding information, requiring her to

work 40 hours per week, taking photographs to construct a case against her, alleging the Claimant was negative or failing to properly advertise the job share.

Reasonable Adjustments

4. The Respondent did not contravene section 39(2)(d) of the Equality Act 2010 by requiring the Claimant to work 5 days per week/40 hours per week and/or on consecutive days.

Unlawful Deductions

5. The claim for unlawful deductions was dismissed upon withdrawal.

REASONS

1. These are claims brought by Alison Whittall ('the Claimant') against her employer, City Facilities Management (UK) Limited ('the Respondent').

Background

2. By way of a brief background to the claims:

   2.1 The Claimant is a Store Cleaning Manager ('SCM') and has been in the Respondent's employment since April 2005. The Respondent provides maintenance and cleaning services to a number of companies. Its biggest customer is Asda and each store has an SCM. The Claimant is based at Asda's Swansea store.

   2.2 The full time SCM role is 40 hours over a five day week. So far as relevant to these claims, this comprises 35 hours management and five hours cleaning contribution. Until 2017, the Claimant worked full-time hours.

   2.3 The Claimant is diagnosed with osteoarthritis, carpel tunnel syndrome and hypertension. In November 2017, the Respondent agreed to temporarily reduce the Claimant's hours to 24 per week over three non-consecutive days. However, the Respondent refused to make the change permanent until it had successfully recruited someone to cover the remaining 16 hours of the full-time equivalent SCM post.

   2.4 The Claimant continues to work 24 hours per week in what is termed a phased return. A job-share appointment has, to date, not been made.

   2.5 Following a period of early conciliation (between 20 August 2020 to 4 September 2020), the Claimant issued her claims in this Tribunal on 26 September 2020, alleging disability discrimination, a failure

to make reasonable adjustments and unlawful deduction from wages. In its response, the Respondent resisted the claims in their entirety, although it accepted that the Claimant was disabled at the relevant times (as defined by section 6 of the Equality Act 2010).

2.6 On 4 May 2021, the Tribunal conducted a preliminary case management hearing with the parties. This resulted in the Case Management Order of Judge Moore ('the CMO').

The Hearing

3. The hearing was conducted remotely. We heard oral evidence from the Claimant. For the Respondent, we heard oral evidence from Gill Fettah (Regional Cleaning Manager), Kevin Rodbard (Divisional People Partner) and Pamela McNeill (Employee Relations Advisor). All witnesses provided and adopted written statements as their evidence in chief.

4. We were also provided with a paginated and indexed digital file of documents to which were referred ('the Bundle'). We also received helpful and cogent oral submissions from Ms Collins for the Claimant and from Ms Beattie for the Respondent.

5. At the outset of the hearing, Ms Collins confirmed that the Claimant's unlawful deductions claim had been brought out of time and had not been presented within a reasonable period of time (pertaining as it did to an alleged unlawful deduction in 2018). It was therefore being withdrawn by the Claimant and the Tribunal duly dismissed it accordingly.

The Issues

6. The remaining issues to be determined by the Tribunal were agreed as being those set out at Paragraph 67 of the CMO, reproduced so far as relevant below:

1. Time limits

1.1 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.1.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.1.2 If not, was there conduct extending over a period?

1.1.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.1.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.1.4.1 Why were the complaints not made to the Tribunal in time?

1.1.4.2 In any event, is it just and equitable in all the circumstances to extend time?

…

3. Discrimination arising from disability (Equality Act 2010 section 15)

3.1 Did the Respondent treat the Claimant unfavourably by:

3.1.1 Suggested demoting the Claimant to work at a smaller store on less money from 2017 onwards;

3.1.2 Withheld company sick pay and SSP and blocked the Claimant from accruing further CSP entitlement in breach of the company handbook and her contractual terms (the Claimant maintains that sick leave in May 2018 was inaccurately recorded leading to a premature and incorrect designation that she had exhausted CSP in August 2018);

3.1.3 Made deductions from wages from November 2019;

3.1.4 Amended her salary range to reduce the rate she was paid holiday pay;

3.1.5 Withheld information [documents relating to pay and benefits as to why she was unable to accrue CSP/SSP

3.1.6 Marked her performance down in appraisals from January 2019 onwards;

3.1.7 Refused to provide support (the Claimant maintains there were 16 hours surplus management time when she began to work 3 days per week which should have been allocated to support to the role;

3.1.8 Required the Claimant to work a 40 hour week in 24 hours;

3.1.9 Deliberately took photos of the store before it was due to be cleaned to construct a case of poor performance in July 2020

3.1.10 Alleged the Claimant was negative, disruptive and did not care at a meeting on 22 July 2020;

3.1.11 [Deleted]

3.1.12 Failed to property advertise the job share so as to discourage candidates from applying and failed to advertise until filled contrary to company policy;

3.1.13 Refused to allow the Claimant a permanent change in contract to enable her to work 2/3 days per week with a day in between.

3.2 Did the following things arise in consequence of the Claimant's disability:

3.2.1 The Claimant's various sickness absences and;

3.2.2 The Claimant's inability to work 5 days/40 hours per week?

3.3 Was the unfavourable treatment because of any of those things?

3.4 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent shall set out their aims in the amended response.

3.5 The Tribunal wilt decide in particular:

3.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

3.5.2 could something less discriminatory have been done instead;

3.5.3 how should the needs of the Claimant and the Respondent be balanced?

4. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

4.1 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

4.2 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs:

4.2.1 A requirement to work 5 days per week/40 hours per week and/ or on consecutive days

4.3 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability. in that she was unable to work these hours and also required a day's rest in between work days?

4.4 Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be pieced at the disadvantage?

4.5 What steps could have been taken to avoid the disadvantage? The Claimant suggests:

4.5.1 Correctly advertised a job share;

4.52 Advertised the job share until post filled;

4.5.3 Allowed the Claimant to work reduced hours on a permanent basis;

4.5.4 Provided support to the Claimant for example by providing cover from another store supervisors;

4.5.5 Appointed two appointable candidates for the job share by;

4.5.6 When Ms Simiy Coombes applied for the job share role and was appointed, the Respondent should have appointed her to the job share role she had applied for rather than divert her appointment her to a full time role elsewhere and;

4.5.7 Appoint Mr R Davies to the role (Mr Davies has been acting up for the last 3 years, but the Respondent allegedly refused to appoint him to the job share as he is deemed unsuitable).

4.6 Was it reasonable for the Respondent to have to take those steps?

4.7 Did the Respondent fail to take those steps?

The Relevant Law

7. Section 39(2) of the Equality Act 2010 ('EqA 2010') states:

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.

8. Section 6 of the EqA 2010 defines disability for the purposes of the Act.

9. Section 15 of the EqA 2010 defines discrimination arising from a disability as follows:

(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.

10. Section 20 sets out the duties to make reasonable adjustments in respect of disabled persons. So far as relevant, section 20 states:

> (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 … 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.
>
> …

11. Schedule 8 to the EqA 2010 provides more details as to the duty to make reasonable adjustments. In addition, section 212 EqA 2010 defines "substantial" as "*more than minor or trivial."*

12. If a person fails to comply with the duty to make reasonable adjustments, that person discriminates against the disabled person (per section 21 EqA 2010).

13. In considering a claim that an employer had discriminated against an employee by failing to comply with the duty to make reasonable adjustments, the Tribunal must identify: (i) the provision, criterion or practice applied by or on behalf of an employer; (ii) the identity of non-disabled comparators, where appropriate; and (iii) the nature and extent of the substantial disadvantage suffered by the claimant (Environment Agency v Rowan [2008] ICR 218).

14. Section 123 of the EqA 2010 requires that proceedings under the EqA 2010 may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the Tribunal thinks just and equitable. By reason of section 123(3), conduct done over a period of time is treated as being done at the end of the period, for the purpose of calculating the three month time limit for bringing proceedings.

