EMPLOYMENT TRIBUNALS

Claimant: Ms J Payne

Respondent: Regal Fish Supplies Ltd

Heard at: Leeds **on:** 9 to 11 May 2022

Before: Employment Judge Cox
Members: Mr M Elwen
Mr P Kent

Representation:
Claimant: In person
Respondent: Mrs Shields, Human Resources Manager

REASONS

1. The Respondent is a company that buys, processes and sells fresh and frozen fish and fish products to domestic customers. It has around 85 employees employed across two sites. Fish is purchased and processed at the Grimsby site and support functions, including a call centre handling customer sales and enquiries, are based at the Barton site.

2. The Claimant worked for the company as an administration assistant from October 2020 until her dismissal in May 2021. Her job included taking telephone orders from customers. She presented a claim to the Tribunal alleging that the Respondent had subjected her to various forms of disability discrimination, namely, direct discrimination, discrimination arising in consequence of disability, failure to make reasonable adjustments for disability and harassment related to disability. At the beginning of the Hearing, the Claimant clarified her allegations,

which involved minor amendments to the record made of them at the Preliminary Hearing for case management on 9 November 2021. The Respondent did not object to these amendments. The Claimant also withdrew allegations relating to direct discrimination in the allocation of shifts and harassment at a meeting on 28 April 2021 and these were dismissed.

3. At the Hearing, the Tribunal heard oral evidence from the Claimant and two of her friends, Mr Richardson and Mr Baxter. For the Respondent, the Tribunal heard oral evidence from: Miss Jones, administration assistant/financial controller; Miss Keal, senior administrator, who supervised the Claimant and Miss Jones; Ms Carty, training and development officer, Mr Brummitt, general manager; Mrs Brummitt, call centre and administration manager and the Claimant's line manager; and Mrs Shields, human resources manager.

4. The Tribunal was also referred to various documents in a file produced for the Hearing.

5. On the basis of that evidence, the Tribunal made the following findings on the issues in the claim.

Knowledge of disability

6. According to the definition of a disabled person in Section 6 of the Equality Act 2010 (the EqA), a person is disabled if she has a physical or mental impairment that has a substantial and long-term effect on her ability to carry out normal day-to-day activities. The Respondent accepted that the Claimant met the definition at the relevant time by reason of the fact that she has depression and anxiety. The parties did not agree, however, on whether the Respondent knew or could reasonably have been expected to know that she met the definition at the time it was alleged to have discriminated against her. The Claimant's position was that the Respondent knew of her disability even before she was recruited. The Respondent's position was that it neither knew nor could reasonably have been expected to know about her disability before mid-February 2021.

7. The evidence of the Claimant, Mr Richardson and Mr Baxter was that Mr and Mrs Brummitt knew about her disability before she was recruited because they used the same pub as her and she referred frequently in the conversations she had there to her mental health issues. The Brummitts' evidence was that they did frequent the same pub as the Claimant in the few months before she was recruited but they did not hear her say she had serious mental health issues, although Mrs Brummitt did hear her say that she had been in an abusive relationship.

8. The Tribunal preferred the evidence of the Brummitts on this point, which was clear and unequivocal. Neither Mr Richardson nor Mr Baxter was able to give any detail of the conversations in which the Claimant mentioned her mental ill-health

in the company of the Brummitts. The Brummitts' unchallenged evidence was that they were acquainted with the Claimant but were not her friends and they were relatively infrequent visitors to the pub. On that basis, the Tribunal accepted that it was entirely credible that, even if the Claimant was accustomed to mentioning her ill-health in conversation in the pub, the Brummitts did not hear her doing so.

9. The Claimant also alleged that the company knew about her disability because of what happened during her induction in the week beginning 12 October 2020. Her evidence was that she was in an induction session with Mrs Shields when Miss Keal brought her bag over to her because it contained her mobile 'phone which was ringing. The Claimant said to Mrs Shields that it was her "meds alarm" and she best not miss them because she was "a bit nutty without". Mrs Shields's evidence, on the other hand, was that her part of the induction programme with the Claimant was not interrupted. Although both Mrs Brummitt and Miss Keal accepted in their evidence that the Claimant's mobile 'phone had been ringing, they both said that the Claimant was with Miss Keal at the time and it was Mrs Brummitt who brought over the Claimant's bag. Both accepted that the Claimant said that the ringing was an alarm, but both denied that the Claimant made any mention of the alarm being related to her "meds".

