EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4101234/2020

Preliminary Hearing held remotely at Glasgow 15-18 March 2021
Deliberations 21 and 22 March 2021

Employment Judge Hoey
Tribunal Member O'Hagan
Tribunal Member Singh

Mr Hasan Ahmed Tariq	**Claimant** **Represented by:** **Ms Mohammed** **(solicitor)**
Telecom Service Centres Ltd **t/a Webhelp UK**	**Respondent** **Represented by:** **Mr Byrom** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The Claimant's claim that the Respondent was in breach of sections 20 and 21 of the Equality Act 2010 by failing to comply with the duty to make reasonable adjustments is well founded. The Respondent accordingly unlawfully discriminated against the Claimant.

2. A separate Telephone Case Management Preliminary Hearing will be fixed to progress matters with regard to remedy.

REASONS

1. This was a claim for disability discrimination having been lodged on 27 February 2020 with ACAS having been approached on 8 January 2020 and a certificate issued on 20 February 2020.

2. A number of previous Preliminary Hearings had taken place. The most recent, on 15 September 2020, had considered the Preliminary issue of time bar and determined that the claims in relation to reasonable adjustments had been brought outwith the statutory limitation period but had been brought within such a period that was just and equitable. The claim was therefore allowed to proceed. The Claimant confirmed that there were no other claims being advanced (such as under section 15 of the Equality Act 2010).

3. The hearing was conducted remotely via Cloud Video Platform (CVP) with the Claimant's agent, the Claimant and the Respondent's agent attending the entire hearing, with witnesses attending as necessary, all being able to be seen and be heard, as well as being able themselves to see and hear. There were a number of breaks taken during the evidence. The Tribunal was satisfied that the hearing had been conducted in a fair and appropriate manner, with the practice direction on remote hearings being followed, such that a decision could be made on the basis of the evidence led.

4. Written witness statements had been provided by each of the witnesses together with an agreed bundle running to 185 pages.

5. We agreed a timetable for the hearing of evidence and the parties worked together to assist the Tribunal in achieving the overriding objective, in dealing with matters justly and fairly taking account of the issues, cost and proportionality.

Issues to be determined

6. The hearing had been fixed to determine liability only and the parties had worked together to agree a list of issues setting out the issues to be determined which were as follows:-

   a. It was conceded that the Respondent knew the Claimant had a disability (epilepsy) at all material times.
   b. It was also conceded that the Respondent applied the provision, criterion or practice (PCP) of requiring the Claimant to work erratic shift patterns.
   c. It was also conceded that the PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that it primarily aggravated his epilepsy (and it had an adverse effect upon his psychosis).
   d. At the submissions stage the Respondent's agent confirmed that the Respondent conceded that it knew or could reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage that was relied upon.
   e. The outstanding issue was therefore what step could have been taken to avoid the disadvantage. The Claimant argued that the step required was to provide fixed shifts of Monday to Friday from 9am until 330pm which should have commenced following the first welfare meeting. This was disputed by the Respondent which contended it had taken all reasonable steps.
   f. In the event that the claim was successful a separate remedy hearing would need to be fixed to deal with remedy.

Evidence

7. The Tribunal heard evidence from 4 persons, comprising the Claimant, Mr McIntyre (the Claimant's Manager for around 6 months), Mr Farwell (an Operations Manager, to whom Mr McIntyre had reported) and Ms Gillespie (Head of Operations, to whom Mr Farwell had reported).

Facts

8. We are able to make the following findings of fact. The parties had worked together to agree facts within a chronology which was of use to the Tribunal. We only make findings of fact that are necessary to determine the issues that require to be determined (and not in relation to each of the matters raised in evidence nor where there were disputes which did not pertain to the issues). Where any disputes arose in the evidence in respect of matters that required to be determined, we resolved these by considering the evidence in its totality in conjunction with the surrounding circumstances and any contemporaneous notes and decided what was more likely than not to be the case.

Background

9. The Respondent provided outsourced services to major businesses at various locations throughout the world and had over 10,000 staff. At its office in Glasgow there were between 600 and 800 staff.

10. The Claimant was employed as a customer service agent (or contact centre associate) from 20 August 2018 until 8 October 2019.

11. The Respondent required flexibility in the staff it employed since it was a 7 day operation that was open from around 7am until 11pm. It worked on campaigns for different clients and staff tended to work in teams servicing a particular client.

Working hours

12. Staff were engaged on a flexible contract that required them to work a set number of hours each week on such shifts as are required from time to time. The Claimant's contract with regard to hours of work stated: "You are required to work 40 core hours per week between Monday and Sunday. We will try to give you as much advance notice as possible of your working arrangement to

allow you to plan appropriately. Whilst we always try to provide a good work/life balance, Webhelp reserves the right to vary (by increasing or decreasing) your hours of work on a short or long-term basis to allow us to be as flexible as possible to deliver great service to our clients and to suit commercial needs." That was the basis upon which the other staff worked.

13. The Respondent required its staff (unless specifically agreed) to work such shifts as it determined on a week by week basis. Staff ordinarily worked 5 days over 7 in each week on varying shifts, whether an early shift (ordinarily 7 or 8am to 4 or 5pm), a mid-shift (such as 11 to 730pm) or a late shift (such as 12 till 830pm).

14. Ordinarily the Respondent applied a 12-week shift rotation. 3 weeks would be spent on a late shift (which could have finish times between 8 and 11pm) with 9 weeks on day (or mid) shifts. Staff worked 5 days out of 7 but not necessarily with 2 consecutive days off (unless a specific agreement was reached with the Respondent to fix the shift pattern).

15. Given the nature of the Respondent's business, demand was much higher in the evenings. During the day, 12 noon can be the busiest time with the volume of calls dropping substantially in the afternoon. The Respondent did not need a large number of staff between 9am and 5pm. Saturday was the busiest day and often the most common day for holiday requests.

16. Shifts were determined by the planning team (with input from the operation team and line manager as appropriate). It was possible for team leaders to agree temporary shift changes for colleagues but any change to the shift pattern would require the input of the planning team to ensure there was cover elsewhere (and shifts were shared).

17. The planning team prepared shifts based on the forecasts from clients to ensure forecasted shifts are covered and that the Respondent was likely to meet its commercial obligations. A failure to deal with calls with sufficient alacrity could result in a financial penalty. The Respondent also sought to be

fair with regard to the distribution of shifts, including those during the weekend and those where a worker would require to work unsociable hours.

The team

18. The Claimant worked in a team of between 10 to 15 agents each of whom reported to the same Team Leader. The Claimant was an effective contributor to the team. He worked within a specific campaign for a specific client.

Disability

19. The Claimant has a disability in terms of the Equality Act 2010, namely epilepsy. He has also suffered from non-organic psychosis and multiple sclerosis. In September 2018 the Claimant was told he could not drive. His epilepsy remained drug resistant. The Claimant experienced seizures which were unpredictable and which can be triggered by stress and sleep deprivation.

Policy documents

20. The Respondent had a number of policies that set out relevant policies and procedures.

Flexible working policy

21. The flexible working policy allowed employees to request changes to their shift pattern. Under “who is eligible to apply”, it stated: “any employee as long as you have 26 weeks continuous service and have not made a request under the policy in the last 12 months”. The policy is engaged by the employee completing a flexible working application form through the flexible working application screen on the intranet portal. Once that was done the line manager should be advised so the application can be reviewed who would then work with the employee and the people advisor team (the HR team) to explore the request and see if it could be accommodated.

22. If necessary, a flexible working meeting would be convened (if the request could not be immediately granted) and a discussion would take place with a letter being issued. The Respondent sought to try and reach agreement with

those who wished flexible working, where possible. The policy stated that the Respondent would act with integrity when considering all requests and accommodate them when business needs permit. Requests would be considered on their own merits. Agreeing to one person's request in the past did not set a precedent.

23. The 8 legal reasons for refusing requests were set out, as was the appeal process. If it was unsure whether the proposal would work, a trial period was possible which would normally last from 1 to 3 months but it would be at the manager's discretion.

24. Although this policy is stated to relate to flexible working, the Respondent insisted that all staff who wished the Respondent to make adjustments to their working pattern in terms of the Equality Act 2010 make an application under that policy. Unless a request to make a permanent shift change (even as a reasonable adjustment) was made as a formal flexible working request, the matter would not be progressed.

25. The Respondent dealt with flexible working requests regularly and around 50% were for "medical reasons". Around 22% of the Respondent's working population were subject to positive flexible working requests.

Dignity at work

27. The Claimant's contract also had a section on "Dignity at work and equality and diversity policies" which stated that the Respondent was a non-discriminatory employer and believed all employees should enjoy a working environment free from discrimination and that the company was committed to equal opportunity. Reference was made to the company's Dignity at Work and Equality and Diversity Policies which were to be found on the company intranet.

28. In the Equality and Diversity policy which is said to supplement the dignity at work policy, the Respondent recognised that to remain successful in a competitive industry it required to nurture high performance through the development of a diverse workforce. To that end, the Respondent was committed to ensuring all decisions about employment and development of

staff are objective decisions made with integrity and based on merit whilst supporting business goals. The starting point for ensuring diversity exists is to be committed to maintaining good practice in relation to equal opportunities and to be prepared to review policies regularly. Working practices were to be free from unlawful discrimination.

29. The managers' responsibility was to ensure employees under their control have understood the need to follow and adhere to the Equality policy. They should be the recipient of allegations of discrimination and contact the people advisory team and follow the appropriate policy. Managers had a positive duty to make reasonable adjustments to the job and the working environment to ensure a disabled worker can perform the job role.

Absence policy

30. The absence and wellbeing policy stated that the Respondent was committed to promoting the health safety and wellbeing of its workforce and regarded high level of attendance at work as vital to ensure operational and service levels were maintained. Where staff were absent the Respondent would work with the employee to offer help and support in a fair, compassionate and consistent way.

31. The policy stated that there would be a consistent framework for reporting recording and managing attendance and that open communication would be encouraged. An aim was to: "identify employees who may require support to return to work/remain in work and identify any support and reasonable adjustments which may be required." Managers were encouraged to speak with the HR team (the people advisory service) for support.

32. Under the heading "Supporting people with disabilities" the Policy stated that the Respondent would work with and support employees with a disability. It was stated that: "Our primary duty under the Equality Act is to make reasonable adjustments which may mean any or all of the following – addressing situations where a provision or practice applied by the employer puts a disabled person at a substantial disadvantage compared to those who are not disabled".

33. In a section entitled “mental health” the policy stated that the Respondent was committed to supporting people with mental health illnesses.

Grievance policy

34. The grievance policy explained that a positive working environment for all staff was sought where problems are resolved in an informal way, where possible, which failing within a robust and fair formal framework. A grievance is defined as “any cause of dissatisfaction or feeling of injustice on the part of any employee arising out of the work situation or the application of conditions of employment”. Employees should try and resolve matters informally. There are employee and employer responsibilities set out in the policy.

