



EMPLOYMENT TRIBUNALS

Claimant: Miss S Wright

Respondent: TJ Morris Limited (t/a Home Bargains)

Heard at: Bristol

On: 24-26 January 2022

Before: Employment Judge Oliver
Mr H Patel
Ms H Pollard

Representation

Claimant: In person

Respondent: Mr D Northall, counsel

RESERVED JUDGMENT

The claims for disability discrimination and unauthorised deduction from wages fail and are dismissed.

REASONS

1. This is a claim for disability discrimination - based on direct discrimination, discrimination arising from disability, failure to make reasonable adjustments, and harassment – and unauthorised deduction from wages

2. The hearing was conducted by the parties attending in by video conference (VHS). It was held in public with the Tribunal sitting in open court in accordance with the Employment Tribunal Rules. It was conducted in that manner because the parties had consented to such a hearing and it was in accordance with rule 46, the *Presidential Guidance on remote hearings and open justice* and the overriding objective to do so.

Issues

3. There was a case management preliminary hearing on 4 June 2021 before EJ Reed. An initial claim was rejected as it did not contain an early conciliation number, and a claim for unfair dismissal was not allowed to proceed as the claimant did not have two years' service. The remaining issues relate to disability discrimination and were identified in outline. There was also a claim for unauthorised deduction from wages, although this was not recorded in the written record of the preliminary hearing.

4. We discussed and agreed a final list of issues with the parties at the start of the hearing. We then conducted an initial hearing on whether the claimant was disabled at the material time. After hearing evidence from the claimant, the respondent conceded that the claimant was disabled with a stammer and spinal issues. The remaining issues for the Tribunal to decide were as follows.

5. Time limits

5.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about any act or omission which took place more than three months before that date (allowing for any extension under the early conciliation provisions) is potentially out of time, so that the tribunal may not have jurisdiction.

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

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

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

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

5.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide why were the complaints not made to the Tribunal in time and, in any event, is it just and equitable in all the circumstances to extend time?

6. Direct disability discrimination (Equality Act 2010 section 13)

6.1 Did the respondent do the following things:

6.1.1 Subject her to criticism by Mr Smitherman from the beginning of June 2020 until the claimant went off sick, by pushing her to do more work, telling her she could not leave on time, and telling her she was slacking as she could not keep up with the required rate of work;

6.1.2 Mr Smitherman not giving the claimant the opportunity to put her case to him;

6.1.3 Change the claimant's shifts at short notice;

6.1.4 Increase her weekend working to one weekend in two.

6.2 Was that less favourable treatment? The Claimant has not named anyone in particular who she says was treated better than she was and therefore relies upon a hypothetical comparator.

6.3 If so, was it because of disability?

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

7.1 Did the respondent treat the claimant unfavourably by:

7.1.1 Subjecting her to criticism by Mr Smitherman from the beginning of June 2020 until the claimant went off sick, by pushing her to do more work, telling her she could not leave on time, and telling her she was slacking as she could not keep up with the required rate of work;

7.1.2 Mr Smitherman not giving the claimant the opportunity to put her case to him.

7.1.3 Changing her shifts at short notice;

7.1.4 Increasing her weekend working to one weekend in two.

7.2 Did the following things arise in consequence of the claimant's disability? The Claimant's case is that she was unable to properly contest orally what was being said to her because of her stammer.

7.3 Was the unfavourable treatment because of the claimant's inability to properly contest orally what was being said to her?

7.4 Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

7.5 The Tribunal will decide in particular, was the treatment an appropriate and reasonably necessary way to achieve those aims, could something less discriminatory have been done instead; and how should the needs of the claimant and the respondent be balanced?

7.6 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

8. Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)

8.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

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

8.2.1 Requiring employees to work to an excessive level;

8.2.2 Requiring employees to work until they had finished their duties;

8.2.3 Requiring employees to stand for six hours;

8.2.4 Mr Smitherman's method of raising issues with employees.

8.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that she found this level of work

and standing for six hours difficult due to her spinal issues, and could not properly contest what was being said to her by Mr Smitherman due to her stammer?