Findings of Fact

15. Many of the relevant facts were not in dispute between the parties. In setting out our findings, we have indicated those which were disputed and explained how we resolved them. Where relevant, we have also included page references from the Bundle.

16. Although the Claimant's employment began in 2005, for the purposes of these claims, the relevant events began in 2017, when the Claimant first asked for a reduction in her hours based, she claimed, upon the advice of her GP. The Claimant is employed on a 40 hour, five day week contract. There was some dispute as to when precisely the Claimant began working reduced hours (and the documentary evidence appeared to contain conflicting evidence, indicating periods during both 2017 and 2018 when the Claimant worked recued hours) although this was of limited relevance given that it was not in dispute that, since August 2018 at the latest, she has been on what was described as a 'phased return' of 24 hours per week, over three non-consecutive days.

17. The Respondent consistently maintained that this arrangement cannot be made permanent until it had recruited someone to fill the remaining 16 hours of the full-time equivalent SCM post in the Swansea store. It was not in dispute that the steps taken by the Respondent to recruit have, to date, been unsuccessful.

18. Since reducing her hours, albeit temporarily, the Claimant alleges that the Respondent has discriminated against her by reason of her disabilities. We were addressed by both parties on the specific allegations identified in the CMO (and detailed above). We have set out our findings of fact and conclusions in a similar manner, although we have not followed the exact order of the individual allegations of discrimination as set out in the CMO. This arose from the findings we made and, we hope, the clarity and cogency of our reasoning benefits as a result.

19. The Respondent accepted that the Claimant was a disabled person at the relevant times (as defined by section 6 of the EqA) by reason of osteoarthritis, carpel tunnel syndrome and hypertension.

Discrimination Arising from Disability (Section 15 of the EqA)

20. So far as relevant to our determination of the section 15 claims, we did not understand it to be materially in issue that the following things arose in consequence of the Claimant's disabilities:

    20.1. Various sickness absences

    20.2. An inability to work five days/40 hours per week

21. In her submissions, Ms Beattie for the Respondent stated that, as the Claimant had had no sickness absences since her 'phased return' in August 2018, it was assumed that the various sickness absences was a reference to the two days per week that the Claimant is currently not working due to her inability to work five days per week. It was on that assumption that the Respondent had defended the claims against it.

22. Ms Collins did not in her submissions on behalf of the Claimant respond to the interpretation adopted by the Respondent but in reality, nothing of consequence turned on the point.

23. We consider each allegation of discrimination arising from disability in turn and as explained above, in a slightly different order from how they appear in the CMO.

Failure to allow the Claimant a permanent change in contract

24. As found above, from August 2018 at the latest, the Claimant has been on what is described as a phased return, whereby she has since then only worked 24 of her contractual 40 hours per week over three non-consecutive days.

25. It was not in dispute that this work pattern was solely informed by the effects on her health of the Claimant's disabilities. On 1 March 2017, the Claimant submitted a flexible working request (at [210] of the Bundle), asking to move to part-time hours of 24 hours per week (although at that time the Claimant also indicated that she would consider a reduction to 32 hours per week, "*if business needs necessitated"*.) The Respondent permitted the Claimant to work three days per week for a period of three months until 4 July 2017. Following a review, the Respondent was concerned at the impact upon the cleaning standards in store (see a subsequent grievance outcome letter of 26 April; 2018, at [244] of the Bundle). It appeared to the Tribunal that the Claimant was required to return to full-time employment thereafter. The following was recorded within a grievance appeal decision summary sheet from in or around June 2018 (at [257] of the Bundle):

> …currently Allison ls working 5 days per week.

26. The Respondent referred the Claimant to Occupational Health ('OH') and in a report dated 20 June 2017, OH's advice was, so far as relevant, as follows (at [216] of the Bundle):

> [The Claimant] is fit for work albeit in a reduced capacity. I would envisage that enforcing full time working will in the not too distant future, impact [the Claimant's] attendance and performance In the workplace. If operationally feasible I would recommend that she work part time to allow her to continue to self manage her health issues while offering regular and effective service at work. If this is not possible you may need to consider longer term capability under the relevant business policies and procedures…

27. Following a meeting between the Claimant and Ms Fettah on 5 July 2017, Ms Fettah confirmed the refusal of the Claimant's flexible working request in a letter dated 28 July 2017 (at [217] of the Bundle). Reliance was placed upon the likely detrimental impact upon performance, quality and meeting Asda's demands. However, the Respondent did not dismiss

the request completely, agreeing to allow the Claimant to drop the five hours per week of cleaning duties from her contracted 40 hours per week. A further meeting was arranged and a number of relocation options also put to the Claimant.

28. There followed a number of further meetings, culminating in a letter from the Respondent to the Claimant dated 6 November 2017, which included the following, relevant terms (at [232] of the Bundle):

> …
>
> As discussed your request to reduce your contract hours to 24 hours per Week, covering three days a week, as part of a Job Share arrangement has been accepted. You will be required to work on Monday, Wednesday and Friday with one of these days alternating to be a Saturday every other week.
>
> This arrangement is dependent on successfully recruiting a new colleague to work 16 hours, over two days per week. This position will initially be advertised for a period of 4 weeks and then reviewed.
>
> Your contracted hours and working days will not change until a successful candidate has been recruited for. Upon implementation of the job share your salary and annual holiday entitlement will be amended on a pro rata basis to reflect your new contracted hours.
>
> …

29. It was not in dispute that the Respondent attempted to recruit a job share but without success. We consider that process in more detail below, as the manner in which the Respondent conducted the various recruitment exercises forms its own head of claim.

30. The Respondent met with the Claimant on 19 January 2018, to explain, amongst other things, that the initial advert for a job share had so far been unsuccessful. In a letter dated 29 January 2018 (at [236] of the Bundle), Ms Fettah confirmed what was discussed at that meeting, including the Claimant's reasons for refusing a number of relocation options put to her. Ms Fettah put forward two further options in the letter (both of which required the Claimant to work on five consecutive days). In addition, Ms Fettah provided an insight into apparent contractual restrictions on the Respondent, which impacted upon what they were seemingly able to offer the Claimant (at [237] of the Bundle):

> …the terms of the contract between City Facilities Management and ASDA require there to be a Store Cleaning Manager working 5 days per week.

31. In the summer of 2018, the Claimant underwent an operation to alleviate her carpel tunnel syndrome. She returned to work on 6 August 2018 on what was described (and continues to be described) as a 'phased

return', wherein the Claimant's working hours were reduced to 24 per week, on non-consecutive days. That 'phased return' continues to date.

32. The Claimant had, therefore, been on a 'phased return' for over three years by the date of hearing. It was not in issue that, as a result of her disabilities, she was unable to work 40 hours per week, five days a week. In that sense, it was a misnomer to refer the Claimant as being on a 'phased return'. In reality, she was never going to return to full-time hours.

33. On that basis, the Claimant contended that the Respondent should have made her change to part-time hours permanent and its failure to do so constituted unfavourable treatment.

34. For reasons we set out in more detail below, we found that the Respondent's failure to make permanent the Claimant's working arrangement, which has been in force since August 2018, did have an adverse impact upon the Claimant's entitlement to Company Sick Pay and how she was assessed in the course of a number of annual appraisals. To that end, the failure to make the arrangement permanent was unfavourable treatment. As it directly related to the Claimant's inability to work her full-time contractual hours, that unfavourable treatment was because of something arising from her disabilities.

35. The Respondent's position, as set out above, was that it would not make the Claimant's part-time hours permanent until it had recruited a job share to cover the balance of the full-time SCM post. The driver for that was, to a large degree (as revealed in the letter of 29 January 2018 by Ms Fettah and repeated in oral evidence to the Tribunal), the contractual demands upon the Respondent by Asda.