35. Informal resolutions should be sought with the line manager which would often avoid the need for formality. If that was not effective, a formal grievance can be lodged with the line manager in writing. A grievance should be lodged within a reasonable period of time, normally within 20 working days and not more than 3 months after the event and the formal process is set out, involving a meeting and written outcome and appeal.

Induction for the claimant

36. On 20 August 2018 the Claimant began his employment with the Respondent at the Glasgow Hope Street site. There was two-week induction process during which the Claimant was shown how to access the Respondent’s systems, which included the intranet and how to access his own records (via the online portal). The Claimant was also shown how to access the Respondent’s policies which were within the portal.

37. The Claimant had disclosed his epilepsy to the respondent. During August 2018 the Claimant’s impairment had worsened and during his induction process he had asked about reducing his working hours. He had been told that if he wished to change his shift pattern (which would be variable dependent upon business need), he would require to make a formal flexible working application. The Claimant suffered severe mental health difficulties and relied upon his managers to guide and support him.

38. The Claimant completed his induction and worked for the Respondent.

Absence

39. On 18 September 2018 the Claimant was absent from work due to a double sleep seizure.

40. On 12 November 2018 the Claimant was absent from work due to another seizure.

41. From 25 to 28 November 2018 the Claimant was absent from work due to further seizures.

Claimant seeks reduced shifts

42. As a result of the Claimant's impairment, he had spoken with his then line manager about the impact this had upon his health and the need for a change to his working pattern. The variable shift pattern in particular was causing the Claimant stress which was impacting upon his seizures. He was told to monitor his health and report to his new manager, Mr Adams, later in the year.

43. The Claimant told his line manager that he needed to change his shifts (and secure fixed shift patterns) given the stress this caused him which could in turn lead to seizures. He was concerned that the different shifts which he was scheduled to work were affecting his health which he considered to be worsening. He was told that a resolution to his request ought to be possible by December 2018. The Claimant had significant healthcare support and he decided to await the resolution. The Claimant understood his line manager was making enquiries on his behalf (with the planning team) about changing his shift pattern. The Claimant continued to attend work during the varying shifts for which he was scheduled each week.

Medical evidence

44. On or around 21st December 2018 the Claimant requested a letter from his epilepsy nurse specialist to evidence the issues his impairment caused him in relation to his work.

45. On 22 December 2018 the Claimant was absent from work due to a seizure and the Claimant was admitted to hospital on 24 December 2018 due to seizures.

Claimant tells his line manager he needs fixed shifts

46. During December 2018 the Claimant had discussions with his manager again, and told him that he required to alter his shift pattern given the impact of his impairment. The Claimant believed that his manager would enter the necessary information within the Respondent's intranet. The Claimant believed that a flexible working application had been made on his behalf to change his shift pattern.

Letter from specialist nurse

47. On or after 3 January 2019 the Claimant handed his line manager a letter addressed "to whom it may concern" which was dated 31 December 2018 from his Epilepsy Nurse Specialist. That letter stated:

> "Mr Tariq has a diagnosis of epilepsy. He is known to Dr Greene, Consultant Neurologist. He attends regular reviews with Dr Greene at the epilepsy service in the Queen Elizabeth Hospital in Glasgow. He also attends the nurse service where he is under the care of me. Mr Tariq requires to take regular medication for his epilepsy. He experiences seizures which are unpredictable. His seizures can be triggered by stress and sleep deprivation. I would be grateful if consideration could be made to his diagnosis of epilepsy and the possibility of allowing him to work a more regular shift pattern in order to prevent periods of sleep deprivation. Please contact me if you require any further information" A telephone number was provided.

48. On 4 to 6 of January 2019 the Claimant was absent from work due to seizures.

First welfare meeting

49. On 11 January 2019 the Claimant was called to attend a Welfare Meeting with Ms Watson and Mr McIntyre. Mr McIntyre had recently joined the Respondent. He had become the Claimant's new line manager.

50. The notes from this meeting are partly written and partly typed. The note taker was said to be Ms Watson with the line manager said to be Mr McIntyre. The notes said that: “This is an informal meeting to allow us the chance to get an update of your health situation and to determine if there are any reasonable adjustments we can provide to support you now or in the future. We will record our conversation and log any actions that we agree from today.”

51. The reason for the welfare meeting was stated to be “support whilst at work”. The checklist had ticked (from the line manager’s side): medical certificate details updated on the intranet, absence records up to date, welfare record up to date, welfare notes up to date and times sheets updated to reflect absence.

52. Under the heading “current health” it stated that the Claimant was “in in good health at the moment but for his specific medical condition he has been experiencing seizures every few weeks – sleep epilepsy”.

53. Under the heading “medical recommendation” (which was stated to require inclusion of any guidance or recommendations from a GP) it stated: shorter shifts (6 hours), a fixed shift pattern (with a 9am start) and a preference for 2 days off together.

54. Under the heading “reasonable adjustment considerations” (with the guidance saying: capture any reasonable adjustments to support the employee back to work to support whilst at work) it stated: “fixed shift pattern – pre-approved, reduce hours and have days off in a row”.

55. The Respondent understood that the Claimant’s impairment was such that he required fixed shifts, fewer hours per week and consecutive days off.

56. Under “support network” it stated that there was a Specialist Nurse on call, Consultants and the Claimant’s wife offered good support.

57. Under the heading “anything else” it stated that if the Claimant had health problems “they can become more serious when in poor health.” The Claimant was due to start new medication.

58. Finally, under “agreed actions” (which was to confirm actions agreed from the meeting when it will happen and who is responsible for the actions) it stated that the Claimant’s “shifts will be amended for 0900 until 1530 which will give him fixed shift patterns and reduced hours. The outcome should see a reduction in absences linked to epilepsy.”

59. The document ended saying: “please certify below that these notes are an accurate representation of the discussion that took place” and the Claimant and the line Manager and note taker signed.

Shifts the Claimant was scheduled to work December to February

60. The Claimant was told that the adjustments to his shift discussed at the welfare meeting would be temporary in nature, to ascertain how they affected his health. The actual shifts the Claimant was scheduled to work were as follows.

61. In the week of 30 December 2018 and 6 January 2019 the Claimant had been working an early shift of Monday to Friday (8 or 9am to 530pm).

62. After the welfare meeting on 11 January 2019 the Claimant was placed on a shift pattern of 9 to 530 Monday to Friday. This was done whilst Mr McIntyre sought input from the planning team. His shifts after this week were as follows.

63. In the week beginning 13 January the Claimant worked an early shift (of 8 or 9 to 430, 5 or 530) with Tuesday and Saturday as rest days.

64. In the week beginning 20 January 2019 the Claimant worked an early shift (9 till 530) with Sunday and Thursday as rest days

65. In the week beginning 27 January 2019 the Claimant worked an early shift with Wednesday and Saturday as rest days

66. For 4 weeks, namely the weeks beginning 3, 10, 17 and 24 February 2019 the Claimant worked an early shift with Sunday and Saturday rest days

67. On 14 February and 9 March 2019, the Claimant was absent from work due to a seizure.

68. In the week beginning 24 February 2019 the Claimant worked an early shift with Sunday and Friday as rest days.

69. The Claimant would have regular oral interactions with his manager during his shift. The Claimant would regularly raise the issue as to placing the Claimant on the shift pattern that was discussed at the January meeting (which was 9 to 330 with 2 consecutive days off). He was told matters were being investigated (and that Mr McIntyre was in discussion with the HR team) but matters did not progress. The Claimant did his best to attend the shifts for which he was scheduled but he believed his health was being affected.

Evidence from Consultant in February 2019

70. Mr McIntyre had told the Claimant following the welfare meeting that an opinion from his consultant would add greater weight to the Claimant's request for a permanent change to his shift. The Claimant took that on board and decided to seek such an opinion and on 20 February 2019 the Claimant received a letter from his Consultant Neurologist, Mr Greene.

71. That letter stated: "This is to state this man attends my epilepsy clinic. He attends regularly but despite trying a multitude of drugs his epilepsy remains quite drug resistant. Given that drugs are only having limited benefit, it is important to try to ensure that all other potential aggravating factors are mitigated. It is well known that shift work can have a negative impact on epilepsy and I would be extremely keen for him to have a regular shift pattern as lack of sleep is well known to aggravate epilepsy. Shifting the weekly time cycle as occurs with working shifts also has an impact on epilepsy. The more that his shift pattern could be regular then the better this would be for his epilepsy. Currently his epilepsy is poorly controlled and he is doing little other than working and sleeping and feels exhausted and fatigued on the hours he is awake. He would greatly benefit from working reduced hours. He would need to reduce his hours to about 4 to 6 hours per day for this to have a beneficial impact on his epilepsy control. There is often a nuclear variation in epilepsy control and the Claimant's seizures are mainly occurring at weekends. A better week to week routine gives regularity in terms of the 7-day body clock just as the shift pattern has an

impact on the 24-hour body clock. It is extremely important for him to have adequate rest days and I would be keen for him to have a work routine of avoiding Saturdays and Sundays. This is likely to have a beneficial impact on his epilepsy control and reduce the number of sick days. I would be extremely keen if these issues could be considered by his employer. He adheres completely to the recommended medication There are no other lifestyle factors which aggravate his epilepsy. He has tried multiple drugs and the only means of trying to improve his seizure control is to alter his work life balance and his sleep/wake cycle as per the above. If the above could be accommodate by his employer I think it highly likely that this would have a positive impact on his epilepsy control."

72. The Claimant gave this letter to Mr McIntyre shortly after he received it on 20 February 2019. The letter was not logged on the intranet and the Claimant's shift pattern was not changed. He was scheduled to work on variable shifts.

Shifts the Claimant worked in March 2019

73. In the week beginning 3 March 2019 the Claimant worked an early shift with Sunday and Thursday as rest days. After this date the Claimant was scheduled to work for later shifts. His shift pattern had not been fixed (nor reduced).

74. In the week beginning 10 March 2019 the Claimant worked an early shift for the Sunday to Tuesday, a rest day on Wednesday then a mid-shift (11am to 730pm) on the Thursday and Friday with the Saturday as a rest day.

75. In the week beginning 17 March 2019 the Claimant had a rest day on the Sunday, worked an early shift on the Monday and Tuesday, a late shift on the Wednesday, Thursday and Saturday (from 2pm until 10pm) with Friday as the rest day.

76. In the week beginning 24 March 2019 the Claimant had Sunday and Saturday as rest days and was scheduled to work an early shift.

77. The irregular hours and long shifts had affected the Claimant's health and his mental health was suffering, He was concerned that the anxiety he experienced because of his work triggered seizures.