8.4 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

8.5 What steps (the 'adjustments') could have been taken to avoid the disadvantage? The claimant suggests:

8.5.1 Reducing her workload and providing assistance;

8.5.2 Not requiring her to stand for six hours;

8.5.3 Raising issues with her with a more measured and understanding attitude.

8.6 Was it reasonable for the respondent to have to take those steps and when?

8.7 Did the respondent fail to take those steps?

9. Harassment related to disability (Equality Act 2010 s. 26)

9.1 Did the respondent do the following things:

9.1.1 Mr Smitherman was rude to the claimant when she told him she could not maintain the working pace required of her;

9.1.2 Mr Smitherman criticised the claimant from the beginning of June 2020 until the claimant went off sick, by pushing her to do more work, telling her she could not leave on time, and telling her she was slacking as she could not keep up with the required rate of work;

9.1.3 Mr Smitherman not giving the claimant the opportunity to put her case to him.

9.2 If so, was that unwanted conduct?

9.3 Did it relate to the claimant's disabilities?

9.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

9.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

10. Unauthorised deduction from wages

10.1 Did the respondent make an unauthorised deduction from the claimant's wages by failing to pay her for four hours of work?

Evidence

11. We had an agreed bundle of documents, which we have read.

12. We took statements as read. For the claimant, we heard evidence from the claimant and Shelley Smith. For the respondent we heard evidence from Simon Smitherman (Store Manager), Dan Evans (Area Manager), and Karen Wiegand (HR Manager).

13. We heard oral submissions from both parties.

Facts

14. We have considered all the evidence and submissions, and find the facts necessary to decide the issues in the case.

15. The claimant resigned from her employment with effect from 21 August 2020. She contacted ACAS on 18 September, and received the early conciliation certificate on 21 September 2020. Acts prior to 19 June 2020 are potentially out of time.

16. The claimant gave some evidence at the hearing about why she submitted her claim when she did. She says she did not know she could make a claim to the tribunal until she realised her grievance was not being taken seriously, at the end of August. She had not been involved in a tribunal claim before, and she did not know about the 3-month time limit until after she had made her claim. She says she spoke to her partner about it in early September. She says she did not contact ACAS until 18 September because she needed to speak to her doctor about her mental health, to ensure she was in the right frame of mind to write her claim. We note that her medical notes do not show a consultation about mental health at around this time, and an entry for the end of July records that her mental health had improved.

17. The claimant was employed by the respondent from 27 March 2020 as a Store Assistant in the Fill Shift team at the respondent's Filton branch. The claimant's manager was Simon Smitherman, Store Manager.

18. The claimant completed an online application form for this role. This form contains 9 questions. She answered "no" to the question asking whether she considered herself to have a disability which would require adjustments to be made if contacted for an interview or assessment. She also answered "non" to a question asking about any circumstances which may affect her ability to undertake manual handling, involving daily and regular lifting of items of differing weight and size. The claimant's evidence is that she filled in these questions wrongly, because she was stressed and anxious at the time as a close relative was very unwell. She says that she realised shortly afterwards that she had filled in the form wrongly, but did not email to correct this. We note that the claimant's impact statement which she submitted to the Tribunal for the purposes of this claim stated, *"I have always been open and transparent with my disabilities whilst I was employed by TJ Morris Limited, my application form clearly states my disabilities I.E. stammer and back"*. This is clearly incorrect. We do not find the claimant's explanation that she made a mistake on the application form plausible.

Even if she was stressed and anxious at the time, we do not see how this would cause her to answer these two questions incorrectly when all other questions were answered accurately. We find that the claimant chose not to mention her back issues on the application form.