36. Reference was made to contractual arrangements with Asda, wherein there was a requirement for full-time SCM cover in each store but we were not provided with any details of those arrangements. In any event, that argument was somewhat undermined by the fact that the Swansea store has been without a full-time SCM since at least August 2018. It was not suggested that Asda had taken any action against the Respondent as a result. As such, we did not accept that the Respondent was contractually precluded from making the Claimant's part-time position permanent.

37. It was also abundantly clear from before the Claimant's 'phased return' began in August 2018 that her health was such that she would never be able to return to full-time hours. The Respondent was made aware of that from the first OH report of June 2017 (see above), which was re-stated in another OH report of 16 May 2018 (at [248] of the Bundle). It was also consistently reported to the Respondent by the Claimant in the course of her dealings with both Ms Fettah and through the Respondent's grievance procedure. Indeed, it was not suggested by the

Respondent or any of its witnesses in the course of these proceedings that there was any anticipation that the Claimant would one day return to full-time hours.

38. In addition, the Respondent's attempts to recruit a job share encountered difficulties from the very beginning, with the first attempt failing to attract any interest despite the Respondent extending the deadline from four to eight weeks (during late 2017/early 2018). Those difficulties continued and despite further recruitment exercises, the Respondent has still been unable to recruit someone to cover the balance of the full-time SCM hours in the Swansea store.

39. The Respondent failed to adequately evidence the primary basis upon which it claimed to be unable to make the Claimant's part-time hours permanent, namely the contractual terms it has with Asda. Even if such terms exist, it was noteworthy, as we have indicated, that the Claimant has been a part-time SCM since August 2018 without any contractual issues being raised by Asda (or, if such issues had been raised, the Respondent did not choose to bring them to the Tribunal's attention). We therefore found that the Respondent's primary reason for not making the Claimant's contract permanent to be without adequate or proper foundation. Any legitimate aim of maintaining their contractual obligations to Asda were similarly not made out and did not afford the Respondent a defence to the unfavourable treatment.

40. For those reasons, we found that the Claimant was treated unfavourably because of something arising from her disabilities when the Respondent failed to put her part-time working on a permanent, contractual footing. This head of claim was therefore made out.

41. In addition, we also found that the unfavourable treatment began at or shortly after the start of the Claimant's 'phased return' in August 2018. By then, it was reasonably clear that (for the reason set out above):

    41.1. The Claimant would not be able to return to full-time hours because of the effects of her disabilities.

    41.2. Making her part-time role conditional upon recruiting a job share was going to face difficulties, given the inability to recruit during the previous nine months.

42. Whilst it was reasonable to afford the Respondent a period of time to try and recruit a job share as proposed, that period had become unreasonable by August 2018. It follows, for all those reasons, that the discrimination arising from a disability for this head of claim began on or shortly after 6 August 2018.

Time Limits

43. Although not specifically raised by either party, for the sake of completeness, the Tribunal also found that this discrimination was a continuing act. The Claimant raised on numerous occasions throughout the relevant period her need to work reduced hours and it was reasonably clear since at least August 2018 that she would be unable to return to her contractual full-time hours. At various stages, the Respondent reiterated its refusal to make the Claimant's part-time hours permanent, until they had recruited a suitable job share. So far as relevant, that position was re-stated by the Respondent in its letter of 19 February 2021 to the Claimant, following a capability meeting which had taken place on 26 January 2021 (at [483] – [487] of the Bundle) and invited the Claimant to submit a fresh flexible working request (at [486]). The Claimant submitted her request and the Respondent began a period of advertising again for a job share, albeit this time on the basis that the Claimant was proposing to reduce her working days to two per week (at [491] – [495]). The flexible working request was received by the Respondent towards the end of February 2021 and the advert was placed in or around March 2021 (per Mr Rodbard's email of 26 February 2021 at [493]). As far as we were aware, the job share has still not been filled and the Claimant remains on a 'phased return'.

44. It follows that this head of claim was brought in time. The Tribunal concluded that it was a continuing act (as opposed to a single act with continuing consequences) and the last of those acts (in effect, the re-stated refusal to accede to the Claimant's request for permanent flexible working and once again make the same conditional upon recruiting a job share) occurred within three months of the start of the Claimant's ACAS Early Conciliation on 20 August 2020.

<u>Company & Statutory Sick Pay issues</u>

45. The essence of this head of claim was about the Claimant's entitlement to Company Sick Pay ('CSP') under the Respondent's discretionary sick pay scheme ('the CSP Scheme). The CSP Scheme operated over a rolling 12 month period and given the Claimant's length of service, she was ordinarily entitled to 12 weeks CSP in any given 12 month period. It was paid equivalent to basic salary. Where CSP entitlement had been exhausted in any given 12 month period, the CSP Scheme included the following provision (at [129] of the Bundle):

> Any colleague who has exhausted their Company sick pay in their current rolling year and their absence continues into a consequent year they will only commence onto new company sick pay entitlement once they have resumed from their current sick leave for a period in excess of 4 weeks.

46. The effect of this provision was that a member of staff had to return to their contracted hours for a period of at least 4 weeks before they were entitled to a new period of CSP (which, in the Claimant's circumstances, would have been a further 12 weeks CSP per 12 months).

47. Once the Claimant reduced her hours to 24 per week, the Respondent treated the remaining 16 hours as sick leave and paid the Claimant CSP for those hours (in effect, paying the Claimant her basic salary every month). The Claimant was absent from work from 24 April to 14 May 2018 and again from 2 July to 31 July 2018. The combination of these periods of sick leave and the supplementing of her salary resulted in the Claimant exhausting her CSP entitlement on or around 23 August 2018.

48. As set out above, the Claimant would ordinarily have re-started her entitlement to CSP following a return to contracted hours for a continuous period of four weeks. However, the Claimant continued (and continues) at her reduced hours of 24 per week. For that reason, the Respondent refused to re-start the Claimant's entitlement to CSP as the CSP Scheme had not been adhered to. In short, the only way the Claimant could once again accrue CSP entitlement was to return to work at her contracted hours.

49. That created a difficulty for the Claimant. It was not in issue that, as a result of her disabilities, she was unable to work 40 hours per week, five days a week. However, those were her contracted hours. She was, in effect, in limbo. In that sense, it was a misnomer to refer the Claimant as being on a phased return. In reality, she was never going to return to full-time hours.

50. Her dilemma was compounded by the Respondent's consistent refusal to make the Claimant's part-time hours permanent until, at the very least, it had successfully recruited someone to cover the balance of the SCM's hours in the Swansea store (a similar approach was adopted in respect of some offers of relocation, with relocation on part-time hours invariably being offered on a temporary basis until a job-share had been recruited).

51. In withholding the Claimant's entitlement to CSP, the Respondent was applying the terms of the CSP Policy. In reality, the failure to allow the Claimant to accrue CSP was because of the Respondent's refusal to make her part-time hours permanent, such that, as described above, the Claimant would have begun to be eligible for CSP after working for at least four continuous weeks on her new, reduced, contracted hours.

52. On the basis, we found that the application of the CSP Policy to the Claimant, such that she was denied the ability to accrue further entitlement to CSP, was unfavourable treatment. The Respondent had a choice. It could make the Claimant's part-time working arrangements permanent. Alternatively, the Respondent could have changed the CSP Policy. It did neither.

53. The Respondent did make a number of offers of relocation to the Claimant, all of which she refused. Whilst the Claimant was free to refuse those offers, we have found that she was entitled to consider them as a demotion. A number of the offers required her to work on consecutive days, contrary to the advice given to the Claimant by her GP and at odds with one of the things arising in consequence of her disabilities. In short, the Claimant was entitled to refuse the various offers of relocation and her decision to do so did not, in our judgment, mitigate the unfavourable treatment described above.

54. It was also clear that the unfavourable treatment was for a reason arising from the Claimant's disability, namely her inability to work 40 hours per week, five days per week.

