Case Number: 2203967/2019

THE EMPLOYMENT TRIBUNALS

Claimant: **Mrs Alison Ritchie**

First Respondent: **Marks & Spencer Plc**
Second Respondent: **Michael Mullen**
Third Respondent: **Kirsty Rutherford**
Fourth Respondent: **Cemaliye Towns**

Heard at: **Newcastle upon Tyne Hearing Centre by CVP**
On: **7th February – 10th February 2022**

Before: **Employment Judge Johnson**

Members: **Mr R Dobson**
Mr P Chapman

Representation:

Claimant: **In Person**
Respondents: **Mr Kelly of Counsel**

JUDGMENT

The unanimous judgment of the employment tribunal is that the claimant's complaints of unlawful disability against all four respondents are not well-founded and are dismissed.

REASONS

1. The claimant conducted these proceedings herself. She gave evidence herself and called her husband, Mr Alan Ritchie, to give evidence on her behalf. The respondent was represented by Mr Kelly of Counsel, who called to give evidence Mr Michael Mullen (Academy Customer Assistant), Ms Kirsty Rutherford (Deputy Store Manager), Ms Cemaliye Towns (Section Manager), Ms Alexandra Bell (Deputy Store Manager) and Ms Rita Smith (Store Manager).

2. There was an agreed bundle of documents marked R1, comprising an A4 ring-binder, containing 578 pages of documents. The claimant, her husband and all

witnesses for the respondents had prepared typed, signed, witness statements, which were taken "as read" by the tribunal, subject to questions in cross examination and from the tribunal.

Summary

3. The claimant was employed by Marks and Spencer as a customer assistant, from 20th February 2005 until she applied, as was accepted for, voluntary redundancy, which brought her employment to an end on 31st October 2020. At the relevant time, the claimant worked at the respondent's Kenton Bar store in Newcastle upon Tyne. Those incidents which form the subject matter of the claimant's complaints to the Employment Tribunal, took place between October 2018 and July 2020. During that period, the claimant alleges that there were 26 separate incidents of conduct towards her by her managers, which the claimant alleges amount to acts of unlawful disability discrimination. What triggered this alleged course of conduct, was a proposal by Marks and Spencer in or about October 2018, to introduce more flexible working patterns for those members of staff who worked on the shop floor. What Marks and Spencer sought was what they described as, "30% flexibility" within each employee`s working pattern. The purpose of the proposal was to ensure that each store had the correct number of staff on the shop floor during busy periods and fewer when there were less customers in the store. From the date when these proposals were first made, the claimant insisted that she would not be able to provide that level of flexibility and insisted upon maintaining the shift pattern which she had worked for some time. The claimant's reason for her refusal was that she suffers from a mental impairment (Reactive Neurotic Depression) which amounts to a disability as defined in Section 6 of the Equality Act 2010. The respondent concedes that the claimant suffered from that disability throughout the relevant period and that it was aware of that disability. The claimant also alleges that her symptoms of the menopause amount to a disability. The respondent concedes that also, but states that it was only aware of the claimant's menopausal symptoms from January 2019. The claimant also alleges that she suffers from Thyroidism, which is also a disability. Whilst the respondent concedes that the claimant suffers from Thyroidism and that it is a disability, it denies ever having knowledge of that condition or that it amounted to a disability.

4. Because the claimant said there were medical reasons why she could not provide the requested level of flexibility, the respondent asked her to provide some medical evidence to support what she said, or otherwise to attend an occupational health assessment so that an appropriate examination could take place, so that appropriate discussions could take place and so that a recommendation could then be made to Marks and Spencer about what the claimant could and could not be expected to do under the new, flexible, system. Throughout the entire period, the claimant refused to provide any medical evidence and refused to attend any occupational health assessments. When occupational health assessments were arranged with her prior agreement, the claimant failed to attend. Accordingly, throughout the entire period, there was no medical or occupational health evidence to explain why the claimant's disability meant that she was unable to provide the requested level of flexibility. The claimant then began to complain that there were certain duties on the shop floor that she could not and should not be

required to undertake because of her medical condition. Again, there was no medical or occupational health evidence to explain why the claimant could not be required to undertake any of those duties.

5. The claimant submitted formal grievances, together with other complaints about these matters on 20th April 20019 and 1st August 2019. Those grievances were not upheld and the claimant's appeals against those outcomes were dismissed.

6. The claimant presented her claim to the Employment Tribunal on 12th October 2019. There were preliminary hearings at which case management orders were made on 4 separate occasions, namely 14th February 2020, 5th August 2020, 28th October 2020 and 10th February 2021. A particular thread running through the management of the claimant's case, was that the claimant should clearly identify those acts or omissions which she says amounted to discriminatory conduct and that she should then identify the particular kind of discrimination which was said to have taken place by specifying the relevant statutory provision from the Equality Act 2010. It was made clear to the claimant that because something happened which she did not like, did not mean that it was discriminatory conduct which had anything to do with her disability. The claimant was urged not to throw every possible kind of discrimination at the same set of facts, but to carefully consider each incident in its own merits and to decide which could reasonably be pursued as allegations of disability discrimination.

7. Eventually, a "Scott Schedule" was prepared by the claimant, which contains the 26 separate allegations of unlawful disability discrimination from October 2018 through to July 2020. A number of those were added after the claim form was presented, when permission to amend the claim was allowed. Despite the employment tribunal's clear and unequivocal guidance during the case management hearings, the claimant insisted upon categorising the vast majority of those allegations as amounting to more than one different kind of disability discrimination.