19. The claimant was interviewed for this role by Mr Dan Evans, the Area Manager. The claimant said in evidence she told Mr Evans about her stammer and back problem during this interview (although this was not in her witness statement). She says this was as part of a general chat about the job role. She says that he asked her how long she'd had the back problem, and she told him it was ongoing for more than 10 years. She also says that she told him she had upcoming GP appointments. We note that no appointments about her back are shown in her disclosed medical notes until May 2020. The claimant also says that her stammer would have been more obvious at the interview because she was nervous and speaking to someone she didn't know, which is when it tends to get worse.

20. Mr Evans confirmed in his oral evidence that he could not remember the interview with the claimant. His witness statement says he is "confident" that the claimant did not tell him during the interview that she had a stammer and a degenerative back condition. His evidence is that it is very rare for applicants to disclose medical conditions during the interview process, and so he believes he would remember if this happened. The respondent's usual process with an applicant who has a medical condition would have been to ask for a note from her GP or medical certificate so they could find out more. The respondent has not been able to find any medical information provided by the claimant during the application or induction process. As Mr Evans cannot remember the interview, he cannot recall whether he noticed the claimant's stammer. Unfortunately, no interview notes are available.

21. This is one of a number of issues where we need to assess credibility, as the claimant is saying she told various managers about her back issues and the managers deny that this happened. Although Mr Evans is unable to remember the interview, we find it plausible that he would remember it if the claimant had actually disclosed a serious medical condition which would affect her ability to do her job. There are no records which show the usual follow-up steps if something like this had been disclosed at interview. Either Mr Evans ignored what the claimant said and failed to take the correct action when the claimant told him this information, or the claimant's recollection is incorrect. We note that the application form did not disclose the back problem, and it would be consistent with this if the claimant had not mentioned it at interview either. The claimant says that she mentioned this due to upcoming GP appointments, but no such appointments are shown in the written medical evidence. We also note that the claimant's ET1 does not refer to her back issues at all. She said in evidence that her mental health "got the better of her". We find it implausible that she would have failed to refer to her back issues altogether if her account of consistently telling managers about it and being ignored was correct. Having considered the available evidence, on the balance of probabilities we reject the claimant's version of events and find that she did not tell Mr Evans about her back issues during the interview.

22. In relation to the claimant's stammer, we have observed during the hearing that this is affected by stress and speaking to people she doesn't know. We find that the claimant would sometimes struggle to get some words out during the interview, although we accept that Mr Evans does not remember this.

23. The claimant also says that Mr Smitherman would have noticed her stammer. Mr Smitherman says that he noticed the claimant on occasion struggled to say some words, with it occasionally taking her 2 or 3 attempts to say a word, but this was not a consistent problem. He says he was not aware that a stammer could be a disability.

24. The claimant's role involved stacking shelves and unloading cages of goods. We have seen a copy of the claimant's induction record, which appears to show she was not trained on manual handling of stock and cages (as these sections are not ticked). Mr Smitherman was away on paternity leave when the claimant was recruited and had her induction, so does not know what the training involved. The claimant said she told the manager who was doing her induction that she couldn't do part of the job because of her back. She says he did not say anything in reply, but she also says he passed the message on to Mr Smitherman. The claimant said this for the first time in her oral evidence.

25. Again, we need to assess the claimant's credibility on this point. As this was only raised for the first time at the hearing, the respondent had not been able to call the relevant manager to give evidence. As with the interview, this version of events does not fit with the information the claimant put on the application form. Again, there are no records of the manager taking action in response. Either this manager ignored what the claimant said, or her recollection is incorrect. The respondent has a wellbeing team that is available for managers to contact for advice on issues about medical problems and making adjustments. Ms Wiegand confirmed that the manager involved was an assistant manager, and had been trained on wellbeing. This is the third manager who the claimant has accused of ignoring information about her back problems (the others being Mr Evans and Mr Smitherman). We find it implausible that the induction manager would have ignored information from the claimant that she could not do part of the job she had been hired to do. Having considered the available evidence, on the balance of probabilities we reject the claimant's version of events and find that she did not tell the induction manager that she couldn't do part of the job due to her back.