Disciplinary issue

78. On Monday 25 March 2019 an investigation was undertaken in relation to a call the Claimant had taken that morning where he had hung up during a discussion with a customer. The Claimant explained that he had "health concerns playing on his mind" which he believed affected his performance.

79. By letter dated 27 March 2019 the Claimant was invited to a Disciplinary Hearing to discuss the allegation that the Claimant had hung up during a customer call.

80. At the hearing on 29 March 2019 the Claimant admitted the conduct and said that he had health issues. The Claimant explained that his seizures tended to happen on a Friday/Saturday and they "explained everything that happens". He also referred to the consultant letter and that nothing has been done with regard to reducing his shifts.

81. Following an adjournment, the Claimant was told that "taking everything into account we are going to give you a first stage written warning taking into account how you are feeling and having listened to your calls. We are going to arrange a Welfare (meeting) to see what further we can do for you."

82. On 29 March 2019 an outcome letter was issued to the Claimant confirming the decision to issue a written warning.

Weeks the Claimant worked from 7 April

83. In the week beginning 7 April 2019 the Claimant was on holiday on Sunday Monday and Wednesday. He had a rest day on the Tuesday and was sick on the Thursday. He was on an early shift on the Friday and a rest day on the Saturday. The Claimant was absent on 11 and 17 April and had a seizure.

84. In the week beginning 14 April the Claimant was on an early shift (8 till 430) with rest days on the Sunday and Thursday.

85. In the week beginning 21 April the Claimant was on a late shift the Sunday to Tuesday (2 till 1030), a rest day on the Wednesday with an early shift on the Thursday (8 to 430) and a mid-shift (11 till 730) on the Friday with Saturday as a rest day.

86. By late April 2019 Mr McIntyre had noticed that the Claimant was becoming more withdrawn.

Second welfare meeting 29 April 2019

87. On 25 April 2019 a second welfare meeting was convened with the Claimant, Mr McIntyre (as his line manager) and Mr Blair as the note taker. The notes were typed. They stated that the meeting was an informal meeting to allow the Respondent the chance to get an update of the Claimant's health situation and determine if there were any reasonable adjustments that can be provided to support the Claimant. Any actions that were agreed were to be logged.

88. None of the boxes under "update medical certificate screen" was ticked. Under "current health" it stated that the Claimant is "in OK health (not too bad) however earlier in the year it was a concern especially January/February and his main concern would be if something was to happen at work as it would not be good for anyone. Seizures have an after effect which is naturally already hard enough taking into account the recovery that is needed from them. The key trigger is the late shift. He had already taken a panic attack on shift during a late shit and this was enough for the Claimant to question if he should even be here."

89. Under "recommendation" it stated: "Already been provided some insight to this previously – noted on Cascade (the intranet portal); late shifts increase fatigue which increases the opportunity to have an adverse effect for the Claimant; ideally looking to work Monday to Friday 0900 to 1530, can't do extra late shifts and may struggle to continue with 8-hour shifts."

90. Under the heading “reasonable adjustment considerations” it stated that Mr McIntyre had a proposal for the Claimant based on how he had seen and dealt with the Claimant. The proposal was (1) 8-hour shifts with a set time of 0800 or 0900 with 2 rest days together, (2) initially pushing for Monday to Friday for the first 2 weeks and (3) run for a period of 4-6 weeks with a review at the 2, 4 and 6-week stages.

91. Thus, by this stage the Respondent was aware of the medical impact of the Claimant’s impairment and that he sought Monday to Friday shifts (on a fixed basis) with restricted hours, namely 9am to 330pm.

92. Under the heading “support network” it was stated that Mr McIntyre would continue to support the Claimant and “doing the above will allow all parties to review if we see and feel improvement”.

93. Mr McIntyre stated that this was not a flexible working agreement but an individual agreement “to be kept personal and confidential”.

94. This was to be reviewed in 2 weeks’ time and as above. The note ended reiterating that this was not a flexible working agreement.

95. The notes were not signed.

Shifts the Claimant worked from 28 April 2019

96. In the week beginning 28 April the Claimant had a rest day on the Sunday, early shifts on the Monday and Tuesday, late shifts on the Wednesday and Thursday, a rest day on the Friday and a late shift (10 till 630) on the Saturday

97. In the week beginning 5 May the Claimant had a rest day on the Sunday, early shifts (9 to 530) Monday to Thursday and a late shift (10 to 630) on the Friday with a rest day on the Saturday.

98. In the week beginning 12 May the Claimant had a rest day on the Sunday, a mid shift on the Monday (11 until 730), an early shift (8 to 430 on the Thursday,) a rest day on the Wednesday and early shifts (8 to 430) on the Thursday to Saturday.

99. In the week beginning 19 May the Claimant had a late shift (1 to 930) on the Sunday, sickness on the Monday, rest days on the Tuesday and Wednesday with early shifts (9 to 530). On the Thursday and Friday and an early shift (7 to 330) on the Saturday.

100. In the week beginning 26 May 2019 the Claimant had early shits (8 to 430) on the Sunday and Friday, 9 to 530 on the Tuesday, rest days on the Monday and Thursday and an early shift of 7am to 330 on the Saturday.

101. In the week beginning 2 June 2019 the Claimant had a rest day on the Sunday, Wednesday and Thursday with shifts from 9 to 530 Monday Tuesday Friday and Saturday.

102. In the week beginning 9 June 2019 the Claimant was absence on the Sunday Tuesday and Wednesday, worked extra-long shifts on the Monday (9am till 8pm) and Saturday (8am to 7pm) with rest days on Thursday and Friday.

103. It was clear that the fixed shift pattern that had been discussed as necessary to assist the Claimant's health at the welfare meeting in April had not been implemented.

Email from Claimant's wife to his line manager

104. On 10 June 2019 the Claimant's wife sent an email to Mr McIntyre as follows: "I hope you are well. I have been meaning to get in touch for a number of weeks but something kept getting in the way! I am really concerned about these extra-long shifts that have popped up on the Claimant's schedule. I wondered if the next Welfare Meeting could be on a Monday or Tuesday as I would like to attend with him just so I know what is happening. Things are quite hard for us at the moment in that the Claimant comes home from work and doesn't have the energy for anything else. Weekends are either spent recovering from seizures/working/resting leaving absolutely no room for a normal family life. My understanding was that there was going to be a more regular pattern of shifts. As per his neurologist's letter reducing hours would ultimate have a huge impact on his quality of life. I am not sure what the position is on the reduced hours as the Claimant has not mentioned anything about this for some time.

He has been quite anxious about these shifts and this has impacted on his sleep. I believe he is scheduled for 3 of these at the moment before he has a break. His last lot of seizures were very frightening for me to witness and occurred 5 days after he already had one. My primary goal at the moment is to try and help him go longer without having them to allow him to recover as he isn't getting a chance to do that. I really appreciate everything that has been done so far to help him as his confidence in himself is slowly increasing. There is so much I have to deal with at home with his health and our son so any help outwith would be great. I appreciate you are incredibly busy but any update on the above matters would be great so I can prepare myself for the coming days."

105. Mr McIntyre did not reply to that email.

Shifts the Claimant worked from 16 June

106. In the week beginning 16 June 2019 the Claimant had an early shift on the Sunday (7am to 330pm), a late shift on the Monday (12 to 830pm), an early shift on the Tuesday (9am to 530), rest days on the Wednesday and Thursday with a mid-shift on Friday (11am to 730) and an early shift (10am to 630) on the Saturday.

107. In the week beginning 23 June 2019 the Claimant worked early shifts of 10 till 630 on the Sunday and Monday, a rest day on the Tuesday and Saturday, a mid shift (10 till 630 on the Wednesday), extra long shift on the Thursday (11 to 730) and a late shift (11 till 730) on the Friday.

108. In the week beginning 30 June 2019 the Claimant had rest days on the Sunday and Saturday, sickness on the Monday, and early shifts (8 till 430) the Tuesday to the Friday.

109. The Claimant was not being given a fixed shift pattern and this was having a serious impact upon his health. There had been no discussion with the Claimant as to the shift pattern nor the impact on his health, following the welfare meeting in April.

Occupational health input at the Claimant's behest

110. On 7 July 2019 to 31 July the Claimant was on leave. On 29 July 2019 the Claimant chose to attend an Occupational Health Assessment privately having been referred via his own GP. The review stated that the Claimant may be fit for work if the recommendations were taken on board.

111. The fitness for work report stated that with the Respondent's agreement the Claimant may benefit from altered hours and amended duties. The difficulty set out in that report was that the Claimant's health condition was exacerbated by his current shift pattern and work-related stress. The goals that the Claimant discussed with the adviser were consideration to be given to a consistent shift pattern avoiding last minute changes, working reduced hours (to a 6 hour shift), working a Monday to Friday shift pattern (with the understanding that some weekend working is needed), and allowance to be made for his spouse to call on his behalf.

Shifts from 28 July 2019

112. The Claimant was on holiday from 7 July to 31 July. In the week of 28 July, he was scheduled to be on a rest day on the Sunday, he worked a mid-shift on the Thursday (1000 till 630) and a late shift on the Friday (2.00 till 1030) and a rest day on the Saturday.

113. From around mid-July 2019 the Claimant's team leader changed. Mr McIntyre was no longer the Claimant's manager. There was no evidence of any handover between Mr McIntyre and the Claimant's new line Manager with regard to the Claimant's request for a fixed shift pattern given the impact upon his health.

114. In the week beginning 4 August the Claimant had rest days on the Sunday and Monday, early shifts from 9am to 530 on the Tuesday to Friday and absence on the Sunday

Email to Operations Manager

115. At the start of August 2019, the Claimant met with one of the managers who knew about the Claimant's position in some detail, Ms Bradley. The Claimant

had been concerned that his previous managers had not progressed his request to adjust his shifts and his health was being adversely affected and he believed that Ms Bradley might be able to progress matters. Ms Bradley raised the matter with Mr Farwell, operations manager, her line manager.

116. Mr Farwell looked at the system and found no formal flexible working requests in place in respect of the Claimant. He then checked what shift patterns were currently available. He did not consider what medical evidence was available or might exist in relation to the Claimant.

117. On 6 August 2019 Mr Farwell sent an email to the Claimant headed "fixed shifts" as follows: "Jade [Ms Bradley] has spoken to me today re your concerns over an FWA. I understand that you have requested this on a few occasions. I have sent an email to our cascade team to see what has happened with the other requests as these should never leave the system. Jade has advised that you are also requesting this on the back of advice given by medical experts. Jade has said that you are looking to reduce your hours down to 30 hours per week and are looking for a consistent shift. 0900 to 1530 Monday to Friday however does not support the shape of the business and is not a feasible option. Shift patterns that would offer similar stability and would likely be reviewed and accepted need to include an element of unsociable working. We currently have a Friday, Saturday, Sunday, Monday and Tuesday shift available that would allow you to work 0900 to 1530 and have 2 consecutive days off. Alternatively, if you wanted to drop a day but increase the hours on the other days this would be considered and offer you 3 days off and consistency in your shifts. Thanks."