55. The Respondent submitted that applying the CSP Policy as it did was a proportionate means of achieving the legitimate aim of ensuring staff are paid commensurate to the hours which they work and it would be disproportionate to use CSP to supplement the Claimant's income whilst working part-time hours. However, with respect, that missed the point. The unfavourable treatment arose because of the Respondent's failure to make the Claimant's part-time hours permanent, such that she was in effect perpetually excluded from accruing CSP. The Claimant was not accruing CSP commensurate to the hours she was working because she was not accruing CSP entitlement at all. The very legitimate aim being relied upon was not being pursued in respect of the Claimant.

56. For all those reasons, we found that the effective withholding of CSP entitlement from the Claimant in the circumstances described above was discrimination arising from her disabilities. It follows that her claim in this regard is made out.

57. For the sake of completeness, we did not find that the Respondent withheld Statutory Sick Pay ('SSP'). It was not in dispute that the Claimant exhausted her entitlement to SSP in late 2018 but the operation of the SSP scheme was outside any remit or influence of the Respondent.

Time Limits

58. As we found with the claim regarding the Respondent's failure to make the Claimant's part-time hours permanent (set out above), the Tribunal similarly concluded that the withholding of CSP was a continuing act for the same reasons. It remained open to the Respondent to accede to the Claimant's flexible working request of February 2021 without making the same conditional on the recruitment of a job share. Its refusal to do so had the consequential effect of denying the Claimant any entitlement to begin accruing CSP.

Marking the Claimant's performance down in appraisals from January 2019.

59. The Claimant underwent annual appraisals. These were usually conducted early in the beginning of any given and assessed the Claimant's performance over the previous calendar year. We had sight of the Claimant's appraisal reports for the years 2016 (at [130] of the Bundle), 2017 (at [143]), 2018 (at [158]), 2019 (at [176]) and 2020 (at [192]).

60. Aspects of performance are graded out of four, with an overall mark also being given, again out of four. So far as relevant, a score of four reflects outperformance of the appraised criteria, compared to their role and their peers; a score of three reflects consistent delivery top a high level; and a score of two reflects hitting the appraisal criteria over the year but not consistently (at [208] of the Bundle). We understood that as well as reflecting an employee's assessed performance for the year and setting out goals and targets, the appraisal score was also linked to a bonus scheme operated by the Respondent.

61. For convenience, we have referred to each appraisal by the year to which it related, rather than the year it was carried out.

62. The report for 2016 pre-dated the health issues relied upon in these claims. The Claimant scored threes and a four for the individual aspects of the appraisal (out of four) and achieved an overall score of three.

63. The report for 2017 covered the period when the Claimant began to experience difficulties arising from her disabilities and mention was made of this in the body of the report (see, for example, at [146] of the Bundle). The Claimant again scored mostly three out of four for the individual aspects of the appraisal (she received one score of two) and her overall score was again three (at [155]).

64. The report for 2018 acknowledged the difficulties now facing the Claimant by reason of her disabilities and the fact that she was on a phased return and not working full-time hours. She scored twos and threes for the individual aspects of the appraisal, with an overall score of two out of four (at [170]).

65. Whilst all other appraisals had been undertaken by Ms Fettah, the appraisal report for 2019 was undertaken by Victoria McAleenan-Marks, a manager from the Respondent's Birmingham region. This followed a recommendation made by the Respondent in the course of a grievance raised by the Claimant in 2019. Specifically, the Respondent's grievance appeal outcome letter of 20 November 2019 included the following (at [352] of the Bundle):

> Looking at your previous appraisals I note that you have consistently scored higher, and having spoken with your line manager, she has confirmed this, as well as praising your skills and experience. Whilst I do not uphold this point of appeal, I recognise that your score seems to be an anomaly. I therefore confirm that as we are close to the appraisal window for 2019, I will ensure a full appraisal takes place early in the New Year. The actual date will be confirmed as soon as possible. I further recommend that this be carried out by another Regional Manager within the Division to continue to ensure the highest standards of transparency and accountability.

66. The report for 2019 was again a mix of twos and threes for individual aspects of the appraisal, although some areas were not scored and there was no overall grade set, although a score of two was predicted (at [191]). This appeared to be linked to Ms McAleenan-Marks' failure to complete aspects of the report. However, the Claimant's oral evidence was that she did not receive her full bonus in 2020, which suggested that her performance had, to some extent, been marked down.

67. The report for 2020 was a similar mix of twos and threes but the overall score was back to a three (at [205] of the Bundle).

68. The Tribunal concluded that the scores allocated in these appraisal reports could constitute unfavourable treatment. They had a direct impact upon remuneration (being linked to the annual bonus payment) and could also impart a sense of grievance or disappointment in an employee, particularly if they felt that they had been judged unfairly. The Claimant submitted that the downgrading of her appraisal scores from the report for 2018 onwards was unfavourable treatment and that the same which arose from her disabilities.

The Report for 2018

69. The report for 2018 was written by Ms Fettah and produced on 18 January 2019 (at [158] – [173] of the Bundle).

70. There were material aspects of the report for 2018 where reference was made to the Claimant only being able to work three days per week and the impact that was having on performance and particularly on the retention of staff. We found that the reduction in the Claimant's score from three out of four in the report for 2017 to two out of four for 2018 was unfavourable treatment. It impacted upon the Claimant's bonus payment amount. We also found that the reduced score was materially linked to the Claimant's inability to work full-time hours, which was out of her control and induced an understandable sense of grievance. The Claimant's inability to work 40 hours per week across five consecutive days was for a reason arising from her disabilities and it followed that the reason for the unfavourable treatment of marking her down in the appraisal report for 2018 arose from those disabilities.

71. The Tribunal did not accept the Respondent's submission that the reduction from a score of three in the report for 2017 to a two in the report for 2018 was not materially because of the Claimant's part-time working pattern. In particular, it was suggested that the Claimant had shown her ability to score a three in 2017, even though the impact of her disabilities on her working hours had begun to manifest themselves. However, we had particular regard to the following, relevant factors:

    71.1. There was limited evidence that the Claimant worked reduced hours during 2017, save for the three month trial period between April and June 2017. In contrast, there was agreement in August 2018 for the 'phased return' on part-time hours.

    71.2. It was clear from the text of the report for 2018 that the Claimant's part-time hours were a material factor in the assessment of her performance (see, for example, the Managers Response at [159] & at [166]).

72. The Respondent was entitled to have the legitimate aim of upholding and maintaining standards via the appraisal scheme. It would, as submitted, have been artificial and disproportionate to artificially inflate the Claimant's scores if her performance were substandard. However, what, in our judgment, was disproportionate was the Respondent's failure to clearly assess the Claimant's performance against the hours she was actually working, rather than penalising her for failing to meet the standards expected of a full-time employee whilst she was working part-time hours.

73. For all those reasons, the Tribunal found that the reduction in the Claimant's score for the appraisal report for 2018 was unfavourable treatment for a reason arising from her disabilities and the same was not a proportionate means of achieving a legitimate aim. As such, her claim in this regard of disability discrimination was made out.

The Report for 2019

74. As explained above, the appraisal for 2019 was conducted by Ms McAleenan-Marks. The report was dated 24 January 2020 (at [176] – [191] of the Bundle). There were again several references to the Claimant's reduced hours by both Ms McAleenan-Marks and the Claimant. There was an acknowledgment that it was challenging for the Claimant to be "*at the top of her game"* given her reduced hours (at [179]). There continued to be concerns regarding staff turnover (at [184]). It appeared that the Respondent treated the overall score as two out of four (given the Claimant's evidence that she received a reduced bonus and that the predicted overall score was cited, in the email at [174], as being a two).

75. The Claimant did acknowledge in her oral evidence that Ms McAleenan-Marks gave her the benefit of the doubt in some areas of the appraisal, as she was less familiar with the Claimant's circumstances. However, we found on balance that the Claimant's overall score remained at two out of four. We also found that a material factor in that score was the challenges facing the Respondent's Swansea store as a result of the Claimant's part-time working pattern.