8. On the first day of the final hearing, the Tribunal took the claimant through each of those individual, factual, allegations and invited the claimant to explain why many of them were said to engage so many different kinds of discrimination. It was immediately apparent that the claimant did not grasp the difference between those different kinds of discrimination and that she expected the employment tribunal to undertake that task for her. The tribunal explained that it could not and would not run her case for her and that it was for her to decide which factual allegations to pursue as which kinds of discrimination and which statutory provisions would be engaged. With the agreement of Mr Kelly on behalf of the respondent, the tribunal then took the claimant through each of the 26 separate allegations, identified those which could not amount to allegations of disability discrimination and explained which of the kinds of discrimination under which statutory provisions may be the most appropriate for that particular factual allegation. The tribunal was satisfied that the claimant understood why this was being done and accepted that it was appropriate, so that her complaints could be dealt with justly and in accordance with the Overriding Objective.

9. The Tribunals' findings of fact on each of those separate allegations are set out below in chronological order. Each factual allegation is allocated the number relevant to that allegation on the Scott Schedule which appears at page 77 – 87 in the bundle.

10. It is appropriate at this stage for the tribunal to set out its assessment of the claimant, her husband and the respondent's witnesses as reliable witnesses of fact. The Tribunal found that the presentation of the claimant's case has been materially influenced by her husband, Mr Alan Ritchie. The wording of the claimant's pleadings, further information, correspondence and witness statements clearly indicate that Mr Ritchie has had a substantial influence on the presentation of the claimant's case. The general tenor of the claimant's case is that because she suffers from a disability, she is entitled to dictate to her employer exactly what she can and cannot be required to do. Similarly, whenever something happens, which the claimant does not like, then she immediately associates that with her disability. If something happens which she does not like and that exacerbates her depression, she defines that as unfavourable treatment because of something arising in consequence of a disability. The "something" is the exacerbation of her condition. That ignores the requirement that the "something" must be the cause of the treatment, rather than its effect. A constant thread running through the claimant's case was that the respondent had a duty of care towards the claimant's mental health and if it failed in that duty, then every incident was one of unlawful disability discrimination. The tribunal found it likely that Mr Ritchie was behind the claimant's refusal to attend any occupational health assessment on the basis that, "Marks and Spencer use occupational health to manage employees out of the business". The tribunal found that the claimant's refusal to provide any kind of medical evidence, or to attend any occupational health assessment, was totally unreasonable in all the circumstances of this case. The tribunal found that the respondent's request that the claimant attend for an occupational health assessment was simply designed and intended to analyse the claimant's requirements for any adjustments to her shift pattern, flexibility, place of work or general duties. The tribunal found that the claimant had formed the opinion that, because she was disabled, she did not have to comply with any reasonable management requests because, when faced with such requests, she would simply allege that they amounted to unlawful disability discrimination.

11. The tribunal found the respondent's witnesses to be honest, credible and reliable. In particular, their evidence was inevitably supported by contemporaneous documents and was consistent with that of the other witnesses. The tribunal found that the claimant had become someone who was difficult to manage, because she was unwilling to be managed.

<u>Allegations 1 & 2</u>

12. The claimant alleges that, "A new shift regime was instigated by management, requiring all staff to agree to work flexible shifts, ie to agree to change shift patterns at little or no notice, plus the same for days off. Consequently, there have been instances of staff receiving no more than a day's notice of a change of shifts for a week or one day. An internal document written by head office to store management states that this flexible regime should be interpreted voluntarily by

staff." The claimant alleges that this a provision, criterion or practice which places her at a disadvantage because of her disability, in that she "suffers from depression and needs to keep to a daily routine as any change to her working hours or days off has a detrimental impact on her psychological and physical health in that they worsen her anxiety with symptoms of nausea, palpitations, light-headedness, diarrhea, shortness of breath, disorientation which then triggers my depression." In terms of the provision, criterion or practice which the claimant says was applied to her, she says at page 88 of the Scott Schedule, it was a "requirement to comply with the flexible shift regime as detailed." That included "requirements to change location of work to different departments either at the start of or on the commencement of shifts, with little or no prior notice." The tribunal found that there was no such "requirement" imposed upon the claimant. The claimant had immediately objected to any change in her shift pattern and the tribunal found that, between the beginning of the consultation process and the date of her dismissal, the claimant had not been required to work to a different shift pattern. Furthermore, the tribunal was not satisfied that any such requirement did, or may have, put the claimant at a substantial disadvantage. The tribunal found the claimants explanation as to the impact such matters may have had upon her medical condition, to be unpersuasive in the absence of any supporting medical evidence. The tribunal found that the claimant could easily have obtained that evidence either from her own GP, her own consultant or, more particularly, from the respondent's occupational health advisor. The claimant chose not to do so and her reason for not doing so was unreasonable in all the circumstances. There was no good reason why the claimant did not submit herself to an occupational health assessment. The tribunal was not satisfied that the claimant was put to any disadvantage by the proposal for a flexible working pattern.