26. Shifts for the Fill Shift team were allocated using an automated system "Kronos", which can then be manually changed if needed. Part of the claimant's claim is that her weekend working was increased to one weekend in two. Her application form says "flexible" in response to a question about availability Monday to Sunday. The claimant says she later had childcare issues. We have seen a handwritten entry in what the claimant says is her work diary, for May 2020, which says, "*my hours had starting increasing to every weekend, when my boss knew I had children at home*". We have seen a copy of the claimant's work rota, which shows she worked three Saturdays in April. She was then away from work self-isolating due to COVID-19, and then on holiday, until Monday 11 May. She did not work any weekends that month until 17 May and 31 May (both Sundays). The shift on 17 May appears to be a voluntary additional shift as it is not shown as part of the regular rota.

27. The claimant agrees with Mr Smitherman's evidence that the "case rate" target of the Fill Shift team was to unload 35 cases of stock per hour, and this was the same for all team members. This had been reduced during COVID-19 from the previous target of 48 cases in order to allow for social distancing. Mr Smitherman says that the claimant did a good job, and in oral evidence he said she was a good team member who worked hard, she stood out, and she worked better than other colleagues who had been there longer. The claimant says that Mr Smitherman was rude to her as she could not maintain the required pace. She has provided no detail about what Mr Smitherman is alleged to have done or said that was rude, and based on Mr Smitherman's evidence that she was a good worker we find that this did not happen.

28. The claimant has complained that she was expected to work until she finished her duties, although she was on set hours. Her contract says she may be required to work overtime. Mr Smitherman gave evidence that any overtime he asked people to do was always voluntary. At the end of a shift, if work needed to be finished, he would ask everyone in the team if they can stay to complete the work. He may say "think of the money" to incentivise them. The claimant accepted in her evidence that overtime was voluntary, but said she felt "pressurised" to do it. She did not explain how she was pressurised, and we find on the evidence that overtime was genuinely voluntary.

29. The claimant has complained that her shifts were changed at short notice, and she might be told she was finishing at 4 and then have the time changed to 5. The claimant says she was supposed to be working 11-4 but was pressured to work until 5. The work rota shows that the claimant's shift pattern was not always the same. It was initially 10-2, then 11-5 for two weeks, and varied later on. We note that the claimant has said she was flexible, and was not promised consistent times or dates. We accept that the shift patterns were set by the Kronos system rather than Mr Smitherman, as recorded in the work rota. It was also put to Mr Smitherman that the claimant was supposed to work 20 hours over 5 days, and he overrode this and made her work until 5pm. He denied overriding the shifts set by Kronos, and explained that it was 20 hours over up to 5 days – meaning she could work those hours in 4 days instead.

30. The claimant says that she obtained a fit note from her GP on 22 May 2020, which said she should not do any heavy lifting. The disclosed medical records show that the GP issued a fit note for amended duties for one month. The claimant had contacted her GP to ask for a note for light duties at work in relation to her back. It was provided at the time for the claimant to download. We have not seen a copy of this document.

31. The claimant says she gave this fit note to Mr Smitherman next time she was in work. She says he then put her on light duties by asking her to stand at the door counting customers in order to ensure social distancing inside and that she did this for a number of days, but he then moved her back onto bulk work filling shelves.

32. Mr Smitherman's version of events is very different. He says that he was not made aware at any point that the claimant had a problem with her back, or any other medical issues. He says he has no knowledge of any fit note from the claimant. He confirmed in his oral evidence that matters would have been dealt with very differently if he was made aware that the claimant had a back condition

and should only do light duties, as work in the Fill Shift team involved heavy items, and she would have needed to move to different work such as on the tills. He says that if she had raised this issue with him, he would have spoken to his Area Manager and then contacted the wellbeing team.