118. The Claimant replied to that email saying: "Hi It is just that I know people had their shift changed to different patterns to the ones you mentioned and one recently has Saturday and Sunday off. I also would appear to have a stronger case for a shift change which I have requested for 10 months now. I will bear this in mind and have a think about it. Thanks."

119. On 10 August 2019 the Claimant was absent from work sick. Mr Farwell did not progress matters further, including checking the position from the team in

respect of whom he had sent an email to check the position, as he discovered that the Claimant had later gone directly to Ms Gillespie, his line manager.

Shifts from 11 August

120. In the week beginning 11 August the Claimant had a rest day on the Sunday and Saturday and early shifts 8am to 430pm for the Monday to Friday.

121. In the week beginning 18 August the Claimant was scheduled to have a rest day on Sunday to Saturday with early shifts the remainder but the Claimant began his long-term sickness on 21 August.

122. By 19 August 2019 the Claimant's health was suffering such that he struggled to complete his shifts. He was scheduled to work 1130 until 8pm on 19 August 2019 but had to leave around 3pm due to his health.

Email to head of operations

123. On 20 August 2019 the Claimant decided to email Ms Gillespie directly. In an email entitled "Shift patterns, welfare, health and disability support" he stated: "I've got a query about my shifts. I have been trying to get them amended since October 2018 to a Monday to Friday 0900 to 1530 shift pattern for health reasons and I have provided a lot of healthcare support since then as over the months since then my health has deteriorated I've been to meetings and spoken to my managers about this. Eventually the final option I was given about 2 weeks ago was the exact same pattern changes that are available to everyone. Whilst I fully acknowledge that the company has to do what is best for the company I have been left feeling disheartened. This impact of my worsening health has taken its toll on my wife and family. My proposal at this stage would be that whilst I cannot have the 6 hours reduced shift at the moment that I be given 0900-1730 shift Monday to Friday if possible. The reduced hours would really give me a chance to recuperate and its not to say it would be very long term. I have struggled with a few things since October and I was referred to an OT through my doctor who has also outlined some things which could help me. This is a new letter of support which hasn't been handed in to my current manager. I was meant to have a welfare meeting

arranged several weeks ago which never took place. I am currently trying to arrange a third with my new Manager now. I wondered if it may be possible to get some support on this matter and any advice would be greatly appreciated. I have tried pretty much every route for over a half a year now and for 1 month I was given a set shift of 9 to 530 earlier this year when I was just told I needed even more evidence which I provided."

124. Half an hour later Ms Gillespie replied saying; "Thanks for your email. I am sorry to read that you have been unwell. We don't have a Monday to Friday shift unless it is a 5pm until 10pm shift. We have over 300 people who have requested this shift but we have customer demand 7-11pm 7 days a week unfortunately we cannot align a permanent Monday to Friday shift as we need people to do a fair amount of evenings and weekends.

That said, we will review every case on an individual basis. I have a few questions. Did you advise of your medical conditions when you joined and was support offered? Also what shift have you been on?

Whilst I cannot approve this or comment much without understanding all the facts, I will speak to the operation managers and planning to understand if there is a flexible working agreement in place and what review has taken place. While we will always aim to support recovery there are some restrictions on what I can approve as we have a large amount of people all asking for similar shifts which leaves us with no cover at the other opening windows. Thanks."

125. Around an hour or so later the Claimant replied stating: "Thanks for your quick response. For the first 6 weeks I wasn't having seizures and then when they started in October I spoke to my manager. Whilst waiting for changes which I was told could be made with medical support, my condition was worsening. My requests matched my needs, absences and hospital admissions. I have filled in 2 FWA forms. My condition has been shown to be aggravated by late shifts and inconsistencies. Currently I am still on the standard shift pattern alternating all the time. Having Saturday and Sunday off in particular is also important not from a social perspective as I get the impression it may be for some people but health wise. If I had a seizure on regular cycle, approximately on Friday every

2 weeks which seemed to be the problem them I end up with absences on the weekend anyway which is unplanned and worse for the business if anything. I have shown my commitment and resilience since I have been here for the last 12 months and will continue to do my best with determination. It just doesn't seem to fit the ideal routine considering my health. Either way I do appreciate your help in this matter so thanks again."

126. While the Claimant believed he had completed 2 flexible working applications, these had not been formally recorded on the Respondent's intranet. The managers in question knew that the Claimant was looking to restrict his shifts to a fixed pattern of Monday to Friday 9am to 330pm.

Claimant's further absence

127. On 21 August 2019 the Claimant went off on sick leave and on 26 August 2019 the Claimant received a statement of fitness for work from his GP which stated that he had been examined on 26 August 2019 and because of tremor and recent seizure the Claimant was not fit for work. The fit note expired on 16 September 2019. There were no suggestions as to any adjustments from which the Claimant would benefit. The Claimant submitted that to the Respondent by email on 26th August 2019.

Further requests regarding his shifts

128. On 30th August 2019 the Claimant emailed his new line manager, (Mr Mallen), stating that he had been advised to send this (the occupational health letter) regarding his bid to "get reduced and regular Monday to Friday 9 to 330 shift pattern". The Claimant had given his manager a copy of the occupational health report at the end of July. There was no reply to his email.

129. On 4 September 2019 the Claimant emailed his manager again and asked if he had received his last email "regarding occupational health" and whether it had any impact on his shift pattern requests. He asked if there was any update. There was no reply to the email.

130. Om 17 September 2019 the Claimant submitted another statement of fitness for work from his GP stating that due to tremor and recent seizure the Claimant was not fit for work. There were no suggestions as to what would assist the Claimant in his return to work. The note stated the Claimant was likely to remain unfit until 8 October 2019.

Leaving his employment

131. The Claimant had been advised by his doctor that he should leave his employment as the impact on his mental and physical health had become extensive and he could not cope with it any longer.

132. On 1 October 2019 the Claimant emailed the Respondent stating: "I don't have access to my intranet [work email] anymore but I am emailing to hand in my notice. I am on sick leave until the 8 October as is anyway. I am no longer able to continue with the requires shift patterns so must leave. If there is anything that I need to give or hand in to the company can you please let me know asap. Could you also kindly confirm receipt of this message and acceptance of this request/notice. Thanks".

133. On 8 October 2019 the Claimant's employment with the Respondent ended.

Claimant's health

134. Since commencing his employment with the Respondent, the Claimant's seizures increased in frequency. Initially they had been monthly at most, latterly they happened almost on a weekly basis. Whilst he had initially had sleep seizures they had become "awake" seizures. When the Claimant experienced a seizure, appropriate support is needed. The Claimant began to have seizures near the end of the week. His wife was able to support him over the weekend but not so much during Monday to Friday.

Observations on the evidence

135. While each of the witnesses sought to do their best and provide the Tribunal with their evidence to the best of their recollection, a number of issues arose.

136. Firstly, with regard to the Claimant there were a number of areas in which the Claimant's oral evidence differed from the evidence within his written witness statement or when he was tested in relation to certain points.

137. For example, with regard to when the Claimant was more susceptible to seizures, his initial position was that he was more susceptible to seizures at the end of week and that was why he had told Ms Gillespie on 20 August that he sought week day shifts. The Respondent's agent took the Claimant through a number of his absences which appeared to how his absences did not have any particular pattern and did not appear to support the assertion that his absences occurred at the same time.

138. While we note that position, we do take account of the consultant neurologist's expert view which is clearly that the Claimant's seizures did mainly occur at weekends and that he should avoid Saturday and Sunday working. Even if the Claimant was able to manage is seizures, such that he did not require to take the same time off, we did not consider this issue to fundamentally affect the Claimant's credibility.

139. When asked in cross examination about why he was seeking week day shifts the Claimant's focus was on the support he had at home. He noted that his wife would be able to help him during the weekend but not so much during the week which meant that working weekends was problematic. He did not focus upon the medical issue (and in fact the medical evidence that showed working weekends in fact exacerbated his impairment). We found that surprising but it did not detract from the medical evidence presented to the Tribunal. The Claimant's health had been affected and we took that into account.

140. We did not consider the Claimant's evidence that the intranet had "stopped working" for a number of months was entirely accurate on the balance of probabilities. It was possible that certain parts of the system may not have been working correctly and that some areas may have had reduced functionality. The Claimant may have believed that the system was not working but we did not consider as a fact the system had ceased to operate. That did not suggest, however, that the Claimant was not telling the truth as it represented his

understanding and his experience of the system. We also considered that the Claimant had been given details as to the relevant policies and of how to access them (and the intranet portal generally). While the Claimant may not have been proficient in the use of the system, we did not consider that the system was "down" as alleged by the Claimant. Each of the Respondent's witnesses was able to use it. If the Claimant had difficulty with the system he could (and should) have raised it at the time. There was no evidence that he had done so.

141. We also took into account some contradictions within the Claimant's evidence with regard to the status of his health during 2018 and what he said had happened with regard to the recommendations at the January welfare meeting but we did not consider these issues to fundamentally affect the Claimant's credibility.

142. We did find it surprising that the Claimant purported not to know what a grievance was when asking during cross examination given his previous employment history and experience and given the existence of a grievance policy, which the Claimant could have engaged if he wished (or sought assistance to do so) but that again did not affect the issues we had to determine. We considered the Claimant's health to potentially have affected his position.

143. We approached the Claimant's evidence with some caution given the inconsistencies, but we did not consider that the Claimant was dishonest nor was he seeking to misrepresent the position. We considered that he was trying to recollect matters to the best of his abilities given the health challenges he faced.

144. While the Claimant believed that 2 flexible working applications had been formally lodged on his behalf, the Respondent's systems did not show that. We concluded that this was more likely than not to be due to the fact that the Claimant's manager had not entered the information on the system. While the policy had made it clear that it was the worker who should input the information, the Claimant had understood, in light of the health challenges he faced, that

his manager would process matters. The Claimant understood that telling his managers, in clear terms, with appropriate medical evidence, as to what he needed, would be sufficient and would be processed. He understood his request were being processed, even although there was no formal request logged on the system.

145. We found Mr McIntyre's evidence to provide very limited assistance. He was cautioned on a number of occasions to ensure that rather than simply deny remembering that he do his best to recall what happened and provide the Tribunal with evidence on which it could make a decision. We found it very surprising that Mr McIntyre was unable to recall significant issues that had occurred during the period when he managed the Claimant, particularly with regard to significant aspects of his management, such as the rationale for his actions and steps taken with regard to implementing what was agreed. His inability to recall significant matters was surprising. This affected the cogency of the evidence that he was able to provide. He was unable to say, for example, what had in fact happened with regard to the Claimant's shift pattern following both welfare meetings, despite this being one of the key issues in this case.