<u>Allegation Number 3</u>

13. The claimant alleges that she was unfit for work between 22nd February 2019 and 28th March 2019 and that during that time she "received harassing and intimidating calls by Mr Mullen, demanding to know how long I would be off for, what was wrong with me and pressuring me into coming back to work, after he was advised to refrain from contacting me by the "People Policy Service" team". The tribunal found that the claimant was obliged to maintain contact with Mr Mullen as her manager under the terms of the respondent's Absence Management policy. Regardless of whether or not she had submitted a fit-note, the claimant was required to contact her manager on a daily basis to keep the manager informed as to the reason for the absence, the likely length of the absence and the prospects of returning to work. The tribunal found it reasonable for Mr Mullen to attempt to contact the claimant when she failed to comply with that obligation. The tribunal accepted Mr Mullen's evidence that his calls had been measured and supportive and not "harassing and intimidating" as described by the claimant. The record of the call which appears at page 560 in the bundle shows that Mr Mullen was spoken to by Mr Ritchie and that Mr Mullen had sought HR advice as to how to deal with the matter. The claimant argued that the tone of Mr Mullen's calls was such that she found them intimidating and harassing. From the way in which Mr Mullen gave his evidence to the tribunal, the tribunal found this to be unlikely.

Allegation Number 4

14. The claimant alleges that she received an "absent without leave" letter from Mr Mullen on 21st March 2019, stating that she had failed to keep in contact with him. The letter appears at page 357 in the bundle and states as follows:-

> "I am writing to you as you have been absent from work since 22nd February 2019 as a result of a stress-related problem and I have had no contact with you since the 8th of March 2019. I have tried to contact you using the telephone numbers we have on file but have not been successful. I am keen to talk to you to understand your current medical situation and whether I an offer any support to help you return to work. Please contact me to discuss:
>
> - The medical situation
> - The prognosis
> - Possible adjustments to support your return to work
> - Future actions
>
> The Attendance at Work policy is available on-line from People Guide if you wish to view it or you can ask your line manager for a copy. I look forward to hearing from you."

15. The tribunal found that the phrase "future actions" could not reasonably be interpreted by anyone as being intimidating. The general tenor of the letter is supportive, and the tribunal was satisfied that this was Mr Mullen's intention. No reasonable person would describe the letter as "intimidating".

Allegation Number 5

16. He claimant alleges that she requested a reasonable adjustment of a phased return to work, her start time to remain as usual and to be kept off tills for a short time. The claimant says each of those was accepted by the respondent, but that on her first shift back to work she was "pressured onto the till" and "my need for my daily routine was denied by way of changing my start times". This is alleged to be a failure to make reasonable adjustments. However, the claimant failed to understand that those were adjustments agreed between the claimant and Marks and Spencer to enable her to gradually integrate herself back into the workplace, following a period of absence. They were not, and were intended to be, "reasonable adjustments" to remove the disadvantage caused by the implementation of a provision, criterion or practice. At page 358 in the bundle is the fit-note from the claimant's GP, which recommends a phased return to work – "planning to return to work on Thursday 28th March but to start on reduced hours. To start on three-hour days, increasing over two weeks to normal hours". There is no mention of working on the till or any specific start times or finish times for the claimant's shift. The tribunal was not satisfied that the claimant had established that any of these matters had been "agreed as reasonable adjustments". At page 359 – 360 are the notes of the discussion with the claimant on 29th March in which the claimant appears to have requested to work on a belted till.

Allegation Number 6

17. The claimant alleges that on 29th March 2019, Cemaliye Towns gave her a list of shifts for the next 5 shifts, only the last of which enabled the claimant to maintain her previous routine. The claimant alleged that she told Ms Towns that she needed to maintain that routine, otherwise it would make her ill, whereupon Ms Towns is alleged to have stated, "If you don't do them then it will be misconduct." The claimant alleges this to be an act of harassment, contrary to Section 26 of the Equality Act 2010. Ms Towns evidence was that the claimant's fit-note did not state which hours the claimant should work, but accepted that the claimant had asked if she could avoid being put onto the tills. Ms Towns` evidence was that at the meeting on 29th March, she told the claimant that her length of absence meant that the absence triggers had been met and that Mr Mullen would be likely to be discussing that with her in their return to work meeting, the claimant's missed occupational health appointment. Ms Towns asked the claimant to do a shift at a start time later than the claimant's normal start time, but which finished earlier than the claimant's normal finish time. The claimant gave no explanation as to why this could not be accommodated. The claimant simply refused, stating "I need that for me." Ms Towns evidence to the tribunal was that the claimant kept refusing in such a way that Ms Towns told her that if she did not provide a reasonable explanation for her refusal and if she did not turn up for the allocated shift, "it could be seen as misconduct". The tribunal found that Ms Towns was simply informing the claimant about a shift pattern which was in accordance with the recommendations from the claimant's GP and that it was entirely reasonable for Ms Towns to warn the claimant that, in the absence of any meaningful explanation as to why she could not work that shift, then it could be regarded as a failure to comply with a reasonable management instruction which could be seen as misconduct. The tribunal found it entirely appropriate for Ms Towns to inform the claimant in straightforward terms as to what may be the potential consequences of her refusal.

Allegation Number 7

18. The claimant alleges that she rang Kirsty Rutherford on 30th March 2019 and "explained that my reasonable adjustment of keeping to my usual start times had been denied. I asked K Rutherford for my normal start time to remain and she said, "No, its policy". The claimant alleges that the use of the phrase "No, its policy", amounts to a failure to make reasonable adjustments. Again, the claimant overlooks the fact that the GP's recommendations on a phased return to work made no mention of start times or finish times. The claimant has not provided any explanation as to why she could not work a shift which began later than her normal start time and finished earlier than her normal time. The claimant would, undoubtedly, have been at work during the hours which she was being expected to work. The tribunal was not satisfied that the claimant was put at any disadvantage by this particular instruction. The requirement to make an adjustment did not arise.