10. The Tribunal preferred the evidence of the Respondent's witnesses, which was clear, unequivocal and consistent with each other.

11. On 15 February 2021, the Claimant had a form of breakdown at work because she had been unable to obtain the medication she uses to control her depression, due to difficulty in contacting her GP and picking up the prescription. On learning of the Claimant's breakdown, Mrs Brummitt gave the Claimant permission to go to her doctors to collect her prescription. She invited the Claimant to a meeting on 18 February 2021 with herself and Mrs Shields to discuss her condition and what the company could do to support her.

12. The Tribunal finds that Mrs Brummitt learning of the Claimant's breakdown on 15 February was the first point at which the Respondent knew, or could reasonably have been expected to know, that the Claimant had significant mental ill-health that substantially affected her ability to carry out normal day-to-day activities. (The Tribunal heard no evidence on how the Claimant described her disability to the company.)

Allegation 1: The Respondent allowed only a 10-second gap between calls, which put the Claimant at a substantial disadvantage because she had a poor short-term memory as a result of treatment for her depression and so needed to make notes on the call in order to remember what was said. The Respondent failed to make reasonable adjustments to this practice

13. An employer has a duty to make reasonable adjustments to any practice it adopts that puts a disabled employee at a substantial disadvantage in comparison with employees without that disability (Section 20(3) and 21(2) EqA). It is not under that duty, however, unless it knows or could reasonably be expected to know that the employee is disabled and is under that disadvantage (paragraph 20 of Schedule 8 EqA). As the company only had knowledge of the Claimant's disability on 15 February 2021, it had no duty to make adjustments before then.

14. On the evidence it heard, which was supported by a screenshot, the Tribunal found that the company's telephone system in fact allowed a 20-second break, rather than a 10-second break as the Claimant alleged, between calls.

15. The Tribunal heard Insufficient evidence to establish that the Claimant was put at a substantial disadvantage by the length of the break compared with someone without her disability. The Claimant asserted that the electroconvulsive therapy (ECT) that she had received for her depression had had an adverse effect on her short-term memory. She did not explain, however, why that meant she needed more time between calls. Those answering calls recorded the customer's order details on the computer system whilst the customer was still on the 'phone. The Claimant also accepted in evidence that she wrote down any information she needed to remember during the call. In any event, the Claimant could avoid taking another call until she was ready to do so by switching her 'phone to "do not disturb". Mrs Brummitt positively encouraged her to do so when necessary. The Claimant accepted in evidence that she would not have been penalised for doing so.

16. As the Tribunal does not accept that the Claimant was put at a substantial comparative disadvantage by the length of the break between calls, this allegation fails.

Allegation 2: From around November 2020, the positioning of the Claimant's perspex screen put her at a substantial disadvantage because she was able to see Miss Keal make faces behind her back. The Respondent failed to make reasonable adjustments to this physical feature.

17. An employer is under a duty to make reasonable adjustments to any physical feature of its premises that puts a disabled employee at a substantial disadvantage in comparison with an employee without their disability (Section 20(4) EqA).

18. The Claimant asserted that she was at a substantial disadvantage because the perspex screen installed in front of her desk in order to reduce risk of infection by COVID in the workplace allowed her to see Miss Keal, who was seated behind her, and Miss Keal was making faces. That caused her more distress than it would have caused to an employee who did not have depression and anxiety.

19. The Tribunal heard insufficient evidence to establish that the Claimant was put under a substantial disadvantage. Her own evidence was that she could see Miss Keal making faces behind her back. She did not explain what exactly she meant by that, or whether, and if so why, she believed Miss Keal's actions were in some way aimed at or referring to her.

20. For the reasons explained above, the company was under no duty to make adjustments before 15 February 2021, when it first knew or could reasonably have been expected to know that the Claimant was disabled. Further, as the Claimant did not raise any concerns about the reflections she could see in the screen, the Tribunal does not accept that the Respondent knew, or could reasonably be expected to know, that the position of the screen was putting her at a substantial disadvantage.

21. As the Tribunal does not accept that this physical feature put the Claimant at a substantial comparative disadvantage or that the company had any knowledge of such a disadvantage, this allegation fails.

Allegation 3: In the period from November 2020 to February 2021, because of the Claimant's disability, Mrs Brummitt and Ms Carty failed to treat her complaints as a grievance or encourage her to raise a formal grievance.

22. It is unlawful direct disability discrimination for an employer to treat a disabled employee less favourably, because of her disability, than it treats or would treat a non-disabled employee in the same or not materially different circumstances (Section 13(1) and 23(1) EqA).