33. The claimant has also complained about standing at the front doors keeping track of customers, particularly on one hot day when she got sunburnt. She says this caused her back pain, and when she told Mr Smitherman this he just walked away. Mr Smitherman again says the claimant did not say anything to him about back pain being caused by standing at the front doors. He says staff took it in turns to do this, and he would have rotated staff more if anyone said they couldn't do this job. If she had raised the issue, he would have spoken to wellbeing, as if she struggled to stand for long period of time, she would be likely to struggle to perform her other duties.

34. This is a stark conflict of evidence that we have to resolve. Having considered all the available evidence, we find on the balance of probabilities that the claimant did not give a GP fit note about light duties to Mr Smitherman, or tell him that standing at the door caused her back pain, or tell her about her back issues at any other point. There is no record of the fit note or any other information about the claimant's back issues held by the respondent. Again, this means the claimant is alleging that Mr Smitherman simply ignored her concerns, did not file the fit note, and did not follow the proper processes. Having heard evidence from Mr Smitherman, we find this implausible. We found him to be a clear and consistent witness, who praised the claimant a number of times for being a good worker during his evidence. The respondent has a wellbeing team if an employee raises issues about a medical condition that affect their work, and Mr Smitherman was aware of the process and support from wellbeing. He is adamant that the claimant did not tell him about any back or spinal issues, or any other medical condition. We can see no reason why he would ignore this type of information from the claimant, particularly if it was backed up by a fit note from her GP. Again, we note that the claimant's ET1 does not refer to her back issues at all, and we find it implausible that she would have failed to refer to it altogether if her account of consistently telling managers about it and being ignored was correct.

35. The medical records do show that the claimant was given a fit note to download relating to her back and light duties. In cross-examination of Mr Smitherman, the claimant's friend (who was assisting her with questions) said that the claimant had asked another manager to download and print the fit note for her, as she did not have a printer at home. This is a possible explanation for why Mr Smitherman did not see the fit note, as there may have been some confusion about when, how and whether this was passed on. The claimant may have become confused about the chain of events and what happened with the fit note. In any event, we do not accept her version of events on this point.

36. There was an incident between the claimant and Mr Smitherman on 2 June 2020, following which the claimant became upset. The claimant asked on Monday 1 June whether she could have the following Saturday off work. This was because it was her son's birthday. Usually, three weeks' notice is needed to fit with the Kronos system. Mr Smitherman said it was too short notice and would leave the team short-staffed. At the claimant's request he looked into whether

she could work an earlier shift instead. The next day he spoke to her on the shop floor and confirmed she could work the early shift instead. The claimant no longer wanted to do that as her plans had changed, she wanted the whole day off.

37. There is a dispute about what happened during this conversation, and shortly beforehand. The claimant complains that from the beginning of June, Mr Smitherman pushed her to do work, told her she could not leave on time, and said she was slacking. She says that Mr Smitherman would not allow her to put her case to him by speaking over her and completing her sentences. She also says that he shouted at her on 2 June. Mr Smitherman denies all of these allegations.

38. In relation to being pushed to do more work, not being allowed to leave on time, and being told she was slacking, we do not find this happened as described by the claimant. Mr Smitherman was clear in his evidence that the claimant was a good worker. The work rota records show that the claimant clocked out on time on both 1 and 2 June.

39. In relation to speaking over the claimant and completing her sentences, the claimant was unable to give any specific examples of this when asked about it in the Tribunal. Mr Smitherman was clear in his evidence that he did not speak over the claimant or complete her sentences. In relation to Mr Smitherman shouting at the claimant, he denies this and explained that he doesn't believe in shouting as it has the opposite effect. Again, taking into account our overall assessment of credibility, we prefer Mr Smitherman's evidence on these points. We accept that the claimant may have found the conversation on 2 June difficult as she was not getting the time off that she wanted. On Mr Smitherman's version of events, he warned her that if she still took the time off it would be an unauthorised absence. If she was stressed, this may have made her stammer worse. Mr Smitherman also accepted in cross-examination that it possibly could have been more professional to have this conversation in the office instead of on the shop floor. We also accept that the claimant became upset after the conversation. However, we do not find that Mr Smitherman shouted at the claimant or prevented her from speaking during this conversation.