Allegation Number 8

19. This allegation relates to a letter written by the claimant to Kirsty Rutherford dated 30th March, explaining her need to maintain her daily routines and listing the symptoms she says she suffers if that were to be denied. The Tribunal found that this is likely to amount to a "protected act" in accordance with Section 26 of the Equality Act, but nowhere does it amount to an act of discriminatory conduct by any of the respondents.

Allegation Number 9

20. The claimant alleges that on 3rd April 2019, whilst she was on certified sick leave, she received "an aggressive telephone call from Mr Mullen demanding to know why I was off sick, is it because you just don't want to do the new hours you've been given?" The claimant further alleges that, "he threatened to cease my company's sick pay and said he would have to ring PPS. He rang back the same day and told me he was stopping my company sick pay but didn't give me a reason for it." The claimant alleges this to be an act of harassment contrary to Section 26. Mr Mullen's evidence was that he had spoken to the claimant at lunchtime that day, when the claimant told him her sick-note would follow in the post. Mr Mullen had spoken to HR, telling them that the claimant remained absent from work and that he believed this was due to being asked to work rehab hours at varying times within her contracted shifts. Mr Mullen advised HR that the claimant had failed to maintain sufficient levels of contact throughout her absence, despite her contractual obligation to do so and despite repeated requests from Mr Mullen. Following that advice, Mr Mullen decided that the claimant should no longer receive discretionary sick pay because she had failed to maintain regular contact with her manager. The tribunal found that the reason why the discretionary company sick pay was withdrawn was because the claimant failed to maintain contact with Mr Mullen or any other manager. The company sick pay was not withdrawn because the claimant was absent from work. Accordingly, it was not something arising as a consequence of her disability. The tribunal accepted Mr Mullen's version of the telephone call and found that he had done nothing more than explain to the claimant why the discretionary sick pay was being withdrawn. The tribunal found that Mr Mullen's decision was in no sense whatsoever related to the claimant's disability, but was entirely due to the fact that she had failed to maintain the required level of contact during her absence.

Allegation Number 10

21. Again, the claimant states that this refers to a four-page letter written by her to HR requesting payment of her company sick pay and criticising the lack of support and alleged bullying. Whilst that may amount to a protected act under Section 27 it could not amount to any other form of discrimination.

Allegation Number 11

22. The claimant returned to work on 1st May and alleges that "Mr Mullen took me into training room and stated, "I know you've put in a grievance, I know I`m mentioned in it and I will have to be interviewed, so what do you think of that." The claimant described Mr Mullen's tone as "extremely aggressive, intimidating and threatening." The claimant alleges this to be an allegation of harassment contrary

to Section 26 and victimisation contrary to Section 27. Mr Mullen's evidence to the tribunal was to deny saying any of those things and to deny acting in an intimidating or threatening manner. Mr Mullen's evidence was that during the return to work interview, the claimant had begun to cry and that he had asked her why she was upset, whereupon the claimant said she was scared of what the store was going to do and that she had concerns about being disciplined for her absence and that she wanted to wait until her grievance had been heard before any absence review meeting was conducted. Mr Mullen agreed to the claimant's suggestion. The claimant then asked for a few minutes on her own to have a drink before she went onto the shop floor. When Mr Mullen returned approximately 30 minutes later, a colleague who had been talking to the claimant explained that the claimant "needed to go home". Mr Mullen asked the claimant if that was the case and that the claimant had told him she felt she had returned too soon. Mr Mullen asked the claimant whether she was able to drive home or whether he should contact her husband to collect her. The claimant confirmed that she was able to drive home and did so. The tribunal found that Mr Mullen's version of this exchange was more likely to be accurate. The tribunal found that there had been no intimidating or threatening behaviour.

Allegation Number 12

23. This refers to a letter from the claimant's GP, confirming that she suffers depression and that changes to her routine greatly affect her mental health and recommending that she "maintains a steady routine and for meetings with management to be limited to no more than one per week." Again, this cannot and does not amount to any alleged act of discriminatory conduct.

Allegation Number 13

24. The claimant alleges that on 17th May 2019, she received a second "absence without leave" letter from Mr Mullen, stating that she had failed to keep in contact with him. That letter appears at page 399 in the bundle. Again, the letter is in exactly the same terms as that referred to as Allegation Number 4. Again, the claimant alleges use of the phrase "future actions" to be "threatening and intimidating". The tribunal found that it was entirely reasonable in all the circumstances for Mr Mullen to send this letter and that no reasonable person would consider any part of it to be either intimidating or threatening. Furthermore, the claimant has not shown that the issue of the letter was in any way connected to her disability. It was sent because she had failed to comply with her obligations to keep in contact with Mr Mullen.

Allegation Number 14

25. In this allegation the claimant says that on 30th May she advised Mr Mullen that she was attempting a third return to work on 5th June and that in the conversation she "requested reasonable adjustments of a phased return to work and to remain on my usual start times being:- Monday, Wednesday, Thursday, Friday 7am to 4pm, Saturday 11am to 8pm.

The phased return over a 4-week period was agreed to, but my request to remain on my usual start times was denied three times being:- 10th June – 2pm to 4pm, 24th June 11am to 4pm, 26th June 11am to 4pm". The claimant alleges that when she told Mr Mullen that she would not be able to deviate from that routine she was told, "It is the needs of the business."