23. In her evidence, the Claimant referred the Tribunal to various emails she sent Mrs Brummitt and Ms Carty from 25 November 2020 to 4 May 2021. Having read

these emails, the Tribunal accepts that the Claimant was telling her managers that she was having to cope with a large volume of work. There was nothing in the evidence the Tribunal heard from which it could conclude that their response to these emails amounted to less favourable treatment than the managers would have given someone without the Claimant's disability writing those emails, or that their response was because of her disability. There was nothing in the emails to indicate to a manager that the Claimant was effectively raising a grievance. She was not asking the managers to do anything about the concerns she was raising; indeed, in one of the emails she expressly stated that she was coping. The Tribunal does not accept that a manager receiving this type of email would normally encourage the employee to raise a formal grievance.

24. The Claimant alleged that the company had treated her less favourably than it treated Miss Jones, who was encouraged to raise a grievance when the Claimant alleged that Miss Jones had interfered with records to cast her in a bad light. The Tribunal finds, however, that the relevant circumstances in Miss Jones's case were entirely different. She was raising concerns that she had been bullied by the Claimant, not about workload. Further, the evidence before the Tribunal was that in fact both Miss Jones and the Claimant were told that they could bring a grievance.

25. As the Tribunal does not accept that the Claimant was treated less favourably than a non-disabled employee was or would have been treated in the same relevant circumstances, this allegation fails.

Allegation 4: Mrs Brummitt threatened to make deductions from the Claimant's wages because of mistakes that arose in consequence of her disability, namely short-term memory loss resulting from the ECT she had had to treat her condition.

26. It is unlawful for an employer to treat an employee unfavourably because of something arising in consequence of her disability, unless it can show that the treatment is a proportionate means of achieving a legitimate aim (Section 15 EqA).

27. In her evidence to the Tribunal, the Claimant referred to three emails in which she said that Mrs Brummitt threatened to make deductions from her wages because of errors she had made because of the short-term memory loss caused by the ECT she had had.

28. Having read those emails, the Tribunal does not accept that they can be fairly characterised as Mrs Brummitt "threatening" the Claimant. The company's policy, of which the Claimant was aware, was that a deduction might be made from an employee's pay if they made a mistake in administering an order (referred to

internally as a customer care incident) that led to a loss of income for the company. A deduction would be made, however, only if, after investigation, Mrs Brummitt concluded that the employee was at fault and it was appropriate in all the circumstances to hold them responsible for their error. As a new employee, the company accepted that the Claimant was learning the job and so could be expected to make mistakes and should be excused if she did. Mrs Brummitt's email of 23 February 2021 did no more than make clear to the Claimant, who had by then been doing the job for over four months, that she was now at risk of deductions being made for her mistakes.

29. The Tribunal accepts that, if the Respondent were saying that it would or might make deductions from the Claimant's wages because of mistakes that were in fact due to her poor short-term memory, that might have amounted to unfavourable treatment because of something arising in consequence of the Claimant's disability, given that the Tribunal accepted that her memory had been damaged by the ECT she had had to treat her depression. The evidence before the Tribunal, however, was insufficient to establish that the mistakes that the Claimant was making and might continue to make in fact arose in consequence of her poor short-term memory, as opposed to being mistakes that any employee, particularly one relatively new to the business and still learning about the company's products and procedures, might make. Further, there was no evidence to establish that Mrs Brummitt would or might have authorised a deduction from the Claimant's wages if the mistake was due to the Claimant's poor memory rather than carelessness or lack of concentration.

30. As the Tribunal does not accept that the Claimant was treated unfavourably because of something arising in consequence of her disability, this allegation fails.

Allegation 5: On 1 April 2021 Ms Carty said to the Claimant: "do you feel you need to leave your crap at the door and come in with a fresh mind?". This amounted to harassment related to her disability.

31. It is unlawful disability harassment for an employer to subject an employee to unwanted conduct related to disability that has the purpose or effect of creating a hostile environment for the employee (Section 26 EqA).

32. There was a clear conflict of evidence about what was said at the meeting on 1 April 2021, at which Ms Carty discussed with the Claimant the conflict that existed between the staff in the administration department. The Claimant's evidence was that Ms Carty said she should consider "leaving my crap at the door". In her evidence, Ms Carty denied ever using that language and was almost indignant that it be said that she, as a manager, would do so.