146. The Respondent's agent conceded that the inability of Mr McIntyre to recall certain matters created serious difficulties for the Respondent given the absence of any records or detail as to what actually happened, thereby providing no evidence as to certain important matters, such as what happened between the first and second welfare meeting with regard to the Claimant's shifts. While it appeared that agreement had been reached as to the Claimant's shift pattern, the evidence did not reflect such a pattern emerging.

147. We carefully considered Mr McIntyre's evidence that he did not recall receiving the consultant's letter of 20 February 2019 from the Claimant. We preferred the Claimant's evidence in this regard, that the letter was hand delivered to Mr McIntyre. We preferred the Claimant's evidence in that regard for a number of reasons:-

    a) Firstly, the Claimant was clear in his recollection that he had done so. Mr McIntyre was entirely unclear. In this respect we accepted the

Claimant's evidence which we found to be credible and reliable. There was no reason for the Claimant not to tell the truth on this point.

b) Secondly, the letter itself was a "to whom it may concern letter" and was identical in that regard to the letter dated 3 January 2019 from the nurse practitioner. The Claimant said he had given that letter to Mr McIntyre which Mr McIntyre accepted he had received. It was more likely than not that the same had occurred with regard to the consultant letter and that Mr McIntyre had simply forgotten that he had been given the letter on this occasion.

c) Thirdly, it was accepted that the Respondent had asked for more evidence, particularly from a consultant, to bolster the Claimant's position, particularly as the shift pattern he sought was commercially difficult for the Respondent to accept and so the more medical evidence the Claimant had, the more likely the Respondent would apply its policies with regard to reasonable adjustments and support the Claimant. The Claimant had done as requested and there had been no evidence from the Respondent that suggested the Claimant had not done as had been requested. We did not consider it likely that the Claimant had secured the consultant letter and not disclosed it to the Respondent given its content and what the Claimant had been told.

d) Fourthly, we note in the email the Claimant's wife sent to Mr McIntyre on 10 June 2019 reference was made to the neurologist's letter (and that this supported his reduced shifts). Again, there was no suggestion from Mr McIntyre at the time that this was material he had not seen. In fact, there was no reply to the email. We considered it would have been more likely than not that if Mr McIntyre had not seen the letter which the Claimant's wife referred to, he would have asked about it. .

e) Fifthly, we also took into account that at the disciplinary hearing in March the Claimant again referred to the consultant letter and that nothing was getting done with regard to his shift changes needed. This again showed that such a letter existed and that the Respondent knew of it. It was

unlikely that the Claimant would refer to it had he not given it to his line manager.

f) We took into account the absence of any reference to the letter on the Respondent's system, and the fact that Mr McIntyre did not think he had received it (albeit was not entirely sure) but that was not of itself evidence the letter had not been received. Not all information was contained on the Respondent's systems and no steps had been taken by the Respondent to seek the information that they had sought. Mr McIntyre was not at all clear as to his recollection and it was entirely possible he had received the letter but not progressed matters, such as by placing the letter on the intranet system.

g) On the balance of probabilities, from the evidence before the Tribunal, we concluded that the Respondent was given the letter from the Claimant's consultant in the course of February 2019.

148. We found Mr Farwell and Ms Gillespie to be impressive witnesses who provided clear and cogent evidence. Both witnesses were candid and accepted for example that had the letter from the consultant been placed before them (or had they asked for it) they would have taken further steps. Significantly both witnesses accepted that if the medical position was such that weekday working was needed, the commercial difficulties in so doing could be overcome and an accommodation could be made to support the Claimant.

149. Another conflict in the evidence was whether or not the Respondent had been given a copy of the Occupational Health Report of 29 July 2019. We concluded that this had been given to the Respondent. The Claimant believed he had submitted it to the Respondent and said in cross examination that he gave it to his Manager at the time. He referred to it in his email to Ms Gillespie on 20 August saying: "This is a new letter of support which hasn't been handed in to my current manager." That was an email the Claimant sent on 20 August. In cross examination the Claimant said he made a mistake in his email as he did provide the report to his manager. We considered from the evidence before us that it was

more likely than not that the Claimant did make a mistake in his email and meant to say: “This is a new letter of support which has been handed in to my current manager” or alternatively he gave the report to Mr McIntyre who was his manager until around the end of July and had not given the report to his then current Manager (on 20 August). We were satisfied that the Respondent had been given a copy of the document. We took into account that by this time the Claimant’s health had been adversely affected and that was likely to have been a factor causing the error.

150. In any event on 30 August 2019 the Claimant emailed his then manager referring to the report saying: “I have been advised to send this to you regarding my bid to get reduced [shifts]”. The “this” referred to was the report in question. We took account of the fact that the email print out did not obviously have an attachment but we considered that it was more likely than not that the Claimant was correct in his recollection that it had been given to the Respondent. If the email did not have an attachment it was more likely than not that the recipient of the email would have asked for it. There was no reply to the email, which suggested the email had been complete and did not require any follow up. Indeed, in the Claimant’s email of 4 September the Claimant referred to the previous email and “regarding occupational health info” which supported the conclusion that the email did have attached to it, the occupational health report. There was no reply to the email of 4 September and had the occupational health report not been received it would have been more likely than not that the recipient would have sought this.

151. It was consistent with the Claimant’s approach which was to provide the Respondent with as much information that he had to support his request. There was no reason given the Claimant’s approach to why he would not provide the letter when he did. He had told Ms Gillespie that he had the information and told his manager thereafter.

152. The absence of the document on the intranet was not conclusive since it was clear that not all of the information the Claimant had provided was properly

recorded. On balance we concluded that it was more likely than not that the report was provided to the respondent.

Law

153. The complaints of disability discrimination were brought under the Equality Act 2010. By section 109(1) an employer is liable for the actions of its employees in the course of employment. In deciding the discrimination claims, the Tribunal is to have regard to the Equality and Human Rights Commission Code of Practice in this area. We have done so.

Burden of proof

154. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides as follows:

> "(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."

155. The section goes on to make it clear that a reference to the Court includes an Employment Tribunal.

156. It is for a Claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the Claimant establishes those facts, the burden shifts to the Respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

157. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in ***Igen Limited v Wong*** *2005 ICR 931* and was supplemented in ***Madarassy v Nomura International plc*** *2007 ICR 867*. Although the concept of the shifting burden

of proof involves a two stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

158. With regard to the burden of proof in reasonable adjustment cases, the Employment Appeal Tribunal in **Project Management Institute v Latif** 2007 IRLR 579 at paragraph 54 said:

"…the Claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made*."*

159. In this case the Tribunal has been able to make positive findings of fact without resort to the burden of proof provisions.

Reasonable adjustments

160. Section 39(5) of the Equality Act 2010 provides that a duty to make reasonable adjustments applies to an employer. Further provisions about that duty appear in Section 20, Section 21 and Schedule 8. This is considered in chapter 6 of the Equality and Human Rights Commission Code of Practice. That paragraph states: "A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know, … that an interested disabled person has a disability and is likely to be placed at the disadvantage".

161. Therefore the duty does not apply if the employer did not know, and could not reasonably be expected to know that the employee had a disability and was likely to be placed at the disadvantage in question by the PCP (Schedule 8 paragraph 20) (for which see ***Wilcox v Birmingham CAB*** *2011 EqLR 810*).

162. An employer will be taken to know of the disability if it is aware of the impairment and the consequences. There is no need to be aware of the specific diagnosis. If an employer has no actual knowledge of the disability, the Tribunal must consider whether there was constructive knowledge, namely, whether the employer ought to have known of the disability from the facts before the employer at the time (**McCubbin v Perth** UKEATS/25/13).

163. If the employer did not know of the disability (or ought not reasonably to have known) the duty to make reasonable adjustments is not engaged. The same applies if the employer did not know, or could not reasonably have known, of the alleged substantial disadvantage.

164. The Court of Appeal in ***Gallop v Newport City Council*** *2014 IRLR 211* said that it is essential for a reasonable employer to consider whether an employee is disabled, and form their own judgment. In that case the employer relied on advice from Occupational Health that the Claimant was not 'covered' by the Equality Act 2010, and had then unquestioningly adopted that unreasoned opinion. Whilst ordinarily an employer will be able to rely on suitable expert advice, this cannot displace their own duty to consider whether their employee is disabled, and it is impermissible simply to rubber stamp a proffered opinion.

165. In ***Donelien v Liberata UK Ltd 2018 IRLR 535***, Underhill LJ emphasised that an unquestioning reliance on an unreasoned report will not prevent a finding of constructive knowledge. The Respondent in that case was entitled to rely on the Occupational Health Physician’s opinion that the Claimant was not disabled. Along with the medical advice, the Respondent took into account its observations at return to work interviews, GP letters provided, and sought clarification of the opinion that was provided. The court said this was not simply a 'rubber stamping exercise'.

166. The Employment Appeal Tribunal considered this issue in **Kelly v Royal Mail Group Ltd** UKEAT/0262/18 which emphasised that it is not sufficient for an employer merely to rubber-stamp in that case the medical advisors’ report and that it must make his own factual judgment as to whether the employee is disabled. The Respondent in that case gave independent consideration to the

matter rather than unquestioningly following Occupational Health reports. It was relevant to note that from the information available to the employer from the Claimant, there had been no suggestion from the Claimant that there was any adverse effect on his day-to-day activities and there was nothing to alert the Claimant's managers to the need to look behind the conclusions of the information they had obtained. In light of all the information available to the employer, this is not a case where it could be said that they had knowledge that the Claimant has a disability. Particular consideration was given to the lack of any evidence that the Claimant's condition was likely to be long-term and/or that it had an adverse effect on his day-to-day activities.

167. When **Gallop** was remitted to the Tribunal it was unsuccessful because the decision maker did not in fact have knowledge of disability and that was upheld by the Employment Appeal Tribunal in ***Gallop v Newport City Council (No 2)*** *2016 IRLR 395.*

168. The question of whether an employer could reasonably be expected to know of a person's disability is a question of fact for the Tribunal (**Jennings v Barts and The London NHS Trust** UKEAT/0056/12*)*. In that case the Employment Appeal Tribunal suggested that an employer should concentrate on the impact of the impairment, not on any particular diagnosis.

169. Langstaff P in **Donelien v Liberata UK Ltd** UKEAT/0297/14 *(*affirmed by the Court of Appeal 2018 IRLR 535) warned that when considering whether a Respondent could reasonably be expected to know of a disability, it is best practice to use the statutory words rather than a shorthand such as 'constructive knowledge' as this might imply an erroneous test. The burden is on the employer to show it was unreasonable to have the required knowledge

170. The duty to make reasonable adjustments appears in section 20 as having three requirements, and the requirement of relevance in this case is the first requirement in Section 20(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".