The claimant alleges that this amounts to a failure to make reasonable adjustments. Again, the tribunal found that the claimant had failed to establish that there was a provision, criterion or practice applied to her which put her at a substantial disadvantage because of her disability. The claimant has failed to provide any meaningful evidence as to why she could not work a shift which began later than her normal start time but ended sooner than her usual finish time. The letter from her doctor referred to in Allegation 12 above, simply refers to the importance of Mrs Ritchie maintaining a steady routine. The tribunal was not satisfied that the claimant's routine was adjusted to such an extent that it had any impact on her wellbeing. The claimant would have been working during those hours in any event.

Allegation Number 15

26. The claimant alleges that, following her return to work in June, she was rostered to work on different departments than she was used to working on. Those different departments included desserts, food on the move, bread and cake, meat, fish, poultry and deli. The claimant had previously worked usually on traditional meals, prepared vegetables, gastropub, healthy and children's meals. The claimant said she had worked on those departments for 5 years and that it was part of her usual routine. When questioned about this, the claimant accepted that her role on the shop floor was to collect products from the storeroom/warehouse, stack them on a trolley, take them to the relevant aisle on the shop floor, remove them from the trolley and put them on the shelves. The claimant accepted that those tasks would be exactly the same if she was stacking different products on different shelves in a different aisle. The claimant could not explain what difference it made to her mental health if she was stacking one set of products on one aisle as opposed to a different set of products on a different aisle. The tribunal found that the claimant was not placed at any disadvantage by being required to perform the same task in a different aisle in the same shop. The claimant accepted that she was contractually obliged to work in different departments in the store. There was no medical reason why she could not do so. There was no evidence to show that there was any disadvantage.

Allegation Number 16

27. With regard to the claimant's grievance, the claimant had declined to attend the grievance hearing whilst she was on sick leave. In the HR advisory note disclosed to the claimant, it shows that Ms Swann, line manager advisory services, had said that if the claimant was unable to attend the hearing then the grievance should be heard in her absence. These notes were disclosed to the claimant during the Employment Tribunal disclosure process and she now alleges that these amount to harassment, contrary to Section 26 and/or victimisation contrary to Section 27. The tribunal found that the claimant was not subjected to

any detrimental treatment by this issue being raised. In any event, the claimant did get a lengthy personal hearing following the postponement at her request. The internal advice given could not regarded as “unwanted conduct” to the claimant when she was unaware of it at the time and did not learn of it until after the grievance hearing had taken place.

Allegation Number 17

28. Following the withdrawal of the discretionary company sick pay, the claimant applied for, and received, a “cash advance” in the sum of £647.89. The respondent accepted that the claimant had suffered financial hardship because of the lack of company sick pay and the grant was made on the basis that it would be repaid by 30th July 2019. The claimant in fact never repaid that money. Enquiries of the respondent’s HR services showed that the claimant had been paid correctly and that the cash advance was due to be repaid by the claimant. The claimant alleges that Mr Mullen was supposed to make some form of adjustment, so that this money was not to be repaid. The Tribunal found that this was never the case. The claimant appears to allege that the failure to make the wages adjustment was an act of harassment or victimisation. The tribunal found that it was neither of those. The requirement to repay the advance was in no sense whatsoever related to the claimant’s disability and was no more than a contractual obligation imposed upon the claimant who add, in simple terms, received a loan from the respondent to alleviate the financial hardship encountered by the reduction in her company sick pay.

Allegation Number 18

29. The claimant alleges that on 12th July, she attended a meeting of the Business Involvement Group, at which details were given as to how the proposed flexible working system would be implemented. The claimant alleges that all present were told that they would have to be flexible, that all managers were aware of the claimants needs for a daily routine, but that her requests for those were being denied. No further details were provided by the claimant. The Tribunal found this to be a repetition of earlier allegations about the flexible working pattern. The claimant has failed to show that she was put at any disadvantage by the proposal to implement flexible working.

Allegation Number 19

30. The claimant alleges that between 26th July 2019 and 2nd August 2019, she was required to work in the bread and cake department. The claimant states that Mr Mullen was aware that she was going through the menopause and that, as a result, she should not have been required to work in that department where the heat was such as to exacerbate her symptoms of the menopause. The claimant accepted that she had never specifically asked not to work in that department, but insisted that Mr Mullen should have been aware it was likely to cause her difficulty because he knew that she was going through the menopause. Mr Mullen’s evidence was that the claimant wrote to him on 5th August telling him for the first time that she was going through the menopause and specifically asking to be kept off the bread and cake department. Mr Mullen immediately agreed to that

suggestion and informed the other managers and co-ordinators accordingly. This of course was after the claimant had worked on the bread and cake department on 26th July and 2nd August. On both of those occasions, Mr Mullen's evidence was that the claimant had not raised any complaint about working on the bread and cake department. Had she done so, then Mr Mullen would have arranged for a change of duty. The tribunal found that 5th August was the first date when Mr Mullen or anyone else within the respondent's undertaking could reasonably have been expected to be aware that the claimant was going through the menopause and that her symptoms were such that she should not be required to work in the bread and cake department. The tribunal found that as soon as the respondent became aware of that, then the claimant was no longer required to work in the bread and cake department. Accordingly, the adjustment which the claimant requested was in fact made. The respondent's decision to ask the claimant to work on the bread and cake department before 5th August was in no sense whatsoever related to her disability, nor was it in any way related to any protected act which the claimant had performed before then.