33. The Tribunal accepts Ms Carty's evidence as the more credible. The context of this alleged remark was a serious discussion between the Claimant and Ms Carty about the conflict that existed within the administration department. It was inherently unlikely that such language would be used in such a context. In any event, even if Ms Carty had used that phrase, the Tribunal was presented with no evidence to establish that it related to the Claimant's depression and anxiety. A manager would be likely to tell anyone in a workplace who was allowing their personal feelings to affect their behaviour at work to leave those feelings behind on arriving at work.

34. As the Tribunal does not accept that the alleged comment was made and is also not satisfied that, if it was made, it related to the Claimant's disability, this allegation fails.

Allegation 6: On 1 April 2021 Ms Carty asked the Claimant "are you being paranoid?" This amounted to harassment related to her disability.

35. The Claimant's own witness statement did not expressly state that this comment was made at the meeting on 1 April 2021. On the other hand, there are several references in the notes of a later meeting on 28 April 2021 recording that the Claimant made the comment about herself. In her evidence, Ms Carty denied that she would use such a word. The Tribunal accepts Ms Carty's evidence, which was clear and unequivocal.

36. In any event, even if Ms Carty did use that phrase, there was no evidence before the Tribunal to establish that it related to the Claimant's disability. Paranoia is not the same as depression and anxiety. The Claimant was raising concerns that Miss Jones was falsifying records to put her in a bad light, although she was unable to provide any evidence of this. The Tribunal finds that this comment is one that any manager might make to an employee who appeared to be getting things out of proportion or imagining things that were not there.

37. As the Tribunal does not accept that the alleged comment was made and is also not satisfied that, if it had been made, it related to the Claimant's disability, this allegation fails.

Allegation 7: On 27 April 2021, Mrs Brummitt forced the Claimant to discuss issues between the staff at a meeting of the administration team. This amounted to harassment related to her disability.

38. The Tribunal accepts that Mrs Brummitt did lead a discussion amongst the administration team - the Claimant, Miss Jones and Miss Darby - about the bad working atmosphere in the department and what was causing it. There was no evidence that her conduct related in any way to the Claimant's disability: she

wanted to get to the bottom of why the relationships in the department were not working and considered that having a discussion with everyone was the most effective way of doing so.

39. Even if Mrs Brummitt's conduct had related in some way to the Claimant's disability, the Tribunal would not have accepted that it was unwanted conduct. The Tribunal accepts Mrs Brummitt's evidence that she asked Mrs Shields for advice about whether she could hold such a meeting if the Claimant agreed and the Claimant did then expressly agree to the meeting. Even though the Claimant knew it would probably be a difficult discussion, she was prepared to take part because she was "not at work to make friends". Mrs Brummitt did not force the Claimant to take part in this meeting or to discuss the issues, she agreed to do so.

40. Because the Tribunal does not accept that Mrs Brummitt's conduct related to the Claimant's disability or that it was unwanted, this allegation fails.

Allegation 8: On 14 May 2021 Mrs Brummitt accessed the Claimant's computer and went through her desk drawers in front of other staff. This amounted to harassment related to her disability.

41. The Claimant's evidence was that on her way to her car at the end of her shift on 14 May she realised she had forgotten her mobile 'phone and ran back to the office to collect it. On arriving back in the office, she found Mrs Brummitt going through her desk drawers and on her computer, presumably investigating, she said, by rummaging through her belongings. Mrs Brummitt emphatically denied this and the Tribunal prefers her evidence. Before leaving work, the Claimant would have closed down her computer. Her computer was password-protected. Mrs Brummitt did not know the password. It is not credible that Mrs Brummitt would have had time to restart the Claimant's computer and access it before the Claimant returned to the office.

42. In any event, even if Mrs Brummitt did behave as alleged, there was no evidence before the Tribunal to establish that it would have related in any way to the Claimant's disability. Indeed, the Claimant did not provide any explanation of why Mrs Brummitt might have been acting in this extraordinary way.

43. Because the Tribunal does not accept that Mrs Brummitt behaved as alleged and does not accept that there was any evidence that her conduct related to the Claimant's disability, this allegation fails.

Allegation 9: During the week beginning 17 May 2021 Mrs Brummitt, Mrs Shields and Ms Carty monitored the Claimant's telephone calls. This amounted to harassment related to her disability.