76. As with the report for 2018, the overall score had the attendant, adverse impact upon the Claimant's bonus entitlement. It would have also continued the sense of grievance felt by the Claimant, since aspects of her performance were being unfavourably linked to her inability to work 40 hours over five consecutive days. The score for the report for 2019 therefore constituted unfavourable treatment for a reason arising from the Claimant's disabilities.

77. We reached the same findings as above on the Respondent's statutory defence (which was advanced in identical terms for all of the reports we considered). There was again a failure by the Respondent to properly assess the Claimant's performance against the hours which, by reason of her disabilities, she was able to work. That rendered the pursuance of the purported legitimate aim of the appraisal system disproportionate, when considered in the context of how the report for 2019 was conducted and scored.

78. It follows that the maintenance of a score of two out of four for the report for 2019 was unfavourable treatment for a reason arising from the Claimant's disabilities and the same was not a proportionate means of achieving a legitimate aim. As such, the claim in this regard of disability discrimination was made out.

The Report for 2020

79. The report for 2020 saw the Claimant's overall score return to one of three out of four. It also saw the return of Ms Fettah as the appraising manager. The report was dated 24 January 2020 (at [176] – [207] of the Bundle).

80. There remained a number of aspects of the report for which the Claimant was scored two out of four. Reference was again made to difficulties with staff retention and poor morale in store (at [194], [198] & [200]), as well as to the store manager's preference for a full-time SCM (at [199]) and the challenges which the Claimant was facing trying to fit everything into her reduced hours (at [201]). In our judgment, there remained an indelible link between what the Respondent deemed to be lower standards of performance (which warranted a score of two) and the Claimant's part-time working pattern.

81. For those reasons, the Tribunal found that those aspects of the report for 2020 which received a score of two constituted unfavourable treatment. Although the overall score returned the Claimant's bonus entitlement to where it had been following the report for 2017, she was still reasonably entitled to feel a sense of unfairness and grievance that, once again, the assessment of her performance was being materially affected by her inability to work full-time hours.

82. The Respondent's statutory defence was, for the reasons rehearsed above, not made out because of its failure to properly assess the Claimant's performance upon the hours she was capable of working, rather than the hours she was contracted to work. It follows that the maintenance of a score of two out of four for aspects of the report for 2020 was unfavourable treatment for a reason arising from the Claimant's disabilities and the same was not a proportionate means of achieving a legitimate aim. As such, the claim of disability discrimination was made out.

Time Limits

83. There was, in respect of all three reports, an overlap with the Respondent's failure to make the Claimant's part-time working hours permanent. It was perhaps understandable that those conducting the Claimant's appraisals (as well as the Claimant herself) had her working hours at the forefront of their minds. The Claimant was designated as being on a 'phased return', with the implication that she would eventually return to full-time hours. But as we have already found, that was a misnomer and took not proper regard of the medical evidence available to the Respondent.

84. The Tribunal was left in little doubt that, had the Respondent made the Claimant's part-time working pattern permanent in August 2018, it would have had a beneficial impact on the mindset of appraiser and appraisee in the course of each of the aforementioned appraisals.

85. The report for 2020 was produced after these proceedings commenced and raises no time issues. The reports for 2018 and 2019 was produced more than three months before the effective time limit of 20 May 2020 began. However, the unfavourable treatment found to have arisen from those two reports was, as with the report for 2020, intrinsically linked to the Respondent's failure to make the Claimant's part-time working pattern permanent. Although they constitute free-standing claims of disability discrimination (and have been made out on their own merits), the unfavourable treatment which arose from the reports for 2018 and 2019 was, in our judgment, a continuation and an extension of the Respondent's refusal to offer the Claimant a permanent part-time contract.

86. We have found that the Respondent's failure to make the Claimant's part-time working pattern permanent was disability discrimination, that the discrimination is a continuing act and the claim in that regard was brought in time. Given the overlap between that continuing act and the unfavourable treatment that we have found arose from the appraisal reports for 2018 and 2019, we concluded that they were similarly continuing acts of discrimination and were properly treated as continuing in line and in time with the part-time hours discrimination claim.

87. It follows that, to the extent required, we found the disability discrimination claims in respect of the appraisal reports for 2018 and 2019 to have been brought in time.

88. In the alternative, and for completeness, had we not found the disability discrimination in respect of the appraisal reports of 2018 and 2019 to be continuing acts which brought them within the three month time limit, it was just and equitable to extend time because of their intrinsic association with the Respondent's discriminatory failure to make the Claimant's part-time working pattern permanent.

Refusal to provide support

89. When the Claimant commenced her 'phased return' in August 2018, she reduced her hours from 40 to 24 per week. That, she argued, left 16 available hours per week for the Respondent to provide her with additional support and ensure the full-time duties of an SCM were met, until a suitable job share candidate was recruited. Further, the Claimant submitted that the Respondent failed to utilise those hours or deploy any other resources to assist her. The alleged lack of support resulted in, it was argued, a number of unfavourable treatments – declining standards within the Swansea store which impacted upon the appraisal reports (discussed above), the initiation of the Respondent's capability process from January 2019 and the Claimant's inability (without such support) to remedy or address any of the concerns raised.

90. We did not understand the Respondent to take issue with the factual nexus regarding this head of claim. Rather, the focus of Ms Beattie's submissions was on the difficulties faced by the Respondent in recruiting a job share. To that end, it was submitted that there had never been a refusal by the Respondent to provide support, rather there had been an inability to do so because of difficulties in identifying and recruiting a suitable candidate.

91. We consider in more detail the allegations regarding the Respondent's recruitment process later in these reasons.

92. The Respondent also pointed to the numerous relocation proposals made to the Claimant and the arrangement from April 2021 for Amanda Jones, the SCM in the Asda store in Gorseinon, to provide support

(which failed only because of Ms Jones' resignation a few weeks later). Again, it was submitted that there was never a refusal to provide support, simply an inability to do so as a result of factors beyond the Respondent's control.

93. The Tribunal understood the Claimant's complaint to be broader than the failure to successfully recruit a job share. It was, to a large part, focussed on the Respondent's refusal to provide support pending recruitment. The Respondent was unable to (and remains unable) to fill the hours vacated by the Claimant's 'phased return'. Reference was made to the existence within the business of designate SCMs, a form of floating support which was usually deployed into store with no SCM presence at all. The Respondent could have deployed a designate into the Swansea store to assist the Claimant but chose not to. That was its choice and the Tribunal appreciates that decisions have to made across the whole of the Respondent's business, not just one store. Similarly, we were told that it was usual practice not to have one SCM covering two stores (albeit that the Respondent did make an exception with the arrangement involving Ms Jones).

94. The Respondent had 16 hours of management time available to it in the budget for the Swansea store from August 2018. It also suggested that there was an additional nine hours per week available, which arose from the supervisor's development hours (a post which was line managed by the SCM). However, those nine hours existed prior to the Claimant moving to part-time hours and were not changed. In addition, the 16 hours which were available from August 2018 were never utilised.

95. The Tribunal concluded that, whilst it was reasonable for the Respondent to initially seek to fill those 16 hours by recruitment, it became increasingly harder for the Respondent to merely rely upon recruitment (and the argument that, in effect, matters were out of its control) as it became apparent that no suitable candidates were forthcoming. In our judgment, as the reality of the recruitment exercises emerged, the Respondent should have considered other alternatives, whether that was the use of a designate SCM or making use of other stores' SCMs earlier than April 2021.

96. In addition, and as explained in more detail below (under Demotion), the relocation offers made were unsuitable (either because of the working patterns or because they constituted a demotion) and the Claimant was entitled to reject them. Importantly for this head of claim, the relocation offers were not suitable offers of support.

97. Drawing all this together, the Tribunal found, on balance, that the way in which the Respondent approached the issue of support for the Claimant in her SCM role in the Swansea store could be properly described as a refusal. There was an over-reliance on recruitment and a failure to consider other, interim measures within a timely manner. We also found

that the failure to properly support the Claimant constituted unfavourable treatment, as it materially impacted upon both the adverse appraisal scores discussed above and the instigation of the capability procedures.