171. The importance of a Tribunal going through each of the constituent parts of that provision was emphasised by the Employment Appeal Tribunal in **Environment Agency v Rowan** 2008 ICR 218 and reinforced in **Royal Bank of Scotland v Ashton** 2011 ICR 632.

172. As to whether a "provision, criterion or practice" ("PCP") can be identified, the Commission Code of practice paragraph 6.10 says the phrase is not defined by the Act but "should be construed widely so as to include for example any formal or informal policy, rules, practices, arrangements or qualifications including one off decisions and actions". The question of what will amount to a PCP was considered by the Employment Appeal Tribunal in **Nottingham City Transport Limited v Harvey** UKEAT/0032/12 in which the (then) President Mr Justice Langstaff (dealing with a case under the Disability Discrimination Act 1995 and the Disability Rights Commission's Code of Practice from 2004, both now superseded by the provisions summarised above) said of the phrase "provision, criterion or practice" in paragraph 18: "Although those words are to be construed liberally, bearing in mind that the purpose of the statute is to eliminate discrimination against those who suffer from a disability, absent provision or criterion there still has to be something that can qualify as a practice. "Practice" has something of the element of repetition about it. It is, if it relates to a procedure, something that is applicable to others than the person suffering the disability. Indeed, if that were not the case, it would be difficult to see where the disadvantage comes in, because disadvantage has to be by reference to a comparator, and the comparator must be someone to whom either in reality or in theory the alleged practice would also apply. These points are to be emphasised by the wording of the 1995 Act itself in its original form, where certain steps had been identified as falling within the scope to make reasonable adjustment, all of which, so far as practice might be concerned, would relate to matters of more general application than simply to the individual person concerned."

173. For the duty to arise, the employee must be subjected to "substantial disadvantage in comparison to a person who is not disabled" and with reference to whether a disadvantage resulting from a provision, criterion or practice is substantial, section 212(1) defines "substantial" as being "more than minor or trivial". The question is whether the PCP has the effect of disadvantaging the disabled person more than trivially in comparison to those who do not have the disability *(**Sheikholeslami v University of Edinburgh,** 2018 IRLR 1090).*

174. The obligation to take such steps as it is reasonable to have to take to avoid the disadvantage is one in respect of which the Code provides considerable assistance, not least the passages beginning at paragraph 6.23 onwards. A list of factors which might be taken into account appears at paragraph 6.28 and includes the practicability of the step, the financial and other costs of making the adjustment and the extent of any disruption caused, the extent of the employer's financial or other resources and the type and size of the employer. Paragraph 6.29 makes clear that ultimately the test of the reasonableness of any step is an objective one depending on the circumstances of the case. Examples of reasonable adjustments in practice appear from paragraph 6.32 onwards. Paragraphs 17.8 to 17.12 discuss working hours and how adjusting hours of work can be a reasonable adjustment in some cases.

Submissions

175. Both parties had provided written submissions to which both agent's spoke. The agents were asked relevant questions to focus the issues and to ensure both agents were able to respond to the key issues arising in this case.

The Claimant's agent's submissions

176. The Claimant's agent began by confirming that the step relied upon in this case is a fixed shift arrangement running from Monday to Friday 9am to 330pm. She argued this ought to have been implemented following the first welfare meeting in January 2019.

177. The Claimant's agent noted that the Respondent was an international business with a contact centre based in Glasgow which is home to a large client service The business provided a customer service to customers from 7am to 11pm. In order to meet the needs of the customers the business adopted long, erratic shift patterns with only 1 rest day and not 2 days together. It was not disputed that the Respondent is an international company with many procedures in place to ensure that an employee is supported throughout the journey of their employment with them. There were various mechanisms in place to ensure that that Respondent picks up on any distress, ill health or general concerns an employee may have.

178. On 20th August 2018 the Claimant began his employment at the Glasgow site. There was two weeks of induction training. The Claimant had high levels of absence. He was absent on 18 September 2018 due to a double sleep seizure and then again on 12 November 2018 and then again on 5 to 28 November 2018 all due to seizures he was having. The Claimant was having these because of the shift pattern he was working.

179. It was submitted that the Claimant made the Respondent aware that the shift pattern was having an adverse impact on his health. This was relayed verbally to his line managers within this business. On their advice the Claimant sought a letter from his nurse to confirm he had epilepsy and to provide some guidance on what adjustments would remove the detriment. On or before 21st December 2018 the Claimant requested a letter from his Nurse. It was submitted that his managers helped the Claimant complete a form on the Respondents HR system called Cascade around this time. On 22 December 2018 the Claimant was again absent from work due to seizure. It is submitted that by the Respondent's own submission they have in place return to work processes which seeks to engage with the employee on their return to ensure that it is safe for them to return. Therefore, at this point it was the Respondent's responsibility to engage with HR to provide the Claimant the support he needed. There was no evidence of any of these returns to works taking place and there was no record of the discussions leading up to the meeting that would take place on the 13 of January. It was submitted that the culture of the

work environment was such that most of the interactions took place on the floor verbally. It is entirely likely therefore that dialogue was had between the Claimant and his managers around his absences and the issues he was having with the shift pattern.

180. On or after 3rd January 2019, the letter from the nurse was received by the Claimant and given to the Respondent. The Respondent did not dispute this letter was received but cannot recall who received it. This again showed the Respondent's own recording was not accurate. The first welfare meeting was arranged at this point.

181. On 4 to 6 of January 2019 the Claimant was again absent from work due to a seizure. On 11 January 2019 the arranged welfare meeting is held with the Claimant, Mr McIntyre and Ms Watson. The notes of this meeting clearly show that an adjustment to the shift pattern of 9 to 3.30 is agreed. The evidence from the time sheets do not reflect this agreement. The Claimant recalled his line manager gave him guidance at the time of this meeting that a letter from his consultant would carry more weight in allowing his adjustment request to be granted. On 14 February 2019 the Claimant was again off sick but there is no evidence of a return to work meeting.

182. During February the Claimant tried to arrange a letter from his consultant as was requested by his manager. This was received by hand from the Claimant on 21st February 2019 and hand delivered to Mr McIntyre. The Respondent denies receiving this but Mr McIntyre's evidence was not credible. He did not recall anything from the period that he was the Claimant's manager.

183. The Respondent's position was that the Claimant did not follow the flexible working policy but the Claimant was not required to do so. The Claimant would only know to seek medical evidence if he was advised to do so by his line manager. The Claimant consistently stated he was only doing whatever he was asked by his managers. It is likely his actions to seek a medical opinion was as a result of guidance by his managers.

184. The employer's duty begins as soon as it is able to take steps which it is reasonable for it to have to take in order to avoid the relevant disadvantage to the disabled person. It is submitted that this duty began as soon as the Claimant made them aware of the disadvantage but no later than the date they received the letter which was the end of February 2019.

185. With regard to reasonable steps to remove detriment, the Respondent on receipt of the letter of the consultant failed to carry out any follow up to the welfare meeting that took place in January. No referral was made by the Respondent to occupational health. The matter is not escalated by the line manager. It is not until August 2019 – 8 months later - that the matter is picked up by a mid-level Operations Manager, Ms Bradley. It was submitted that this length of time is unreasonable and caused the Claimant severe mental and physical detriment. The Claimant suffered a mental breakdown at the end of August which ultimately led to his resignation in October.

186. Both the Operations Manager and the Head of Operations said that the business would have been able to accommodate the request of a 9am to 3.30pm shift with the weekends off, if it was established that the Claimant would suffer substantial detriment by not being on this shift. The Claimant gave evidence that the weekends off were pivotal as this was to ensure his Carer was available on his days off in the event he had a seizure. The consultant stated that the Claimant's seizures mainly occurred on the weekends and therefore it was better that these were allocated as his days off. The Respondent admitted that in such a circumstance the request would have been granted. This was within the Respondent's power to grant.

187. It was also submitted that the Respondent failed to act reasonably in procuring a reasonable adjustment as was appropriate within a reasonable time frame. The Claimant gave his line manager a hard copy of the consultant's letter at the end of February. Despite this and subsequent chasing by the Claimant on a weekly basis no action was taken by the respondent. Mr McIntyre admitted that the Claimant's temperament was such that he would not sit quietly if he had something to say. It is submitted that the Claimant would at least once a

week ask about the adjustments he had requested. Thereafter the Respondent had many opportunities to pick up on the issue and failed to do so.

188. The Respondent accepted that an incident occurred on 25 March 2019 which resulted in a conduct hearing investigation into the Claimant's conduct. This was followed by a conduct hearing when the Claimant again raised the issues with the shifts. There is opportunity at this point for the managers to make arrangements for the adjustments to be put in place.

189. It was submitted that the delay in resolving matters caused the Claimant great distress and he was beginning to worsen both physically and mentally. On the 1 to 10 April 2019 the Claimant was absent from work marked as holiday and then 11 April the Claimant was absent from work due to a seizure.

190. On 25 April 2019 a welfare meeting took place. The minutes reflected that no previous discussions were documented. It did not discuss the previous shift adjustment that was agreed and suggested a new shift pattern and a follow up plan. The minutes were not shown to the Claimant and he did not sign these. They were not signed as was normal.

191. There is no evidence of the plan again being put in place or actioned. The time sheets do not reflect the agreement.

192. On 20 May 2019 the Claimant was off sick and on 10th June 2019 an email was sent from the Claimant's wife to Mr McIntyre. There is no response from the Manager to the email. Once again it was argued the Respondent failed to engage and take the necessary action to remove the detriment. By July the Claimant's health had been affected and he attended a private occupational health assessment having been referred via his own GP.

193. His health was affected and he approached Ms Bradley. On 6 August 2019 Mr Farwell sent an email to the Claimant regarding adjustment to shifts. He did not offer the adjustment that the Claimant requested but offered an alternative. By this point the delay had become unreasonable. It was argued that case law indicates that as there were so many opportunities available to the Respondent

to remove the detriment throughout this time the delay is considered to be a breach of their obligation.

194. The Claimant had suffered a complete breakdown and although he sent emails to Ms Gillespie and Mr Mallon he was no longer functioning on a normal capacity. His GP advised him to leave and on 1 October 2019 he resigned.

195. Given the Respondent is an international company and it would have been reasonable for this adjustment to have been implemented in February or as the Respondent admits that it would take 28 days to action a change at the very latest end of March.

196. The Tribunal should accordingly find in favour of the Claimant. It was argued that the Respondent had acted in breach of their obligation under section 20.

197. The Claimant's agent ended by reference to a number of authorities which were taken into account, so far as relevant.

The Respondent's agent's submissions

198. With regard to credibility, the Respondent's agent argued that there were some areas of the Claimant's evidence where he was inconsistent and this affected his credibility. He had accepted that his working hours were contractually subject to client and commercial needs. He had suggested he was more susceptible to seizures at the end of the week which was why he sought weekends as his rest days but upon being taken to the days of absence, he appeared to accept that was not borne out by the records.