40. The claimant started a period of sickness absence on 3 June 2020 and did not return to work before her resignation. She was signed off work with stress and low mood. She was not contacted after 4 weeks of stress-related absence as would normally have happened, but we accept Ms Wiegand's explanation that the team was running 2 months behind due to the pressures of COVID-19.

41. We heard some evidence from Shelley Smith, a friend of the claimant who witnessed how upset the claimant was after work on 2 June when she picked her up. She says she called Mr Evans the next day on the claimant's behalf, to raise concerns about what had happened to the claimant. The issues she raised were about the conversation on 2 June with Mr Smitherman, and her own concerns about the claimant and how she was feeling. Mr Evans could not recall this conversation. Having heard Ms Smith's evidence, we accept that this telephone conversation took place as described by her.

42. The claimant's resignation letter dated 20 August 2020 gave notice of resignation with immediate effect as of 21 August, and stated, "*Unfortunately due to the serious nature of my spinal problem I am unable to continue in this line of work as per my doctor's recommendation. Please pass my regards to my colleagues and I wish home bargains every success in the future*".

43. The claimant says that she sent a grievance to the respondent a few days before she resigned. We have not seen a copy of the original grievance. She spoke with the respondent's HR department on 27 August and emailed a written grievance to HR the same day. She received a reply on 3 September which said her concerns would be investigated, but they would be unable to share any detail of the findings of the investigation as she was no longer employed. Both the HR manager and the Area Manager who were dealing with the grievance then left the respondent, and the grievance was not followed up or concluded.

44. The claimant says she is owed 4 hours' pay for the week commencing 25 May. She says she was originally owed 8 hours of missing pay, but she was only paid for 4 hours. Employees are paid weekly, for Monday to Sunday, on the following Friday. The respondent provided the claimant's payslips. Her payslip for the relevant period (dated 5 June 2020) shows she was paid for 25.96 hours. The work rota in the bundle shows she worked 25.68 hours. We have seen a payslip date 4 September which shows "underpay" hours of 4 hours. The respondent says this is for the claimant's induction, which she had not originally been paid.

45. In closing submissions, the claimant said she was not paid properly for her first week of work, as her first payslip is blank. For completeness we have checked this point, although really it was too late in the proceedings to raise this issue. The work rota shows she worked 20 hours in her first week (from 31 March to 4 April). The relevant payslip is not the initial blank one, but the one for 9 April, which shows payment for 20 hours.

Applicable law

46. **Time limits.** Under section 123 of the Equality Act 2010 ("EA"), complaints of direct discrimination or harassment, "*may not be brought after the end of— (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable.*" Under section 123(3), conduct extending over a period is to be treated as done at the end of the period.

47. It is for the claimant to show that it would be just and equitable to extend time. The exercise of discretion to extend time should be the exception, not the rule, but a Tribunal has a wide discretion when considering whether it is just and equitable to extend time (***Bexley Community Centre (t/a Leisure Link) v Robertson*** [2003] EWCA Civ 576, CA).

48. **Direct discrimination.** Under section 13 of the EA, a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

49. A claimant can rely on an actual comparator or a hypothetical comparator. Under section 23 EA, on a comparison of cases there must be no material difference between the circumstances relating to each case.

50. When determining whether direct discrimination had occurred, the tribunal must focus on the thought processes and motivation of the decision-maker (*Gallop v Newport City Council* UKEAT/0118/15). In a direct disability discrimination case, this requires some evidence that the employer knew of the disability in order for discrimination to be “because” of the disability itself, not something related to the disability.