98. That unfavourable treatment arose solely because of the Claimant's inability, by reason of her disabilities, to work 40 hours over five consecutive days per week. It was therefore for a reason arising from her disabilities.

99. The Respondent submitted that any unfavourable treatment was in pursuance of the legitimate aim of ensuring the highest calibre of management being appointed to one of the flagship stores, which was not achieved by appointing unqualified or underperforming managers or candidates. It was further argued that the approaches taken by the Respondent were objectively justified and a proportionate means of achieving that aim.

100. The Tribunal accepted that ensuring the right calibre of managers operated in any of the Respondent's store was a legitimate aim. However, that only extended to the recruitment process and decision by the Respondent to seek to fill the remaining SCM hours in the Swansea store. As we have found, there was an over-reliance by the Respondent on recruitment as a means to solve the issue of support for the Claimant and, to that end, recruitment alone became an inadequate response to the lack of support. The offers of redeployment to other stores similarly failed to address the lack of support for the Claimant in the Swansea store and as explained below, were unreasonable.

101. Over time, that reliance upon recruitment became unreasonable and disproportionate, as it became clear that finding a suitable job share was problematic. That was all the more so given that the Respondent had available to it from August 2018 funding for 16 hours of support (from the balance of the Claimant's contracted full-time hours), its structure included a floating managerial support role (the designate SCM) and it was reasonably clear from the medical evidence available to it that the Claimant was not returning to full-time hours.

102. For all those reasons, the refusal to provide support was unfavourable treatment for a reason arising from the Claimant's disabilities and the same was not a proportionate means of achieving a legitimate aim. As such, the claim of disability discrimination was made out.

Time Limits

103. Although not specifically raised by the Respondent, for the sake of completeness, the Tribunal also found that this discrimination was a continuing act. There were numerous examples of the Claimant requesting support (whether by way of direct requests, within the grievance procedure, as part of the annual appraisals or in the course of

the capability process). There was, as found, a reliance by the Respondent to a large degree on the recruitment process to address the issue of support, with adverts being placed in November 2017, July 2018, November 201 and March 2021. The effective refusal to provide support has, as such, been on-going throughout the relevant period of these claims.

104. As far as the applicable three month time limit was concerned, our attention was drawn to an email from the Claimant to the Respondent's People Support Team on 7 February 2020, which opened as follows (at [368] of the Bundle):

> Could you please advise next stages of my need of support within Swansea Store 4564.

105. There then followed a series of email exchanges about a variety of issues, which continued to include the Claimant's requests for in-store support (see, for example, her email of 3 July 2020 to Mr Rodbard, specifically at [374]). It followed that, so far as is relevant, this continuing act of discrimination was on-going both before and after the limitation date of 20 May 2020. As such, this claim was brought in time.

Demotion

106. At various points throughout the relevant history of these claims, the Respondent offered relocation alternatives to the Claimant. This was to a large degree a result of the failure to recruit a job share for the Claimant's SCM role in Swansea. The Respondent proposed alternatives which would have seen the Claimant relocate to stores which could accommodate less than full-time hours. These were at other local Asda stores and involved part-time hours (although most required at least some degree of consecutive working days). The Claimant turned them down for various reasons, including the requirement to work consecutive days.

107. It was not suggested that the Claimant was in any way compelled to accept the offers of relocation. Neither was it claimed that there was any adverse or unfavourable treatment of the Claimant as a result of refusing the various offers made to her by the Respondent. Rather, she remained in her post at the Swansea store.

108. It was common ground that the Swansea store was the flagship store in the region. The SCM post in the Swansea store commanded the highest salary band and the highest status. It was reasonable to conclude that only those SCMs with the necessary experience and qualities were likely to be qualified to operate in the Swansea store. It was not in dispute that the Claimant met those criteria, save for the fact that she was from 2017 unable to work full-time.

109. It also follows that any alternative store would, by definition, have less status than the Swansea store and, unless banding was protected, lower banding and pay.

110. It was on that basis that the Claimant alleged that the offers made to her of alternative stores constituted a demotion, which in turn was unfavourable treatment arising from something in consequence of her disabilities.

111. We concluded that, viewed objectively, the offers of relocation to smaller stores with less status and potentially lower salary banding could be reasonably viewed by the Claimant as demotion. The change in status, in particular, was understandably a material issue to the Claimant. Notwithstanding that she would have remained employed as a SCM.

112. However, the Claimant was entitled to refuse the various offers without any consequence. There were no repercussions in refusing the offers per se. The Claimant did not suggest in her evidence that she had been specifically upset or demotivated by the offers. Any reduction in status or salary would only have occurred if the Claimant had accepted one of the offers made. The only consequence of refusing to relocate was that the Claimant remained at the Swansea store and the impact of that was, in our judgment, better addressed in the other heads of claim pursued (regarding sick pay entitlement, appraisals, support and her part-time status).

113. What remains is the Claimant being offered roles which, if accepted, could be viewed as a demotion but which the Claimant was free to refuse without any repercussions. On that basis, we were unable to find that the offers of relocation constituted unfavourable treatment for the purposes of section 15 of the EqA 2010.

<u>Deductions from wages</u>

114. It was not in dispute that there were some errors with the Claimant's pay towards the end of 2018. Whilst the Claimant withdrew her unlawful deductions claim (as detailed above), she alleged that the same deductions constituted discrimination arising from her disabilities.

115. In September 2018, the Claimant was overpaid. Although she had exhausted her entitlement to CSP in August 2018, this had been overlooked when processing her September 2018 pay. The Claimant received full pay for September 2018 on the erroneous basis of three days salary and two days CSP per week, when she was in fact only entitled to three days salary and two days SSP per week. That resulted in an overpayment of £760.60.

116. The Claimant was overpaid again in October 2018. This time it arose from the erroneous belief of the person processing the payroll that the

Claimant was off sick for every day of the week and failed to recognise that she was in fact working three days and off sick two days per week. This was compounded by the same error as happened in September 2018, with the Claimant again receiving CSP she was not entitled to. The result was an overpayment of £363.79 in October 2018.

117. In November 2018, the same erroneous assumption was applied, namely that the Claimant was wholly on sick leave. However, by now, her entitlement to CSP had been corrected and she was, as a result, only paid SSP for the whole of November 2018. This resulted in an underpayment of £1,122.50.

118. The net result of the two overpayments and the one underpayment was that the Claimant, for the period September to November 2018, was overpaid by £1.89.

119. At the Claimant's request, the Respondent processed a hardship payment to her in November 2018 of £752, which was the net amount of the underpayment. It was agreed that that payment would be repaid by the Claimant in three instalments from January to March 2019.

120. We did not understand it to be in dispute that the events of September to November 2018 were simply errors. In particular, it was purely coincidental that the November 2018 underpayment all but wiped out the overpayments of the two preceding months. In addition, Ms McNeill's evidence that the person who processed the November 2018 underpayment knew nothing of the Claimant or her circumstances.

121. The Claimant submitted that the unfavourable treatment was the November 2018 underpayment. She was not properly paid for the work she had done that month. However, going into November 2018, the Claimant had received payments to which she was not entitled – to borrow the analogy, she had been paid for work she had not done. It was, in our judgment, somewhat artificial to consider the November 2018 underpayment in isolation for the September and October 2018 overpayments. They were proximate in time and all three were the result of unfortunate but wholly innocent errors.

122. In reality, the November 2018 underpayment merely (albeit accidentally) restored the status quo. The Respondent was legally entitled to recover the previous months' overpayments. Any hardship caused to the Claimant by the underpayment of November 2018 was mitigated by the fact that she had received excess wages in the two preceding months and the Respondent made a hardship payment so that, in effect, she was not immediately out of pocket, with the overpayment then being repaid by agreement over a period of three months.