Allegation Number 20

31. The claimant alleges that on 30th September, she had a meeting with Cemaliye Towns, at which Ms Towns pressurised her to attend an occupational health assessment and informed the claimant that, "We will be changing your hours at some point." The claimant described Ms Towns tone as "aggressive and threatening, although she did not state what the new hours would be changing to." The claimant alleges that this behaviour by Ms Towns was harassment, contrary to Section 26 and victimisation contrary to Section 27. Th tribunal found that Ms Towns had in fact been following up on the outcome of the claimant's grievance and her appeal against the rejection of the grievance and that the hours of work were never mentioned at this meeting. The tribunal found that the request to attend an occupational health assessment was entirely reasonable in all the circumstances and could not be described as a "detriment". Furthermore, it was not connected to any earlier protected acts. The tribunal accepted Ms Towns explanation and description of the exchange between herself and the claimant and found that the tone used by Ms Towns was unlikely to have been either threatening or intimidating.

Allegation 21

32. The claimant alleges that on 15th November 2019 she was required to "fill departments (meat, fish, poultry and deli) I had rarely worked on". The claimant asked to be returned to her normal department and was told, "No, that's what you are working and I'm not changing it." The tribunal found this to be a repetition of the earlier allegations relating to the claimant's alleged routine. The tribunal could see no difference between working on the meat, fish, poultry and deli departments rather than the traditional foods department. The claimant could not explain any difference between stacking products of one description in one aisle as opposed to stacking products of a different description in a different aisle. The claimant had not established that she was put to any disadvantage by being required to do so.

Allegation Number 22

33. The claimant alleges that on 15th November 2019, 25 minutes before the end of her shift, she was required to work upstairs on the tills of the menswear department. An explanation allegedly given to the claimant was that there was a queue at the till and further assistance was required. The claimant's allegation was that there were other members of staff available who were working later hours that day and who could have been requested to go. The claimant asked the supervisor why she was being instructed to go upstairs and was told "You've been asked to go". The claimant says that she went upstairs and could see that there were no customers in a queue waiting to be served. The claimant alleges that the staff members on the tills told her there had never been a queue and certainly not one that they could not manage. The claimant says this made her feel "nauseous, disorientated and caused palpitations and that the heat was "immense and exacerbated my menopausal hot flushes and feelings of unwellness." The claimant alleges this to be an act of harassment by Ms Towns. Ms Towns evidence was that she had never been involved in this incident at all, that she had never sent the claimant upstairs to the menswear department and had never discussed the incident with the claimant. The tribunal found that someone else had probably instructed the claimant to assist in the menswear department shortly before the end of her shift. However, that instruction was in no sense whatsoever related to her disability.

Allegation Number 23

34. The claimant alleges that on 27th November 2019 Ms Rutherford and Ms Towns "surrounded me with C Towns to the side of me and K Rutherford in front of me." The claimant goes on to say that "I believe that it was to intimidate me – they just stood there blocking my exit." Neither Ms Rutherford nor Ms Towns had any recollection of this incident. The claimant does not say that she was spoken to by either Ms Rutherford or Ms Towns. If either Ms Rutherford or Ms Towns, or both, were indeed stood in the claimant's vicinity, the claimant had not established how that had the purpose or effect of creating any of the situations envisaged by Section 26. Furthermore, the behaviour was in no sense whatsoever related to the claimant's disability.

Allegation Number 24

35. On 19th November 2019, the claimant had written to Kirsty Rutherford requesting adjustments to the department upon which she was required to work and complaining about having been required to go upstairs to the menswear department on 15th November. Ms Rutherford replied by letter dated 17th November, a copy of which appears at page 546 – 548 in the bundle. In that letter, Ms Rutherford explained the respondent's position about the claimant working on different departments, changes to her daily routine and being required to work in the menswear department. The claimant described that letter as "aggressive and threatening". In particular, the claimant took exception to the following phrases:-

> "In the absence of medical information, I am unable to consider further adjustments to your job role." And "failure to complete tasks in line with

> the operation requirements of the role will be managed in line with the relevant M & S policy and procedure."

The claimant took this to be a threat of disciplinary action and alleged that it was an act of harassment and victimisation. What the claimant does not refer to is that part of the letter which states as follows:-

> "I also wish to clarify with you that you have several fixed-term adjustments in place to support you at work, not working on bread and cake, no changes to your working hours or pattern and there is no requirement for you to offer flexibility."

The tribunal found that there was nothing in this letter which could reasonably be described as harassment or victimisation. The letter is neither aggressive nor threatening. No reasonable person would consider it to be so.

<u>Allegation 25</u>

36. The claimant alleges that on 2nd July 2020, Ms Towns "demanded a discussion with me regarding the reasonable adjustment that I had requested and had been put in place to not work on bread and cake department. I stated again that nothing had changed, I was still going through the menopause. This was done in front of colleagues and customers. She stood very close to me, her manner was very aggressive and confrontational." This is alleged to be an act of harassment and victimisation. Ms Towns evidence to the tribunal was that she had approached the claimant on the shop floor, but whilst no colleagues or customers were present and said that she would like to speak to the claimant off the shop floor but that the claimant had refused saying, "she would not come off the shop floor to speak to me." The claimant accepted that she had raised no complaint about this matter at the time. In the absence of any supporting evidence, the tribunal was not satisfied that the claimant had established that anything had happened which could amount to an act of harassment or victimisation.