51. **Harassment.** Harassment is defined in section 26(1) EA:

- (1) *A person (A) harasses another (B) if—*
 - (a) *A engages in unwanted conduct related to a relevant protected characteristic, and*
 - (b) *the conduct has the purpose or effect of—*
 - (i) *violating B's dignity, or*
 - (ii) *creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*

52. Conduct will be harassment if it was done with the purpose of violating dignity or creating the proscribed environment. Otherwise, the Tribunal must assess whether the conduct had this effect on the claimant. In deciding whether conduct had this effect, the Tribunal must take into account the perception of the claimant (a subjective test), whether it is reasonable for the conduct to have that effect (an objective test), and the other circumstances of the case.

53. **Disability discrimination - Reasonable adjustments.** A claim for a failure to make reasonable adjustments is made under Section 23 EA. The duty arises where a provision, criterion or practice (“PCP”) applied by an employer places a disabled person at a substantial disadvantage in comparison with persons who are not disabled. “Substantial” for these purposes means “more than minor or trivial”, as defined in Section 212.

54. Under Schedule 8 paragraph 20 EA, the respondent is not subject to a duty to make reasonable adjustments if it does not know and could not reasonably be expected to know both that the claimant has a disability and that the claimant is likely to be placed at the relevant substantial disadvantage. The duty only arises if the respondent has or could reasonably be expected to have knowledge of both of these elements. The required knowledge is of the facts of the employee's disability - the employer does not need to also realise that those particular facts meet the legal definition of disability (*Gallop v Newport City Council* [2013] EWCA Civ 1583, CA).

55. **Discrimination arising from disability.** Under section 15(1) EA, discrimination arising from disability occurs where: A treats B unfavourably because of something arising in consequence of B's disability; and A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

56. There is no statutory definition of unfavourable treatment. The Supreme Court gave some guidance in ***Williams v Trustees of Swansea University Pension and Assurance Scheme and another*** [2018] UKSC 65. The test requires tribunals to answer two simple questions of fact - what was the relevant treatment, and was it unfavourable to the claimant?

57. There will be no discrimination arising from disability if the respondent shows that it did not know, and could not reasonably have been expected to know, that the claimant had the disability (section 15(2) EA). As with the duty to make reasonable adjustments, the required knowledge is of the facts of the employee's disability rather than that these facts meet the definition of disability.

Conclusions

58. We deal with the issues in turn.

59. **Time limits. *Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010?*** They were not. The last act complained of by the claimant was on 2 June 2020, and she did not contact ACAS until 18 September 2020. There is no continuing act that would be within time.

60. ***If not, were the claims made within a further period that the Tribunal thinks is just and equitable?*** Having considered this carefully, we find on balance that it would be just and equitable to extend time in this case. This was a borderline decision, and we have noted the respondent's submissions that the medical records do not show the claimant lacked capacity, and she could have looked into time limits in late August. However, we accept that the claimant had various disabilities, and that she had mental health problems after 2 June 2020. We accept her evidence that she did not know about the tribunal process and time limits, and we do not consider that an individual with no previous experience of tribunal proceedings would know that she needed to look up time limits. We have therefore proceeded to consider her claims.

61. **Direct disability discrimination. *Did the respondent do the following things:***

61.1 ***Subject her to criticism by Mr Smitherman from the beginning of June 2020 until the claimant went off sick, by pushing her to do more work, telling her she could not leave on time, and telling her she was slacking as she could not keep up with the required rate of work.*** As set out in the facts, we find that this did not happen. Mr Smitherman did not push the claimant to do more work or tell her that she was slacking, and there is clear evidence she did leave on time on 1 and 2 June.

61.2 ***Mr Smitherman not giving the claimant the opportunity to put her case to him.*** As set out in the facts, we find that this did not happen. Mr Smitherman did not talk over the claimant or finish her sentences for her.

61.3 ***Change the claimant's shifts at short notice.*** As set out in the facts, we find that this did not happen. Shifts were allocated automatically by the Kronos system, as recorded on the work rota. There is no evidence on the work rota that shifts were changed at short notice, which shows that

this claimant's shifts varied. We accept Mr Smitherman's evidence that the rota could allocate 20 hours per week over 4 or 5 days, and he did not override this to require the claimant to work until 5pm.

