EMPLOYMENT TRIBUNALS

Claimant: **Mrs P Cook**

Respondent: **B & M Retail Limited**

HELD at: **Leeds** **ON: 24-26 October 2022**

BEFORE: **Employment Judge Wade**
Members: **Ms H Brown**
Ms S Norburn

REPRESENTATION:

Claimant: **Miss S Johnson, counsel**
Respondent: **Mr S Lewinsky, counsel**

Note: A summary of the written reasons provided below were provided orally in extempore Judgments delivered on 26 October 2022, the written record of which was sent to the parties on 7 November 2022. A written request for written reasons was received from the respondent on 1 November 2022. The reasons below are now provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the terms of the Judgment given on 26 October 2022 are repeated below:

JUDGMENT

1. The Tribunal's unanimous decisions are follows:

    1.1. The claimant was a disabled person at the material times.

    1.2. Her complaints of failures to make reasonable adjustments, Section 15 and Section 13 Disability Discrimination are dismissed.

    1.3. The respondent's costs application is dismissed.

REASONS

Introduction

1. This is a disability discrimination case which has been heard over three days and in which, admirably, the parties have been able to cooperate to make sure that we have heard all the witnesses and been able to give an extempore decision this afternoon. I am going to announce a summary of our decision and our conclusions - it is important that the parties know our findings and have a sufficient understanding by the end of today. The parties remain in an employment relationship with each other. These findings are expressed, we hope, with some care for that relationship.

The Issues

2. An ACAS conciliation certificate recorded receipt on 12 January 2022 and issue on 22 February 2022. Equality Act allegations from 13 October 2021 are therefore in time. The claim was presented on 2 March 2022 and said this:

3. "I have worked for b&m at same store since opening, I have constantly done early shifts due to my [disabilities] and medication timetable, in 2021, in 2021 the store I have been working for nearly 8yrs received its 8th new store manager and had my shifts changed to latest 2pm till 10pm without any notice. I advised my new store manager I could not do the [late] shifts and was told I either did them as my old shifts had been abolished or none at all, I've had no option but to go on the sick and go through the union and acas to try resolve the matter and b&m have had no intention to resolve this, I have not had a day of sick since the day I started and have tried all means to go back and failed, more information is with [usdaw] and acas".

4. The issues were set out by an Employment Judge during a case management hearing (pages 10-14 of the Case Management Orders). Although the claimant had ticked the "other payments" box in the claim form, as well as alleging disability discrimination, she did not seek to argue or amend her case to suggest that her hours of work on day shifts had become her contractual hours by custom or practice or otherwise. The claimant was represented by USDAW at that hearing and throughout (and by counsel instructed on her behalf during this hearing).

5. There was further clarification from the claimant's solicitor (page 42) as to her Equality Act case as follows:

"With regards to point 7.1. the claimant is continuing to pursue her claim of discrimination arising from disability.

With regards to point 7.2 a) by imposing the late shift pattern on the claimant the claimant has been treated unfavourably because she has been unable to attend work, fulfil her contract and earn remuneration.

b) The thing that arises in consequence of her disability is that she is unable to work a late shift due to increasing pain and tiredness

c)It is the claimants case that she was treated unfavourably because she could not work late, and she could not work late as a consequence of her disability

With regards to point 7.3 the claimant confirms that the payment of sick pay during her absence would have been a reasonable adjustment. It is the claimant's case that had the respondent not removed the previously agreed early shift pattern and imposed a late shift pattern, she would not have taken sick leave and would have continued to work and earn her full salary. The cause of her absence was the failure to make adjustments to her shift pattern and putting her on late shifts caused her to be absent from work and unable to fulfil her contract of employment and at a substantial disadvantage as she was receiving no pay and had the potential to be dismissed/ disciplined for not fulfilling her contract of employment as she was unable to work the late shiftsdue to her disability."

6. The relevant issues from pages 10-14 appear as headings below, amended in light of the claimant's clarification above.

Evidence

7. We have had a helpful bundle of documents of around 400 pages which was agreed. We have also had oral evidence from the claimant, and on behalf of the respondent oral evidence from the claimant's former manager, Ms Jones, by video link; Ms Holliday, Ms Wood, Ms Evans and Ms Armitage (the latter was the manager in place this year for the claimant's trial of alternative arrangements); and from Dr Tom Bendinger, who was an expert instructed by the respondent. Neither the claimant nor her union were willing to bear the costs of a joint instruction and considered it unnecessary; the respondent's letter of instruction (which was expressed neutrally and properly) was also on the basis that the claimant was an ongoing member of staff. We gave permission for Dr Bendinger to be heard orally; his report was certainly a relevant document, and necessary for the fair determination of this case; and in those circumstances it was only fair that the claimant have the opportunity to discuss and challenge any of the matters with which she disagreed.