<u>Allegation 26</u>

37. The claimant alleges that, on 23rd July 2020 the respondent's computer network failed towards the end of her shift, which meant that the claimant was unable to complete her tasks before the end of that shift. The claimant alleges that Mr Mullen approached her stating, "Why are you taking so long to do the checks, is this just a one-off or do you always take this long?" The claimant described Mr Mullen's manner towards her as "very aggressive and degrading" and that it amounted to harassment and victimisation. Mr Mullen's evidence to the tribunal was that the claimant had been required to complete a date-expired food check on fruit and salad which began at 12.30. Those checks usually take approximately 90 minutes, which meant that the claimant should have completed the task by approximately 2pm. At 3.50pm Mr Mullen was told by another colleague that the claimant would not complete the check by her finish time of 4pm. Mr Mullen said that he "approached the claimant and asked if there was a reason why this task was taking so long, and she was abrupt in her response. The claimant told me she had to socially distance from customers who were

shopping in these departments, answer till bells as the network had failed earlier that day as well as take her break in the middle of this. Altogether (excluding the break) this check took almost three hours and still wasn't complete." Mr Mullen pointed out to the claimant that these checks normally take one and a half hours, which the claimant replied that this was insufficient time. Mr Mullen said that, "at no point was my manner towards the claimant aggressive and/or degrading. I have only ever tried to support the claimant." The claimant has not alleged that she was unable to complete the task for any reason associated with, or related to, her disability. The claimant has not alleged that Mr Mullen's attitude was in any sense whatsoever related to her disability. The claimant has not shown which protected act had led Mr Mullen to behave in this way. The tribunal accepted Mr Mullen's version of the exchange, which was simply that the claimant was taking longer than expected to perform the task and, as her manager, he was entitled to enquire as to what was taking so long.

38. The claimant alleges that she was entitled to be paid contractual sick pay throughout her periods of absence and that the respondent's failure to pay company sick pay amounts to an unauthorised deduction from her wages. The respondent's position was that company sick pay is entirely discretionary and that a particular pre-requisite of payment is that the employee maintains the necessary level of contact with management during the absence. The tribunal found that there was no contractual entitlement to company sick pay. The tribunal found that the claimant was in breach of her obligation to maintain contact with her manager during her periods of absence. The tribunal found that the respondent's exercise of its discretion not to pay company sick pay was not an unauthorised deduction from wages, nor was it in any sense whatsoever related to the claimant's disability.

<u>The law</u>

39. The claims brought by the claimant engage the provisions of the Equality Act 2010. The relevant statutory provisions are set out below.

Section 6 Disability

(1) A person (P) has a disability if--

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

(2) A reference to a disabled person is a reference to a person who has a disability.

(3) In relation to the protected characteristic of disability--

(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)--

(a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and

(b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.

Section 15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if--

(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

Section 20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
(2) The duty comprises the following three requirements.
(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to--

(a) removing the physical feature in question,

(b) altering it, or

(c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to--

(a) a feature arising from the design or construction of a building,

(b) a feature of an approach to, exit from or access to a building,

(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d) any other physical element or quality.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

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

Section 21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

Section 26 Harassment

(1) A person (A) harasses another (B) if--

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of--

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if--

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if--

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account--

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are--

age;

disability;

gender reassignment;

race;

religion or belief;

sex;

sexual orientation.

Section 27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because--

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act--

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

Section 136 Burden of proof

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

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

1. Impairment

Regulations may make provision for a condition of a prescribed description to be, or not to be, an impairment.

2. Long-term effects

(1) The effect of an impairment is long-term if--

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

(4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.

3. Severe disfigurement

(1) An impairment which consists of a severe disfigurement is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities.

(2) Regulations may provide that in prescribed circumstances a severe disfigurement is not to be treated as having that effect.

(3) The regulations may, in particular, make provision in relation to deliberately acquired disfigurement.

4. Substantial adverse effects

Regulations may make provision for an effect of a prescribed description on the ability of a person to carry out normal day-to-day activities to be treated as being, or as not being, a substantial adverse effect.

5. Effect of medical treatment

(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if--

(a) measures are being taken to treat or correct it, and

(b) but for that, it would be likely to have that effect.

(2) "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.

(3) Sub-paragraph (1) does not apply--

(a) in relation to the impairment of a person's sight, to the extent that the impairment is, in the person's case, correctable by spectacles or contact lenses or in such other ways as may be prescribed;

(b) in relation to such other impairments as may be prescribed, in such circumstances as are prescribed.

6. Certain medical conditions

(1) Cancer, HIV infection and multiple sclerosis are each a disability.

(2) HIV infection is infection by a virus capable of causing the Acquired Immune Deficiency Syndrome.

7. Deemed disability

(1) Regulations may provide for persons of prescribed descriptions to be treated as having disabilities.

(2) The regulations may prescribe circumstances in which a person who has a disability is to be treated as no longer having the disability.

(3) This paragraph does not affect the other provisions of this Schedule.

8. Progressive conditions

(1) This paragraph applies to a person (P) if--

(a) P has a progressive condition,

(b) as a result of that condition P has an impairment which has (or had) an effect on P's ability to carry out normal day-to-day activities, but

(c) the effect is not (or was not) a substantial adverse effect.

(2) P is to be taken to have an impairment which has a substantial adverse effect if the condition is likely to result in P having such an impairment.

(3) Regulations may make provision for a condition of a prescribed description to be treated as being, or as not being, progressive.

9. Past disabilities

(1) A question as to whether a person had a disability at a particular time ("the relevant time") is to be determined, for the purposes of section 6, as if the provisions of, or made under, this Act were in force when the act complained of was done had been in force at the relevant time.