61.4 **Increase her weekend working to one weekend in two.** As set out in the facts, we find that this did not happen. The work rota shows a decrease in weekend working in May 2020, rather than an increase.

62. As we have found that these things did not happen, we do not need to consider whether this was less favourable treatment because of disability. The direct discrimination claim does not succeed.

63. **Discrimination arising from disability.** The unfavourable treatment relied on is the same as for the direct discrimination claim. We have found that these things did not happen, and for this reason the discrimination arising from disability claim does not succeed. We also find that, in any event, the respondent did not know and could not reasonably be expected to know that the claimant had the disability caused by her spinal issues (as explained further below).

64. **Reasonable Adjustments. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability?** In relation to the claimant's spinal issues, we find that the respondent did not know and could not reasonably be expected to know that the claimant had the disability. As found in the facts, the claimant did not inform the respondent about her back issues – either on her application form, at interview, at induction, or directly to her manager. We have accepted the evidence of Mr Smitherman that he did not receive a fit note about light duties, and he had no idea that the claimant had a back problem. In relation to the stammer, we find that the respondent could reasonably be expected to know that the claimant had the disability. In particular, we have found that her regular difficulty with saying some words would have been evident at interview, when she was stressed and speaking to someone she didn't know. This would have been sufficient to put Mr Evans on notice that she had a stammer, even if he did not realise this met the legal test of a disability.

65. Knowledge of disability is required for reasonable adjustments claim. This means the claims related to spinal issues fail, and there is no need for us to consider the relevant PCPs in detail. In any event, we do not find that the respondent required employees to work to an excessive level, required employees to work until they had finished their duties, or required employees to generally stand for six hours.

66. The remaining PCP relates to the claimant's stammer - **Mr Smitherman's method of raising issues with employees.** The claimant's position is that he should have raised issues with her with a more measured and understanding attitude. It is unclear what normal "method" of raising issues the claimant is saying Mr Smitherman used. If this is him talking over her, finishing her sentences, and shouting, then we have found in the facts that this did not happen. We do not find that there was a PCP of Mr Smitherman raising issues with employees generally in a particular way.

67. For these reasons, the claim for failure to make reasonable adjustments does not succeed.

68. **Harassment related to disability. *Did the respondent do the following things:***

68.1 ***Mr Smitherman was rude to the claimant when she told him she could not maintain the working pace required of her.*** As set out in the facts, we find that this did not happen. The claimant did not provide any detail about what Mr Smitherman is alleged to have done or said that was rude, and we accept his evidence that he in fact regarded her as a good and hard worker.

68.2 ***Mr Smitherman criticised the claimant from the beginning of June 2020 until the claimant went off sick, by pushing her to do more work, telling her she could not leave on time, and telling her she was slacking as she could not keep up with the required rate of work.*** As set out in the facts, we find that this did not happen.

68.3 ***Mr Smitherman not giving the claimant the opportunity to put her case to him.*** As set out in the facts, we find that this did not happen.

69. As we have found that these things did not happen, claim for disability-related harassment does not succeed.

70. **Unauthorised deduction from wages. *Did the respondent make an unauthorised deduction from the claimant's wages by failing to pay her for four hours of work?*** On our calculations, there have been no unauthorised deductions. As set out in paragraphs 44 and 45 above, the work rota and payslips show that the claimant was paid correctly for her first week of work, and for the last two weeks of her employment. This claim does not succeed.

71. In conclusion, it is disappointing that the respondent did not conclude the grievance process and this instead seems to have fallen through the cracks of staff leaving the business. It is possible that some or all of these proceedings could have been avoided if the respondent had addressed the claimant's concerns at the time. The claimant raised various matters during the hearing about the respondent's failure to follow its own procedures. However, we do not find that there was disability discrimination in this case

Employment Judge
Date: 26 January 2022

Judgment sent to parties: 24 March 2022

FOR THE TRIBUNAL OFFICE