123. For those reasons, we were unable to find, when considered in context, that the deduction from wages in November 2018 constituted unfavourable treatment.

124. In the alternative, even if it were unfavourable treatment, it was not because of anything arising from the Claimant's disabilities. The underpayments and overpayments were errors. The person who erroneously processed the November 2018 underpayment had no knowledge of the Claimant, her disabilities or the things which arose from those disabilities. The cause of the underpayment was an error of fact. The person processing the payroll wrongly thought that the Claimant was wholly absent when she was in fact only partially absent. That was the cause of any unfavourable treatment and was not because of something arising from the Claimant's disabilities.

125. In either scenario, the claim is not made out.

Amending the Claimant's salary range to reduce her holiday pay

126. When the Claimant returned to work on reduced hours, her salary was amended pro rata. We did not understand the Claimant to take any issue or objection to that, per se. Rather, it was claimed that there was a reduction in the Claimant's entitlement to holiday pay.

127. The Respondent's evidence was that, in reality, there had been no change to the Claimant's holiday entitlement. Despite the fact that her working hours had reduced and, by association, her salary, the Claimant continued to be entitled to the same annual leave that she had been entitled to when working full-time. In that regard, the Respondent's continued adherence to the notion of a 'phased return' rather than a permanent change of contract benefitted the Claimant. She was still considered to be employed under a full-time contract, with all the attendant annual leave entitlements which that status attracted.

128. That aspect of the Respondent's case was not materially challenged. Rather, in her closing submissions, Ms Collins criticised the information provided by the Respondent to the Claimant regarding her holiday entitlement, arguing that the same was unclear and not provided in a timely manner. That, it was submitted, compounded errors which occurred in processing and paying the Claimant's holiday entitlement.

129. Whatever the merit in Ms Collins' submissions, poor communication was not the basis of this particular head of claim (to be fair, we understood Ms Collins to address us on this and the following head of claim together). The Respondent did not, in our judgment, reduce the Claimant's entitlement to holiday pay. She was and remains entitled to annual leave at the same rate as she was when working full-time. It follows that the basis for the alleged unfavourable treatment is not made out and this claim falls at the first hurdle.

Withholding information relating to pay & benefits

130. As indicated, the Claimant alleged that the Respondent had withheld information from her regarding her pay and benefits, such that it was difficult for her to accurately identify her entitlement to, amongst other things, annual leave.

131. The Respondent accepted that there were a number of errors in processing the Claimant's salary (as referred to above) and also her holiday pay (as explained, for example at Paragraph 19 of Ms McNeil's witness statement). However, those errors were resolved in a timely manner. There was a delay in responding to a query the Claimant raised regarding her entitlement to CSP in February 2020 but that delay was, to a large part, due to Mr Rodbard being on paternity leave, Ms McNeil being on maternity leave and the challenges associated with the onset of the Covid-19 pandemic.

132. For all those reasons, the Tribunal did not find that the Respondent withheld information and documents, as alleged. At most, there were instances of errors which were resolved and delays in communication which were explained. The responses may not have been within a time frame that was agreeable to the Claimant but that falls some way short of the pleaded head of claim. There was no evidence of the Respondent engaging in the more deliberate and conscious decision to withhold information. As the factual basis was not made out, this head of claim must fail.

133. In the alternative, even if we had found that such delays could be considered as the Respondent withholding information and documents, there was insufficient evidence that such decisions were motivated, consciously or otherwise, by something arising from the Claimant's disability.

Requiring the Claimant to work a 40 hour week in 24 hours

134. The Claimant alleged that, despite reducing her hours from 40 to 24 per week in August 2018, the Respondent had required her to work the equivalent of those 40 hours during her three days.

135. We had a number of difficulties with the alleged unfavourable treatment. First of all, even on the Claimant's own case, she was not required to work 40 hours per week every week. Rather, the claim was pursued as a combination of implicit factors and pressures on her, rather than an explicit requirement that she undertaken 40 hours of work. Secondly, whatever the merit in those arguments, that is not how this head of claim was pleaded. The allegation was one of requirement by the Respondent. On the contrary, the evidence presented to us displayed the opposite,

explicit response from the Respondent, with the Claimant being told and reminded in meetings and appraisals not to work in excess of her 24 hours per week.

136. Similarly, we were told of the Claimant's work ethic and her tendency to stay until the job was done, which, given the absence of support, resulted in her working beyond her reduced hours. That may be so but such dedication does not disclose a requirement to undertake extra hours at the behest of the Respondent.

137. To some degree, this claim overlapped with the claim regarding failures to provide adequate support. As detailed above, the Tribunal found that claim to have been made out. However, we were unable to extend that failure to provide support into a positive requirement on the Claimant from the Respondent to continue to work her full-time hours following her 'phased return' in August 2018.

138. Finally, we are reminded that the Claimant has had the benefit of legal advice and assistance. The wording of this particular claim has not been amended or clarified. Applying its ordinary meaning, we were unable to find that the Respondent required the Claimant to work 40 hours per week after she had moved to a part-time working pattern.

139. For those reasons, the claimed unfavourable treatment is not made out.

<u>Deliberately taking photographs of the store to construct a case against the Claimant</u>

140. Similar to the 40 hours per week claim, the wording of this head of claim was important. It was not in dispute that on 15 July 2020, Ms Fettah had attended at the Swansea store to undertake a site audit. In the course of that audit, she took a number of photographs of the store (at [392] – [399] of the Bundle). It was also not in issue that the audit was undertaken before the morning clean of the store had concluded. As explained by Ms Fettah in her evidence, she had arrived at the store at 7am to meet with Asda's store manager but he had been delayed so Ms Fettah decided to undertake the audit whilst she was waiting (at Paragraph 51 of her statement).

141. Under this head of claim, the Claimant alleged that the purpose of taking those photographs at that time and before the morning clean had been concluded was to *"construct a case of poor performance"* against her.

142. We preferred Ms Fettah's account of why the audit had been conducted at the time and in the manner it had. The meeting a few days later was coincidental. Importantly, the Respondent did not, at the time, act in any particularly concerned way over the photographs or the audit in general. Ms Fettah confirmed that, in her view, there was "*nothing untoward about the…audit…carried out at the Claimant's store"* (at Paragraph 52

of her statement). In her oral evidence, the Claimant accepted that she had been told at the time that there were not too many problems with the store and any that arose were considered easy to address. In addition, aspects of the audit report were positive (see [398]).

143. The Respondent's response to the audit was wholly inconsistent with an employer who was trying to construct, fabricate or bolster a case of poor performance. The allegation was simply unsupported by the evidence and not made out.

144. For the sake of completeness, there was also reference to a photograph taken on 21 November 2019 (at [359] – [363]). It was alleged by the Claimant that this photograph (which showed debris in one of the Swansea store delivery bays) was taken in response to a letter before action which had been sent by the Claimant's solicitors to the Respondent on 20 November 2019 (at [347]).

145. However, Ms Fettah's unchallenged evidence was that the photograph had been taken by an Asda director and forwarded to the Respondent's operations director (David O'Byrne). It was wholly unconnected with the Claimant's letter before action, save that the two had occurred within close proximity to each other.

146. We had no reason not to accept Ms Fettah's evidence in this regard. The photograph was not taken by any employee of the Respondent and was in no way related to the correspondence from the Claimant's solicitors.

<u>Alleging that the Claimant was negative, disruptive and did not care</u>

147. On 22 July 2020, the Claimant attended a welfare meeting with Ms Fettah, which was also attended by Mr Rodbard as note taker (the minutes of the meeting are at [415] – [417] of the Bundle). The Claimant made the following allegations in her grievance letter on 24 July 2020 (at [419]):

> At my welfare meeting on 22/07/20 it felt that no concerns were shown to my situation, to the contrary there was an assault on my character, informed I was negative to City, practises in my Store and to my colleagues. I found this to be unprofessional, hurtful and unfair and felt Kevin Rodbards [sic] has a personal issue with me and would require another HR manager to discuss my concerns.