The Law

8. The claims in this case are of contraventions of the Equality Act 2010 ("the 2010 Act"). Section 39(2)(d) of the 2010 Act prohibits an employer discriminating against an employee by subjecting him to "any other detriment". Any other detriment means objectively viewed unfavourable treatment, rather than a subjective and unjustified sense of grievance.
9. In this case three types of discrimination are pursued: discrimination by way of a failure to make a reasonable adjustment (Section 21) and discrimination because of something arising in consequence of disability ("Section 15" discrimination), and direct discrimination. The factual chain of events against which those complaints are made is the same.
10. Disability is a protected characteristic under Section 4 of the 2010 Act. It is defined in Section 6 as physical or mental impairment which has a substantial and long term adverse effect on a person's ability to carry out day to day activities. "Substantial" in this context means more than minor or trivial and "long term" means having lasted a year or more or likely to so last or to be terminal.

11. Section 6(3) clarifies that a reference to a person with the protected characteristic of disability is a reference to a person who has a particular disability, in this case fibromyalgia.

12. In deciding the disability question the statutory provisions require the Tribunal to ask the following questions:-

At the material time did the claimant have a mental or physical impairment?
If the Tribunal can decide on the basis of expert or other medical evidence that the claimant has established the impairment, or if the Tribunal decides to adopt the approach in **J v DLA Piper UK LLP [2010] ICR 1050**, the Tribunal asks the following "condition" questions.
Has the claimant shown effects on his ability to carry out normal day to day activities[1] at the material times?
Has the claimant shown these effects are more minor or trivial at the material times? This assessment takes account of the deduced effect principle described in paragraph 5(1) of schedule 1 of the Equality Act 2010: 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. Likely means "could well happen"[2].
Has the claimant shown that the effects were long term? Paragraph 2 (1) of schedule 1 of the Act prescribes that the effect of the impairment is long term if –

It has lasted for at least 12 months,
It is likely to last for at least 12 months or
It is likely to last the rest of the life of the person affected.

In relation to the meaning of a physical or mental impairment see also Rugamer v Sony Music Entertainment UK Ltd [2001] IRLR 644 at paragraph 34 where the Employment Tribunal says (in the context of the DDA) "impairment for this purpose and in this context has in our judgment to mean some damage, defect, disorder or disease compared with the person having the full set of physical and mental equipment in normal condition. The phrase "physical or mental impairment" refers to a person having (in everyday language) something wrong with them physically, or something wrong with them mentally."

The Code at Appendix 1 does not expand on what impairment covers, other than at paragraph 5 in advising that physical and mental impairments include sensory impairments; it concludes that mental impairment is intended to cover a wide range of impairments relating to mental functioning including what are often known as learning disabilities. In answer to the question "what if a person has no medical diagnosis" the code advises there is no need for a person to establish a medically diagnosed cause for their impairment. What it is important is to consider the effect of the impairment not the cause. This reflects the College of Ripon and York St John v Dr CC Hobbs [2002] IRLR 185 (The Honourable Mr Justice Lindsay President).

Section 13 Discrimination

13. This Section relevantly provides.. “a person A discriminates against another if, because of a protected characteristic, he treats B less favourably than he treats or would treat others”.

Section 15 Discrimination

14. In section 13 and Section 15 cases, the key question is the reason why the claimant was subjected to the alleged unfavourable or less favourable treatment. Section 15 says:

(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.

15. The “something arising in consequence of B’s disability” sometimes has to be proven by a claimant, or sometimes is accepted by an employer. Often, the “something” is a sickness absence or absence record. It can also be, for example, an inability to stand for long, or to read lengthy documents, or fatigue. These are just examples.
16. The Equality and Human Rights Commission Code of Practice on Employment (“the Code”), at paragraph 5.9, also gives examples of consequences of disability, including an inability to use certain work equipment, walk unaided or a need to follow a restricted diet.
17. Unfavourable treatment because of fatigue sounds straightforward: for example a security guard might say, I was disciplined for being found asleep on duty, but my fatigue arises in consequence of my arthritis. In T-Systems v Lewis (UKEAT/0042/15/JOJ) His Honour Judge Richardson sets out a four stage test for Section 15 discrimination:

There must be a contravention of Section 39(2)

There must be unfavourable treatment

There must be “something arising in consequence of the disability”; and

The unfavourable treatment must be because of the “something”.