(2) The relevant time may be a time before the coming into force of the provision of this Act to which the question relates.

40. In **Pnaiser v NHS England & Coventry City Council [2016 IRLR 170]** the Employment Tribunal set out the proper approach to claims under Section 15.

> "The tribunal must determine whether the reason/cause (or if more than one) a reason or cause, is "something arising in consequence of the disability". That expression "arising in consequence of" could describe a range of causal links. Having regard to the legislative history of Section 15 of the Act, the statutory purpose which appears from the wording of Section 15, namely to provide protection in cases where the consequence of effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact. This stage of the causation test involves an objective question and does not depend upon the thought processes of the alleged discriminator. Moreover, the statutory language of Section 15 (2) makes clear that the knowledge required is of the disability only and does not extend to a requirement of knowledge that the "something" leading to the unfavourable treatment is a consequence of the disability. Had this been required, the statute would have said so."

41. Sections 20 – 21 of the Equality Act impose upon an employer an obligation to make reasonable adjustments where a disabled person is placed at a substantial disadvantage as a result of a provision, criterion or practice. This means that employers shall take appropriate measures, where needed in a particular case, to

enable a person with the disability to have access to, participate in, or advance in employment to undergo training unless such measures would impose a disproportionate burden on the employer.

42. In order for the duty to arise, the employee must be subjected to a substantial disadvantage in comparison with persons who are not disabled. “Substantial” as defined means “more than minor or trivial.” That threshold is set deliberately low. The disadvantage is comparative, so it is no answer to a claim to show that persons who are not disabled are also disadvantaged by the PCP, if the claimant’s disadvantage is greater. The duty to make reasonable adjustments arises when the employer can take steps to avoid the relevant disadvantage.

43. It is for the claimant to identify and prove the provision, criterion or practice. **[Project Management Institute v Latif – 2007 IRLR579]**. It is important to keep in mind the whole of Section 20 (3). The elements within that are designed to link together. The purpose of identifying the PCP is to see if there is something about the employer’s operation which causes substantial disadvantage to a disabled person in comparison to persons who are not disabled. The PCP must therefore the cause of the substantial disadvantage. Wide though the concept is, there is no point in identifying the PCP which does not cause substantial disadvantage. **[Secretary of State for Work and Pensions v Higgins – 2014 ICR 341]**

44. Whilst it is for the claimant to identify and prove the PCP, the claimant will have the benefit of the reverse burden of proof in Section 136 of the Equality Act 2010. The claimant must prove facts from which it could be inferred that any PCP has placed her at a substantial disadvantage. If so, the respondent must then go no to prove that there was no such PCP or that the claimant was not at a substantial disadvantage and that there were no further or other steps that the respondent could reasonably have taken in order to reduce or eliminate any such disadvantage.

45. It is trite law that the duty to make reasonable adjustments does not arise if the employer lacks knowledge or constructive knowledge of either the disability or the disadvantage.

46. When pursuing complaints of harassment contrary to Section 26, the claimant must only establish that the unwanted conduct “relates to” her disability and not that it is “because of” that disability. In deciding whether the unwanted conduct relates to the disability, the tribunal must consider the mental processes of the putative harasser. In determining whether conduct has the effect of violating the claimant’s dignity or creating a relevant environment for the purpose of Section 26 (1) (b), the tribunal must take into account the employee’s perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. In **Land Registry v Grant [2001 EWCA-CIV-769]** the court focussed on the words, “intimidating, hostile, degrading, humiliating or offensive” and observed that, “Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.”

47. The test as to whether conduct has the relevant effect is not subjective. Conduct is not to be treated as violating a complainant`s dignity just because she thinks it does. It must be conduct which could reasonably be considered as having that effect. The tribunal must however take the complainant's perception into account in making that assessment. The intention of the alleged harasser may also be relevant in determining whether the conduct could reasonably be considered to violate a claimant's dignity. It is not necessary that the alleged harasser should have known that his or her behaviour should be unwanted. Where the language of the alleged harasser is relied upon, it will be important to assess the words used in the context in which the use occurred. **[Lynsey v London School of Economics – 2013 EWCA-CIV-1650]**

48. The claimant brings allegations of victimisation contrary to Section 27. It is necessary for the claimant to establish that she has done a protected act or that the respondent believed that she had or may do a protected act and that thereafter she was subjected to a detriment because she had done that protected act. In terms of being subjected to a detriment, the claimant need only show that she has been treated badly, not that others have been treated better than her. The claimant must establish that she has been subjected to a detriment because she has performed a protected act. This means that the protected act has to be an effective and substantial cause of the employer's detrimental action, but does not have to be the principal cause. Again, the claimant will have the benefit of Section 136, in that she must prove facts from which, in the absence of an explanation, the tribunal could infer that any subsequent detriment imposed was effectively retaliation for the claimant doing the protected act.

<u>Conclusions</u>

49. The Tribunal has set out above its findings on each of the 26 allegations made by the claimant. In each of those, where there was a difference, the Tribunal has found that the claimant`s description of what happened was less likely to be correct than the version given by the respondents.

50 Having made those findings of fact, the Tribunal rejected each allegation of discriminatory conduct by the respondents. Those facts found by the Tribunal in each case could not and did not satisfy the definition of the various types of discrimination alleged by the claimant. All allegations of unlawful disability discrimination against all four respondents are dismissed.

51 The claim of unauthorised deduction from wages is also not well-founded and is dismissed.

EMPLOYMENT JUDGE JOHNSON

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
24 March 2022

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