148. The Claimant did not expand upon this aspect of her claim in her witness statement. In his statement, Mr Rodbar responded to the allegation as follows (at Paragraph 48):

> I had received feedback from the regional team about the Claimant's attitude. For example, the Respondent's colleagues worked incredibly hard throughout the coronavirus pandemic and this was recognised with a £50

> voucher and access to the Asda store discount. We instructed SCMs to deliver this to their teams in a very positive way. In contrast, the Claimant's team were not suitably informed about it and did not share the same level excitement as there was elsewhere in the business. There had also been feedback about the Claimant gossiping about another SCM and the ROM which was not conducive to a pleasant working environment in the team. There had been no formal action taken as evidence was anecdotal but it demonstrated a decline in her attitude. Personally, I found more of the Claimant's emails to be inflammatory in tone and I felt it was clear there was a disconnect between us. However, I did not say she was disruptive or that she did not care…

149. Ms Fettah confirmed Mr Rodbar's recollection in her oral evidence and, on balance, we accepted that any reference to the Claimant being negative in the meeting on 22 July 2020 was in terms of the launch of the staff recognition scheme. We also found that, on balance, the Claimant had not been told that she was disruptive or did not care.

150. Being criticised, in the term we have found, was unfavourable treatment. However, there was, in our judgment, no causative link between the criticism of the Claimant's delivery to her team of the recognition scheme and something arising in consequence of her disability. The criticism, whether well-founded or not, could in no reasonable way be said to arise from the Claimant's inability to work full-time hours.

151. On that basis and for those reasons, the claim was not made out.

<u>Failing to properly advertise the job share so as to discourage candidates and contrary to company policy</u>

152. As previously recounted, the Respondent sought on a number of separate occasions to recruit a job share to take up the SCM hours which had arisen following the Claimant's 'phased return' in August 2018. The Claimant took issue with how the Respondent went about that recruitment process. Specifically, criticism was levelled against how the vacancy was advertised and was two-fold – the Respondent failed to properly advertise so as to discourage applicants and the Respondent failed to follow its own policy in not leaving the adverts live until the post was filled.

153. We can deal with the second of these allegations relatively simply. The Claimant failed to identify which policy the Respondent was in breach of or that any such policy even existed. The nub of the allegation was that other posts advertised by the Respondent were left open until filled but the job share adverts were not. From that, the Claimant concluded that the Respondent had a policy to advertise until filled and had breached that policy in respect of her situation.

154. In our judgment, that was based upon a false premise. As explained by Ms Fettah (who was responsible, as the Claimant's line manager, for

instigating and directing the recruitment process), it was at the discretion of each manager to decide how long they wanted an advert held open for. She further explained that she usually asked for adverts to be kept open for two weeks and had in fact advertised the job share for longer periods and repeatedly. There was nothing presented to the Tribunal that supported the Claimant's contention of an overarching policy for how recruitment exercises were advertised.

155. For those reasons, we did not find that the second limb of this allegation was made out .

156. The first limb requires close attention to how it is phrased. In our judgment, this was not an allegation of ineptitude or underperformance. It was an allegation that the Respondent sabotaged and deliberately jeopardised the recruitment process by the way in which it advertised the job share post.

157. It appeared to be uncontentious that the initial adverts could have been improved (and indeed, the Respondent later invited the Claimant to provide feedback on draft adverts before they were posted). It was a fair criticism that on one occasion the advert failed to clearly state that the post being offered was a job share position. But that falls some way short of establishing, even on the balance of probabilities, an intention by the Respondent to discourage applicants.

158. Indeed, once again, the Respondent's actions were inconsistent with such an intent. It undertook the recruitment exercise on multiple occasions when, in reality, it was quite entitled not to conduct it at all. The Respondent extended the open dates of the adverts on several occasions when there were no responses within the initial time frame. Again, why do that if the intent were to prevent suitable candidates coming forward?

159. Reference was made by, and on behalf of, the Claimant about Ms Fettah's personal views regarding the suitability of job share for the SCM role and her records of meetings with potential internal candidates were scrutinised. However, whatever misgivings Ms Fettah may have had, that did not prevent the Respondent instigating the recruitment steps described above. In addition, the Claimant's allegations were explicitly directed at a calculated and deliberate failure to advertise properly, which, on the evidence presented, was not made out at all.

160. For those reasons, the first limb of this claim also failed.

Reasonable Adjustments (Section 20 of the EqA)

161. The Claimant's reasonable adjustments claim was based upon the following pleaded provision, criteria or practice ('PCP'):

> A requirement to work 5 days per Week /40 hours per week and/or on consecutive days

162. It was not in dispute that the PCP would put the Claimant at a significant disadvantage by reason of her disabilities nor was it in issue that the Respondent knew or was reasonably expected to know that the PCP would place the Claimant at such a disadvantage.

163. We similarly did not understand it to be contentious that the substantial disadvantage was the impact upon the Claimant's health of working on consecutive days and for 40 hours per week.

164. Finally, it was common ground that the Claimant has been working 24 hours per week over non-consecutive days since August 2018.

165. It follows that the PCP has not been applied to the Claimant since she returned from sick leave in August 2018. Further, as explained above, we found that the Respondent did not require the Claimant to undertake 40 hours of work within those three non-consecutive days.

166. The duty under section 20 of the EqA is to take such steps as are reasonable to avoid the disadvantage caused by the PCP. In our judgment, the Respondent did that when it permitted the Claimant to return on part-time hours on alternate days from August 2018. Therefore, the Respondent discharged its duty to make reasonable adjustments three and half years ago.

167. In addition, we were unable to find that any of the adjustments proposed by the Claimant would have avoided the disadvantages caused by the PCP. The first, second, fifth and sixth suggestions (in the order they were recorded in Judge Moore's CMO and which all related to the job share recruitment process) would only have been reasonable if the Respondent had insisted that the Claimant continue to work full-time until a job share had ben found. But, as we have seen, that was not the case. Rather, the Respondent agreed to allow the Claimant to move to part-time hours and then looked to recruit a job share.

168. There was insufficient evidence to support a finding that the temporary nature of the Claimant's current part-time working arrangement was having an adverse impact upon her health (per the third suggestion). In any event, allowing the Claimant to work reduced hours avoided the disadvantage which arose from the pleaded PCP. It mattered not, in terms of the reasonable adjustments duty, whether the reduction in hours was permanent or temporary.

169. Finally, the fourth suggestion (the provision of support) was not, in our judgment, connected to or arose from the application of the PCP to the Claimant or the disadvantage which would have arisen.

170. In reality, all of the proposed adjustments post-dated the actual adjustment put into place by the Respondent. As that adjustment, discharged the duty on the Respondent, any failure to implement the adjustments proposed by the Claimant was not in breach of the Respondent's statutory duty (although, as found above, the failure to make the part-time post permanent and the failure to provide adequate support did constitute disability discrimination per section 15 of the EqA).

171. Finally, and again for the sake of completeness as we were not expressly addressed on the point, any cause of action arising from a failure by the Respondent to discharge its duty under section 20 of the EqA before August 2018 was significantly out of time. We were not presented with any application to extend time and, even if we had, would have in all likelihood consider it not to be just and equitable to extend time, given the passage of time of over three years. However, we reiterate that we make no criticism of the Claimant or her legal team for not pursuing such an application. In reality, the reasonable adjustments claim was not pleaded on that basis.

172. As the Respondent discharged its duty to make reasonable adjustments in August 2018, the claim is not made out and fails.

Next Steps

173. As the Claimant has been partially successful in her claims, a Remedy Hearing will be listed. Case management directions to prepare for that hearing will be issued separately.

EMPLOYMENT JUDGE S POVEY
Dated: 3 February 2021

Order posted to the parties on 9 February 2022

For Secretary of the Tribunals Mr N Roche