18. This means at stages 3 and 4 the Tribunal sometimes has to look at two different ways in which facts in the case relate to each other. The first is: does the “something” arise in consequence of disability? In the example above the Tribunal would have to find that the fatigue did arise in consequence of the arthritis (and not, for example, because the guard had been up all night looking after a sick child). Stage 3 can sometimes be straightforward, and sometimes complicated.

19. Stage 4 is whether the unfavourable treatment was because of the "something". Again, using the example above, was the disciplinary action because of the fatigue/falling asleep, or was it, in fact, because the guard swore at his manager when he was woken up?
20. "Because of" at stage 4 means that the "something arising" operated on the mind of the person making the decision (consciously or sub-consciously) to a significant (that is material) extent. See Lord Justice Underhill at paragraph 17 of IPC Media Limited v Millar UKEAT/0395/12 SM and at paragraph 25. The Tribunal, as its starting point, has to identify the individual(s) responsible for the decision or act or behaviour or failure to act which is being complained about.
21. There is also often a "Stage 5" in a Section 15 claim: the employer in the example above can say that the disciplinary action was appropriate and necessary to achieve its aim of making sure security guards look after the premises.
22. This type of "justification" defence in section 15(2) is common to many other types of discrimination, including direct discrimination because of age, and indirect discrimination. Whether the employer's "means" are "proportionate" requires the Tribunal to determine whether they were "appropriate and necessary" (taking into account less discriminatory measures) (see Homer v Chief Constable of West Yorkshire [2012] UKSC 15 paragraphs 22 to 25). Section 15 does not derive directly from the European Equality Directive, but there is no judicial decision that the Homer approach should not be applied to Section 15 (2). Even on the bare statutory language, a structured approach is required to considering whether an employer has made out the defence.

Failures to make reasonable adjustments

23. Section 39 (5) imposes the duty to make adjustments on employers and Section 20 explains it:

    (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.

24. Section 21 deals with failure to comply with the 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.

An employer is not subject to a duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement (Schedule 8, paragraph 20 (1) of the 2010 Act).

25. The Tribunal potentially answering two questions: did the employer know about both disability and likely disadvantage; if not, ought the employer reasonably to have known?
26. As to the type of adjustments that were envisaged by the 2010 Act, the guidance from the 1995 Act is rehearsed in the Code. The Tribunal must take into account those parts of the Code which appear to be relevant:
27. At paragraph 6.28: whether it is reasonable for a person to have to take a particular step in order to comply with a duty to make reasonable adjustments, regard shall be had, in particular to:

    the extent to which taking the step would prevent the effect in relation to which the duty is imposed;

    the extent to which it is practicable for him to take the step;

    the financial and other costs which would be incurred by him in taking the step and the extent to which taking it would disrupt any of his activities;

    the extent of his financial and other resources

    the availability to him of financial or other assistance with respect to taking the step;

    the nature of his activities and the size of his undertaking.

28. At paragraph 6.33, the following are examples of steps which a person may need to take in relation to a disabled person in order to comply with a duty to make reasonable adjustments

    allocating some of the disabled person's duties to another person;

    transferring him to fill an existing vacancy;

    altering his hours of working or training;

    assigning him to a different place of work or training;

    allowing him to be absent during working or training hours for rehabilitation, assessment, or treatment;

    modifying procedures for testing or assessment;

    providing supervision or other support.

29. We also note that the purpose of the statutory code, approved by parliament, is to provide a detailed explanation of the 2010 Act and to provide practical guidance on compliance. In Spence-v-Intype Libra Elias P (as he then was) summarised the position in relation to reasonable adjustments under the 1995 Act at paragraphs 43 and 48:

30. "We accept that the concept of reasonable adjustment is a broad one, but we do not consider that this assists the argument. The nature of the reasonable steps envisaged in s4(A) is that they will mitigate or prevent the disadvantages which a disabled person would otherwise suffer as a consequence of the application of some provision, criterion or practice. That is in fact precisely what Lords Hope and Rodger say in the paragraphs relied upon; the duty is not an end in itself but is intended to shield the employee from the substantial disadvantage that would otherwise arise… In short, what s4(A) envisages is that steps will be taken which will have some practical consequence of preventing or mitigating the difficulties faced by a disabled person at work."