199. The Respondent's agent noted that the Claimant said he had begun to lose clarity as his health deteriorated which was something to be taken into account with regard to the cogency of his evidence.

200. There were also a number of areas where new matters arose in the course of his oral evidence, including that the intranet had not been working, despite him having access to various policies and made reference to intranet entries. He also said that he wanted weekends off as his wife was home to help him but that was not something before the Respondent at the time

201. There was no mention of the Monday to Friday pattern in the initial medical letter as the focus was on a regular shift and the April meeting noted that the Claimant was ideally looking for that shift. There was no medical evidence, unless the consultant letter was in the Respondent's possession, which was denied.

202. The Claimant had been given training and ought to have known about the policies and procedures and what a grievance was.

203. It was also suggested that the Claimant changed his position with regard to the January welfare meeting, subsequently arguing that there was reference to a Monday to Friday shift. While this was recorded in the April meeting, his oral evidence that that this was what he had wanted throughout.

204. The fitness for work statements did not record any adjustments nor give any indication as to what was needed for a return to work which was relevant.

205. In light of these issues the Respondent's agent argued that the Claimant's evidence should be approached with caution particularly where it conflicts with the Respondent's evidence.

206. With regard to Mr McIntyre's evidence, the Respondent's agent conceded that his oral evidence was "not helpful". Mr McIntyre struggled to recall mattes but in drafting his statement had looked at documents. It ought to be possible to focus on the surrounding facts in reaching a view. He was clear that he followed due process and the other witnesses supported his position.

207. Mr Farwell provided an insight into the induction process and that it was common to put temporary flexible working arrangements in place, which was something Mr McIntyre had been trying to do. The Claimant had not accepted the offer he had been given.

208. Ms Gillespie's evidence was helpful and showed the impact of flexible working on the business operationally and commercially.

209. While the Respondent relied upon a formal flexible working application process with regard to reasonable adjustments, there was no evidence the Claimant could not engage with the online system and progress that.

210. With regard to the letter of 21 February 2019, it was denied this was received by Mr McIntyre. The Respondent's evidence was consistent on process in such a situation. There was no evidence it had been recorded on the intranet and if the letter had been received steps would have been taken. This was not therefore evidence in the possession of the Respondent and cannot inform the matter. The Claimant had been asked to produce information but had not done so. The Claimant could have checked the system and seen that it was not recorded.

211. It was unclear if the occupational health report was received since it did not seem to appear as an attachment on the printed email which would have been what one would expect. The Claimant says he probably handed it to Mr McIntyre which was denied. There was no evidence that it had been recorded.

212. While the Claimant's agent had made much of the Claimant's absence, it was not that high nor did it hit the trigger for long term absence. Things would have been different had it done so.

213. With regard to the legal position, the test is objective and the practical result is key. It is not an assessment of the reasonableness of the process but a focus on reasonable steps

214. It was argued that an adjustment had been offered to the Claimant, namely reduced hours, fixed shifts, 2 days off. The Claimant had not accepted that.

215. With regard to the step contended for, this was not informed by the medical information at the time (given the argument the consultants letter had not been received). It had been declined by the Respondent as it was not reasonable. The shift pattern could be accommodated but that did not mean it was a reasonable step.

216. Cases are assessed on an individual basis and the Respondent would have sought an occupational health report. There were clear difficulties in accommodating the shift given existing flexible working arrangements and the impact on colleagues and the business, including potential financial penalties

217. It was argued that even if the step would have been proposed there was no evidence the Claimant would have accepted it. The time sheets suggested there was a Monday to Friday shift pattern in place in February, a trial period. There was unfortunately no evidence before the Tribunal as to what happened thereafter. The step sought had been refused on 6 August and on 20 August as it was not reasonable.

218. There was limited information before the Respondent and the commercial situation was such that it would not have been reasonable. It was important to consider the effectiveness of the adjustment and balance this with the impact of the respondent.

219. The Respondent took reasonable steps. There was no failure to make reasonable adjustments and the claim should be dismissed. We took into account the case law referred to by the Respondent's agent.

The Claimant's agent's response

220. The Claimant's agent emphasised that the consultant's letter was important but even in the absence of that the letter from the Claimant's nurse was the trigger and the Respondent ought to have known the impact his shifts had on his health. The policies and procedures of the Respondent placed emphasis on carrying for employees but the Respondent did very little in this case.

Decision and discussion

221. The Tribunal carefully considered the evidence presented and the submissions made, both in terms of the information communicated in writing and orally. We were able to reach a unanimous decision.

222. The issues in this case became very clearly focused by the time the evidence concluded.

Issues that have been conceded

223. The Respondent conceded that the Respondent knew the Claimant had a disability (epilepsy) at all material times, that the Respondent applied the provision, criterion or practice (PCP) of requiring the Claimant to work a particular pattern of shifts, namely erratic shift patterns, that the PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that it primarily aggravated his epilepsy (and it had an adverse effect upon his psychosis which was a by-product) and that the Respondent knew or could reasonably have been expected to know that the Claimant was likely to be placed at the substantial disadvantage.

Issue is whether providing Claimant with a regular shift pattern of Monday to Friday 9am to 330pm was a reasonable step to remove the disadvantage

224. The Claimant's agent confirmed that the issue in this case was whether it was a reasonable step to offer the Claimant fixed shifts of Monday to Friday 9am to 330pm, with which the Respondent's agent agreed. The Claimant's case was predicated upon the argument that offering such a shift pattern was a step which was reasonable for the Respondent to have taken which would have removed the substantial disadvantage the Claimant suffered. The Claimant's agent argued the step should have been taken following the first welfare meeting. The Respondent argued that the step was not reasonable and it had complied with its duty.

Taking account of the Equality and Human Rights Commission Code

225. In reaching our decision we considered the terms of the Equality and Human Rights Commission Code of Practice. Ultimately, what is reasonable depends on all the circumstances and we have considered all the circumstances of this case, focussing upon (and basing our decision upon) what was in the Respondent's possession at the time of the issues in question only.

226. At paragraph 6.25 of the Code it is stated that: "Effective and practicable adjustments for disabled workers often involve little or no cost or disruption and are therefore very likely to be reasonable for an employer to make. Even if an

adjustment has a significant cost associated with it, it may still be cost effective on overall terms, for example, compared with the cost of recruiting and training a new member of staff and so may still be a reasonable adjustment to have to make." We took account of this together with the other parts of the Code.

227. We considered the evidence of both Mr Farwell and Ms Gillespie very carefully. Both gave very clear evidence that although commercially providing a fixed shift of Monday to Friday would be costly, since most people wished weekends off, it was something that could be accommodated. We accepted the Respondent's agent's submission that such an admission does not, in itself, mean that the step is reasonable, but it does show that that it could be accommodated, if necessary. We need to consider the overall circumstances.

228. We considered the factors set out at paragraph 6.28 of the Code in reaching our decision.

Would the step remove the disadvantage?

229. Firstly, we considered whether the particular step contended for would be effective in preventing the substantial disadvantage. The medical evidence that we found was before the Respondent was clear in this regard.

230. The nurse practitioner letter of 31 December 2018 made it clear that the Claimant's seizures were triggered by stress and sleep deprivation. Having a regular shift pattern was important to the Claimant for health reasons. The Respondent knew this since it was made clear at both welfare meetings. Further the consultant's letter (which was before the Respondent) emphasised that routine was extremely important and Saturday and Sunday working should be avoided since it would have a beneficial impact on his epilepsy control. In other words, the medical evidence was clear that if reduced shifts were offered, fixed from Monday to Friday, the substantial disadvantage suffered by the Claimant would be significantly reduced, if not removed.

231. The specific step in question was therefore likely to be effective in preventing the substantial disadvantage suffered by the claimant by the imposition of the PCP.

Practicability of the step

232. Secondly, we considered the practicability of the step, namely giving the Claimant a fixed shift pattern of Monday to Friday 9am to 330pm. As indicated above, although commercially there would be some issues, it was practicable to provide the Claimant with the shift pattern sought. In fact it was noted by Mr Farwell that the duration of the shift was not the issue. It was as practicable to offer a fixed shift pattern of Monday to Friday 9am to 330pm as it was to offer a Monday to Friday 9am to 5pm shift pattern. The first welfare meeting noted that the Claimant's shifts would be amended to become 9am to 330pm and by the second welfare meeting it was clear that the Claimant was looking for a Monday to Friday fixed pattern.

233. There was no suggestion at that meeting that such a shift would not be practicable and indeed it was suggested that such a pattern would be implemented "initially pushing for Monday to Friday for the first 2 weeks". Mr McIntyre in his written statement had said that a Monday to Friday 9am to 330pm shift was "not particularly feasible" but did accept in fact it could be accommodated, if needed.

234. We considered the commercial position and the evidence of Ms Gillespie and Mr Farwell carefully. They both confirmed that although there would be commercial difficulties, it was possible to provide the shift in question. One of the issues would be the fact that other staff would have to work more weekends. We took that into account but the step in question was practicable. We accept that just because something is possible does not necessarily render it reasonable and we will return to that submission.

Financial and other costs

235. Thirdly, we considered the financial and other costs of the adjustment and extent of any disruption. It was accepted by the Respondent's agent that there was no specific evidence before the Tribunal as to the financial and other costs of the adjustment in this particular case.

236. We considered the evidence that we had which related to the general position of the Respondent. The issue with regard to the step in question was whether or not a fixed shift arrangement of Monday to Friday would essentially create too much of a burden on other staff since the weekend work the Claimant would do over the weekend would require to be carried out by other staff.

237. There was no evidence as to the flexibility (or otherwise) the Respondent had with regard to weekend working. Given the numbers of staff involved, removing one person from the normal shift rotation would appear to have a relatively low impact upon the Respondent's business. There was no evidence before us of any immediate (or lasting) financial impact. There was no submission that the financial impact of the adjustment would be unreasonable bearing in mind the terms of the Respondent's policies in this area. Rather the focus was on the argument that it would unfairly impact upon other staff since the main impact would be that the other staff in the Claimant's team would have to cover the weekend shift, which may be regarded as unsociable (albeit days that staff had contractually agreed to work, if required by the Respondent).

238. There was no specific evidence as to what, if any, the impact of this particular step, if implemented, would be on other staff. From the number of staff involved, the step could potentially result in some staff having to work one weekend more perhaps within the cycle but that was something the Respondent had the power to achieve. The Respondent's terms and conditions recognised the needs of the business with regard to fixing shifts. If adjustments required to be made for disabled staff, that would be a reason for the Respondent requiring to rely upon its contractual right to require other staff to work the hours needed commercially to meet client objectives. We take into account the impact upon other staff and the fairness of the matter and balance this in our consideration.