44. The evidence that the Claimant relied upon in relation to this allegation was extremely flimsy. The company routinely records its employees telephone calls for training and monitoring purposes. The Claimant's evidence was that she had a telephone conversation with a manager at the Respondent's Grimsby premises. She made a joke and he was about to respond but then said: "I'd better not answer, we both know why". The Claimant failed to explain why this comment established that the Claimants' managers were actively monitoring all her telephone calls. All three managers denied monitoring the Claimant's calls and the Tribunal accepts their evidence, which was clear and unequivocal.

45. As the Tribunal does not accept that the Claimant's calls were being monitored, this allegation fails.

Allegation 10: On 20 May 2021, Ms Carty mimicked the Claimant behind her back by waving a finger round her head to signify "crazy". This amounted to harassment related to her disability.

46. The Claimant's own evidence to the Tribunal did not support this allegation. She said that Ms Carty was outside in the smoking shelter and was laughing and joking through the window with other staff in the administration team. The Claimant made no reference in her evidence to Ms Carty waving her finger round her head to signify "crazy". The Tribunal accepted Ms Carty's evidence, which was clear and emphatic, that she is a 53-year old woman, not a child, and would not, and did not, behave in this way.

47. As the Tribunal does not accept that Ms Carty behaved as alleged, this allegation fails.

Allegation 11: On 21 May 2021 Mrs Brummitt dismissed the Claimant, because of her disability.

48. There was no evidence before the Tribunal from which it could infer that Mrs Brummitt dismissed the Claimant because of her disability. Mrs Brummitt's evidence, which was clear and unequivocal and supported by all the documentation, was that she dismissed the Claimant because she believed the Claimant had been bullying Ms Jones by making unfounded allegations that she had tampered with records and criticising her work performance to management.

49. The Claimant said that she was less favourably treated than Miss Jones, in that the relationship between the two of them had broken down but she had been

dismissed and Miss Jones had not. The Tribunal finds, however, that Miss Jones was not in the same material circumstances as the Claimant. She had not been found to have bullied anyone. If Mrs Brummitt had based her decision to dismiss on the fact that the relationship between the Claimant and Miss Jones had broken down and decided to dismiss the Claimant only, that might have made Miss Jones an appropriate comparator, but the Tribunal has found that that was not the reason for her decision.

50. The Tribunal also finds that, from the evidence it has heard, the Respondent was not hostile towards the Claimant's mental ill-health. On finding out about it, Mrs Brummitt and Mrs Shields met the Claimant to discuss her condition and what support she might need. The company also sought to refer the Claimant to its occupational health advisers, but she did not agree.

51. It is also significant that the Claimant did not mention in her appeal that she felt she had been dismissed because of her disability. It was only when she decided to bring a Tribunal claim "to clear her name", as she put it in her evidence, that she raised an allegation of disability discrimination.

52. As the Tribunal finds no evidence that Mrs Brummitt's decision was because of, or related in any way to, the Claimant's disability, this allegation fails.

Time limit

53. The Claimant brought her claim to the Tribunal on 2 September 2021, a significant period after some of the alleged acts of discrimination occurred. A claim of discrimination must be presented to the Tribunal within three months of the date of the alleged discrimination. Time is extended to take into account the period of early conciliation through ACAS. If the alleged discrimination is part of conduct extending over a period, the time for bringing a claim does not start to run until the end of that period. If a claim is brought late, the Tribunal has to decide whether the claim was presented within another just and equitable period (Section 123 EqA). It is very much the exception rather than the rule that a Tribunal will consider a late claim: the onus is on the Claimant to persuade the Tribunal on the basis of evidence that the claim has been presented within a just and equitable period.

54. In the Claimant's case, taking into account the period of early conciliation through ACAS, which lasted from 3 to 25 August 2021, any allegation she was making of discrimination occurring before 4 May 2021 would have been presented out of time, unless it formed part of conduct extending over a period with acts of discrimination committed on or after that date.

55. All the evidence the Claimant gave the Tribunal about the timing of her claim related to the period after she was dismissed. The Tribunal accepts that she was not in a position to bring a claim for the three weeks after she was dismissed because of the effect of her dismissal on her mental health. She gave no explanation, however, of why she did not bring a claim in relation to the earlier acts of alleged discrimination at the time, nor of why she waited nearly two months, until the beginning of August, to contact ACAS under the early conciliation procedure even after she had recovered from the effects of her dismissal.

56. If it had been necessary for it to do so, therefore, the Tribunal would have found that any aspect of the claim that had been presented outside the basic three-month time limit, extended for early conciliation, had not been presented within a just and equitable period.

Employment Judge Cox

Date: 1 June 2022

Reasons sent to the parties on:

Date: 8 June 2022