31. This statement of principle is now clear and further developed to the effect that the making of an assessment is not capable of being a reasonable adjustment under the terms of the 1995 Act (and by logical extension, the 2010 Act). There is a line of authorities to this effect, including the decision of Elias J, as he then was, presiding over the Employment Appeal Tribunal in Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664, HM Prisons Service v Johnson [2007] IRLR 951, Environment Agency v Rowan [2008] ICR 218, Smith v Salford NHS Primary Care Trust UKEAT/0507/10 and Rider v Leeds City Council UKEAT/0243/11. The principle applied in these cases is that a reasonable adjustment must be an adjustment designed to enable the employee to attend work or return to work. The carrying out of an assessment achieves neither of these ends in itself.

Establishing Discrimination

32. Section 136 of the Act states:-

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

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

33. In paragraph 25 of the judgment of Mr Justice Underhill (President)(as he was then) in IPC Media Limited v Millar UKEAT/0395/12/SM is a reminder that our starting point is to identify the putative discriminator and to examine their thought processes, conscious or unconscious.

Findings of Fact

34. The claimant commenced work in 2014 at one of the respondent's stores. The respondent is a household name - a very large discount retailer that is profitable, operating stores of different sizes all over the country.

35. Until 1 March 2020 the claimant had progressed to be a Floor Manager, working mainly day shifts. Her contractual hours recorded: "your basic minimum hours of work are **40** per week, working according to an issued rota based on 7 trading days per week…."

36. In 2019 she had written to the respondent about difficulties doing late shifts until 10.00pm because of chronic pain (said to be fibromyalgia and arthritis). Her manager had permitted her to work frequent day shifts.

37. From 1 March 2020 her 40 hour Floor Manager position had been removed as part of a national approach to cost saving. She had agreed with her then manager to become the Replenishment Manager instead and received a letter indicating that all other terms and conditions remained unchanged. The essential task of that post was managing the warehouse and restocking the store, including the management of five to ten colleagues, including a supervisor. They were an inexperienced team.

38. In August 2021 a new store manager was appointed, Ms Jones. She observed difficulties in the warehouse/restocking operation. On 13 October 2021 Ms Jones met her management team and gave the direction that the claimant would have to work late shifts until 10pm, to work with her replenishment team and to supervise them satisfactorily. Ms Jones did the rotas for the Replenishment team, whereas for other teams (store staff), shift rotas were done by their managers.

39. The claimant went to see her GP two days' later, having sent a text to the manager about her difficulties with working late shifts. Given the unfortunate way in which that text was expressed, the manager suggested she put in a flexible working request, which she did. The claimant again explained the reasons she would struggle: they related to both her travel difficulties, and to her medical condition/need to take medication. The claimant did not drive, and she relied on her partner for transport to and from work. She lived about eight miles away from the Old Mill store and buses were infrequent from her home.

40. The flexible working request (in effect to work no later than 6pm at the Old Mill store) was refused on 18 November, following a meeting on 8 November 2021. The respondent offered a number of alternatives, including working at nearby stores, and hoped agreement could be reached. The claimant was then signed unfit for work by her GP – her claim form details express her feelings at the time about that.

41. She appealed the outcome of the request and at an appeal meeting on 6 December 2021 she was asked about her disability and explained it was fibromyalgia/arthritis and that it did not affect her work, but she took medication and had more pain later in the day. Further alternative working patterns and at different stores were offered after that appeal. None fully maintained day shift working of 40 hours at Old Mill.

42. The respondent also arranged for the claimant to attend an occupational health assessment, which took place by way of a telephone consultation on 22 December 2021. The claimant was described as a good historian and as having long term conditions. The report included that pain levels affected mood: 'Due to her pain levels increasing as the day progresses, Paula is considered unlikely to be able to sustain working late shifts, without her underlying medical conditions becoming exacerbated, and so an alternative shift pattern is recommended, if feasibly operational'.

43. Agreement could not be reached about alternative hours at different stores and the claimant remained unwell and in receipt of statutory sick pay. The respondent had no provision in its policy for the provision of enhanced sick pay if a return to work was prevented by a failure to make a reasonable adjustment.