Respondent's resources, financial assistance, size and type of undertaking

239. Fourthly, we considered the extent of the Respondent's financial and other resources. The only evidence before the Tribunal was with regard to the size

of the Respondent, number of staff and the HR offering (the people advisory services) which we consider below under the size of the Respondent.

240. The next issue was the availability to the Respondent of financial and other assistance to help make the adjustment but there was no evidence of any such assistance.

241. Finally, we considered the type or organisation and size of the Respondent. The Respondent stated in its policies of the importance of making reasonable adjustments and of making decisions with integrity. It is clearly a large employer. There was no suggestion that there was any substantive impediment to accommodating the step in question in this particular case, if it was needed (in other words if it was considered to amount to a reasonable adjustment in terms of the Equality Act 2010).

Taking a step back objectively to assess the position

242. We took a step back in assessing the reasonableness of the step bearing in mind the question as to whether the step in question was reasonable was an objective question which depends on all the circumstances of the case from the information before the Respondent at the time. We also need to be satisfied of the effectiveness of the step.

243. We found that the Respondent had received the letter from the consultant. The Claimant gave is to his line manager who had encouraged the Claimant to seek it since it would bolster his case. Ms Gillespie was clear that had she been in possession of the letter, her position would have been different, the suggestion being if she had been aware of the letter (which we found had been given to the claimant's line manager) she may well have been more accommodating with regard to the shift sought by the Claimant. Had the other managers asked the Claimant for the evidence (for example to which is referred in his wife's email) they could have received it. The Claimant did his best to give the Respondent as much information as possible to show them the impact the shift system had upon his health. That information had not been properly

considered nor analysed by the Respondent, nor the effect of the shift pattern on the Claimant appreciated fully.

244. Mr McIntyre was clear that the Claimant had performed well and the Respondent did want to retain his services. He had been a good worker. There was no suggestion to the contrary.

245. We took account of the Respondent's agent's submission that there was no evidence the step being alleged would have removed the disadvantage but we rejected it. The Claimant had been clear to the Respondent that the varying shift pattern and long hours was having an impact upon his health and that the Monday to Friday 9am to 330pm shift pattern would have removed the disadvantage he was suffering. Of more importance, the medical evidence supported that position. The greater the stress the Claimant experienced, the more likely it was that he would experience seizures. That was known to the Respondent. Not allowing the Claimant the fixed pattern of Monday to Friday 9am to 330pm had a significant impact upon the Claimant's health. It caused him significant stress and affected his health adversely. The insistence he work erratic shifts created the disadvantage the Claimant experienced. This had, in essence, been raised during the welfare meetings. Furthermore, Mr McIntyre had noted that the Claimant had become more withdrawn as time moved on.

246. Had the Respondent implemented the agreement that appears to have been reached with the Claimant at the welfare meetings, particularly by April 2019, the impact on the Claimant's health would have been different. They did not and his health worsened. We did take into account that there was a 4 week period in February where the claimant did work a regular shift pattern but that was only temporary and there was no reason why what appeared to have been agreed, and what was required for the claimant in light of his medical position, was not continued.

247. Without any explanation, the Respondent failed to implement the agreement that had been reached during the welfare meetings to provide fixed shifts at the agreed times. The shifts the Claimant was required to work varied as did his rest days. That caused the Claimant stress which worsened his health. That

was the disadvantage which was more likely than not have been removed had the step in question been taken.

Offer of Friday to Tuesday shift in August

248. We take into account the fact that Mr Farwell did offer the Claimant shifts of Friday to Tuesday 9 to 330pm on 6 August 2019 which the Claimant had not accepted by the time he resigned. By the time of the offer, however, the Claimant's health had been seriously affected. The offer did not provide the Claimant with the shifts he had sought, and evidenced medically. The fact the Claimant sought a Monday to Friday shift for some time and by this stage, namely August 2019, was a significant issue for the Claimant (and his health) and something that would have removed the disadvantage. We did not consider the shifts that were offered by Mr Farwell would have removed the disadvantage in all the circumstances at that time or that the offer resulted in the step in question being unreasonable in the circumstances.

249. The requirement for weekends off was not a social request but one firmly based on the medical position. Given what the Claimant had been offered before (during his welfare meetings) and the practical consequences (namely that the shifts did not materially change and the agreement was not implemented) we did not consider the failure of the Claimant to accept the offer on this occasion to have any material bearing on whether the step in question would remove the disadvantage and whether it was reasonable for the Respondent to take the step, particularly in light of the time that had passed and the impact upon the Claimant's health by the time the offer was made. The Claimant's health by that stage had been adversely affected. As a matter of fact the Claimant's shift pattern did not change, despite being told it would. The Claimant needed a shift pattern of Monday to Friday 9am to 330pm to remove the disadvantage he had suffered.

250. The issue before us is whether the fixed shift pattern of Monday to Friday from 9am to 330pm was a reasonable step to take in the circumstances. The fact an alternative shift was offered was a factor which we take into account but it

is not conclusive since we must assess whether it was reasonable, objectively speaking, to offer the shift sought by the Claimant.

Medical issues

251. While the Respondent's agent argued that it was not known what information the Claimant had given his medical experts that led to the medical opinion that was offered and produced to the respondent, equally, the Respondent had made no effort to make inquiries as to that issue. If they were unsure, or if they disbelieved any of the material in question, they ought to have sought clarification. The Respondent could have sought specific information as to the basis for the medical opinion that had been provided but they did nothing in that regard.

Commercial reality

252. We appreciated the commercial reality of a busy operation such as the Respondent's but equally they were presented with a well performing employee who, for sound medical reasons, required to adjust his working hours and who sought a shift which was something that could potentially be accommodated. The Respondent's policies make it clear that such request would be considered on its own merits in line with the obligations within the Equality Act 2010.

The respondent's approach to managing reasonable adjustments

253. The approach the Respondent had of insisting upon formal flexible working applications with regard to the making of shift adjustments for disabled employees hindered the Respondent in this regard. Rather than supporting the Claimant with regard to the specific substantive proposal he had made, the focus was on what specific flexible working agreement had been sought on their internal systems. Ms Gillespie said in evidence that "unless it's formal we won't take action". That was how the Respondent viewed the matter and in the absence of a formal request within their systems, for whatever reason, the matter of formally adjusting shifts would not be fully progressed. That was unfortunate. The Claimant had made his requirements clear and although the

position had not been properly documented on the Respondent's systems as a formal flexible working application, the position was known to the Respondent. The absence of a formal flexible working application did not remove the duty placed upon the Respondent under the Equality Act 2010.

254. The matter had been fully raised and discussed at both welfare meetings. It had been documented. By the second welfare meeting there could be no doubt that the Claimant was seeking for the adjustment now contended (a Monday to Friday 9 to 330pm shift) and that it was based on medical need. Reference was made to the medical position at that meeting. Reference was made to the consultant's letter during the disciplinary hearing and the Claimant's wife's email to the Respondent gave the Respondent a further opportunity to consider the medical evidence but that was not taken.

Removing the disadvantage

255. We do not accept that there was no evidence that the disadvantage would not have been removed had the step been taken. We consider that it was more likely than not that the step would have removed the disadvantage in the sense required by section 20 of the Equality Act 2010 from the evidence before the Respondent and this Tribunal.

256. We took into account the respondent's agent's argument that as the Claimant had not been off work on particular days that suggested weekend working was not the issue. We did not find that an attractive submission on the basis that firstly the medical evidence flatly contradicted that submission. Secondly the fact that the Claimant was able to attend work did not necessarily mean he did not have difficulties in so doing. The Claimant tried to do his best to bring all the information to the Respondent's attention and sought to work as hard as he could to carry out his job. He had done his best to attend work and the shifts for which he was scheduled despite the consequences to his health. We concluded that the step in question would have removed the substantial disadvantage suffered by the Claimant.

Considering matters from the information before the Respondent

257. In reaching our decision we considered the position on the basis of the information that was before the Respondent at the time. We also considered the commercial position facing the Respondent and considered the effectiveness of the proposed adjustment, balancing that with the impact upon the respondent.

258. We found Ms Gillespie's clear evidence to be insightful. She confirmed that if the medical position was that the relevant step was needed it would be something that could be accommodated. She said that if the medical position was that the step required to be made, she was of the view that "we would absolutely" (create the required shift pattern). She noted that the Claimant was a good colleague to have and that they wanted to keep him in the business. She accepted that there would be an element of unfairness to other workers but that would be something that would be balanced, as we have done.

It was reasonable to have offered the Claimant the fixed Monday to Friday 9am to 330pm shift

259. In all the circumstances and balancing all the relevant factors, we concluded that adjusting the Claimant's shift pattern from erratic shifts to Monday to Friday 9am to 330pm was a reasonable step for the Respondent to have taken in all the circumstances in light of the information known to the Respondent at the time to remove the substantial disadvantage he suffered.

Step should have been taken from 23 May 2019 (at the earliest)

260. We considered when it was reasonable for the step in question to have been taken and decided that the step ought to have been taken, at the earliest, with effect from 28 days following the welfare meeting on 25 April 2019 (namely by 23 May 2019). By that stage the Respondent knew of the specific adjustment the Claimant had sought, and the medical reasons for it. In the welfare meeting it was specifically stated that the Claimant "may struggle to continue with 8

hour shifts" and was "ideally looking to work Monday to Friday 9am to 330pm". We accepted that it would have been reasonable for there to have been a 28 day period to arrange for the change in the shift patterns given the commercial impact.

261. The Respondent had a number of opportunities to take the step after that stage prior to the Claimant's resignation (including in August during the communications with Mr Farwell and Ms Gillespie). Ms Gillespie accepted that had she known the full medical position, she may well have taken a different view. The step was not taken despite those opportunities having arisen. The information had been presented to the Respondent and in all the circumstances it would have been reasonable for the Respondent to have taken the step in question from May 2019 onwards. The Respondent failed to do so.

Summary

262. We concluded from the evidence before us that the requirement placed upon the Claimant to work erratic shifts put the Claimant at a substantial disadvantage in comparison to persons who were not disabled and that the Respondent was under a duty to place the Claimant on a fixed shift pattern of 9am to 330pm Monday to Friday with effect from 23 May 2019 and subsequently, such action amounting to a step that was reasonable for the Respondent to take in all the circumstances to avoid the disadvantage, thereby failing to comply with the duty to make reasonable adjustments in terms of section 20 of the Equality Act 2010. As a consequence, in terms of section 21 of the Equality Act 2010, the Respondent unlawfully discriminated against the Claimant.

263. A separate Case Management Preliminary Hearing will be fixed to deal with matters relating to remedy.

Employment Judge: David Hoey
Date of Judgment: 01 April 2021
Entered in register: 14 April 2021
and copied to parties