44. Replenishment is typically undertaken after store closing, 8 – 12pm and sometimes later and overnight – in probably 80% of the respondent's stores, with a minority replenishing in the early mornings. The circumstances of the Driffield and Old Mill stores were very different at the material time. The Driffield store was a very high performing and profitable store - a unique store in many respects, and its replenishment function had been operating very well for a significant period of time. The Replenishment Manager there, B, was not therefore required to work all late shifts. He worked a mix of shifts – with a good proportion of day shifts.

45. That was not the case in the Old Mill store. The reason Ms Jones took the action she did - allocating the claimant evening shifts on the rota - was because of the disarray of the replenishment function in the Old Mill store. The respondent could not provide 40 hours of day shift replenishment manager work at the Old Mill store because of its profitability/size/ status, budgeting constraints and poor replenishment performance.

46. That is not to say that we endorse criticism of the claimant: she was good at moving stock and organising it, but her inability to work late had resulted in the team, and the store's replenishment, to deteriorate.

47. Old Mill was simply a store in which a position had pragmatically been offered and taken up by the claimant, when perhaps it should not have been allocated in the first place, given the then practical restrictions on her shift times. The respondent reasonably requires replenishment to be done out of hours.

48. 2.2.1 Did the claimant have a physical impairment: fibromyalgia, arthritis, thyroid issues and depression?

2.1.2 Did it have a substantial adverse effect on her ability to carry out day-to-day activities?

2.1.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

2.1.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

2.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

2.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

49. As to her medical conditions, the claimant was diagnosed with fibromyalgia in 2018, after a referral by her GP to rheumatology. She had been subject to a number of investigations over the years for different chronic musculoskeletal pain, including for osteoarthritis. She had suffered the adverse effects of pain described below since 2018. By November 2021 osteo arthritis was in its early stages of investigation, and not necessarily then present. The claimant also had a depressive disorder and was in treatment for a thyroxine deficiency, which later resolved.

50. The claimant's unifying diagnosis is fibromyalgia, with a treatment plan in place for that chronic pain. By definition, it is a type of chronic pain that does not have a biological cause.

51. Her treatment for musculoskeletal pain was amitriptyline. The does started at 10mg, but by October 2021 it had increased to 75mg, the claimant being advised by the Pain Clinic. The claimant typically took that medication at six o'clock or so of an evening, but not always. She also took a number of different opiates (co-codamol, oramorph and dihydrocodeine) and Naproxen. Her accounts about the precise amount taken varied but these were prescribed medications taken several times a day. At times from February 2020, and it is not a consistent picture, the claimant was also prescribed mirtazapine (15mg-30mg) to assist depression symptoms, and with sleeping. Certainly in October 2021, she had asked for the anti depressant to be restarted.

52. The claimant was seeking advice at that time because of the potential change to her shifts and her symptoms of anxiety and depression were worsening. She was also worried about how she was going to fit in taking her amitriptyline, if she was required to work until 10pm.

53. The impact of fibromyalgia on her ability to undertake day-to-day activities, in conjunction with a depressive disorder, were set out at paragraph 15 of her disability

impact statement. She struggles to grip cloths; hoovering hurts her back; ironing hurts her hands; she has handrails in her bathroom to help her out of the bath; and she finds it hard to pull up trousers which are not loose. She rarely socialises but rests on a heated blanket in the evening. We do not find that account to be exaggerated. She also describes difficulties with sleeping. These are all day to day activities, which were adversely affected by chronic physical pain – a more than minor or trivial adverse effect - and that subject to treatment.

54. It is convenient here to provide our assessment of Dr Bendinger's report and evidence. We found him to be a very helpful and compelling witness. He properly identified the test in relation to the Equality Act (understanding that "substantial" means more than minor or trivial). We happen to disagree with his reservations about the claimant's difficulties outside work, but we disagree with him in circumstances where we had the benefit of having the claimant cross examined professionally, and deploying our industrial experience. Aspects of his report gently suggested exaggeration and that inconsistency could not be ruled out, in the claimant's account of impact on day-to-day activities. His oral evidence became more frank – his opinion was based on experience of other patients, who cannot work at all. In essence his assessment was that if the claimant could perform her work during the day, it was highly unlikely that she had the difficulties described at home. He is not, however, an occupational health physician and he had neither spoken to the claimant's GP, nor to the occupational health clinician who first advised the respondent. He also considered the claimant's experience of the timing of side effects from the pain medication to be unusual.

55. His is not an opinion to be disregarded lightly, given his expertise, but it is not unrelated to his identification that the claimant was being wrongly treated, in the prescription of opiates. We will say a little bit more about that in due course. He also accepted the claimant had explained significant sleep problems, which was corroborated by GP and other records, but he had not considered sleep a day to day activity, whereas we do so consider it.

56. Industrial knowledge tells us that chronic pain sufferers who want to work, as the claimant did, frequently arrange their medication, sleep and rest to enable them to work, but can do little else and struggle with other tasks after work. The claimant's GP, who has had oversight of the repeat prescriptions of various drugs, is supportive of her evidence and his clinical judgment over time cannot be discounted. Her treatment is plainly not in accordance with NICE guidance, but that guidance has alternatives – including psychological therapies. Such changes in treatment have to be discussed and agreed with patients. The Guidance does not suggest **no treatment** for the claimant's chronic pain. Dr Bendinger was not recommending the cessation of antineuropathic agents – the claimant's Amitryptaline. Further he could not comment on the appropriateness of the treatment for mental health.

57. We consider we can safely accept the claimant's evidence, as the occupational health clinician did. We also consider that even if the effect on dressing, and her partner carrying out household chores, would not without more be more than minor or trivial, it would have been so without treatment. Dr Bendinger's opinion was not that the claimant would derive no benefit from antineuropathic agents, but that the side effects of opiates would be avoided if those opiates came to an end.

58. We are satisfied that the claimant has established a long-term adverse and more than minor or trivial effect on her ability to carry out day-to-day activities by November 2021, from her chronic pain condition - fibromyalgia. She was a disabled person at the material times.

59. As to the claimant's consequent Equality Act allegations, we can deal briefly with three of them.

Direct Discrimination Section 13 - the claimant says she was treated worse than a replenishment manager working at a Driffield store

If so, was it because of disability?

60. As far as the allegation of direct discrimination is concerned, that is less favourable treatment because of disability in comparison with B or another manager (a hypothetical manager) in these circumstances. Our factual findings above deal with this complaint. A requirement to work late was imposed by Ms Jones on the claimant from 13 October 2021, but the reason why had nothing to do with her disability and everything to do with the need to correct the functioning of replenishment at her store.

Discrimination arising from disability (Equality Act 2010 section 15)

4.1 Did the respondent treat the claimant unfavourably by:

4.1.1 Imposing a new shift pattern on the claimant from 13 November 2021 of working late shifts (up to 10pm) (tbc)?

4.2 Did the following things arise in consequence of the claimant's disability:

4.2.1 She *is unable to work a late shift due to increasing pain and tiredness*

4.3 Was the unfavourable treatment because of this?

4.4 Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aim was: the legitimate aim of requiring the Replenishment Manager to work these hours is the need to ensure the Team are properly managed and that the replenishment exercise is carried out to a satisfactory level. Requiring the Claimant to work these hours is a proportionate means of achieving that aim because she is the only person in that role, and the Claimant's continued absence from the late shift has resulted in the Team being inadequately managed as well as failings in the replenishment process (tbc depending on the clarification of the claim)

61. As far as the section 15 complaint is concerned, again the facts simply do not support it. The reason Ms Jones took the action she did, was to address the difficulties in the warehouse and restocking in the Old Mill store. It was not because of, or influenced by the disadvantage to which it would put the claimant – that is almost akin

to a victimisation or harassment type complaint: that she was trying to do harm to the claimant by requiring her to work night shifts because she could not do so. It is simply not sustainable on the facts that we have found, accepting the reason why Ms Jones tackled matters in the way that she did and her subsequent approach to trying to find a solution. That complaint must be dismissed without needing to decide whether the claimant was, "unable to work a late shift because of increasing pain and tiredness".

Reasonable Adjustments

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

Did the requirement to work late shifts to fulfil the role of replenishment manager put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that as a result of all her impairments, the claimant's pain gets worse throughout the day and she needs to take her medication around 6pm and she gets drowsy after her medication.

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

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

Adjusted her hours of work

Reallocating some of her duties to floor supervisor.

Allowing alternatives ways of working with the replenishment team which enabled the team to be effectively managed and the full tasks of the claimant's job to be undertaken while still finishing earlier than about 6-7pm. This might include but is not limited to using the WhatsApp group communicate, putting new starters on the same pattern as her, timetabling training when she was on shift and making sure certain duties were caried out in the morning.

Paying the claimant fully for the time off sick as this was a direct failure of the respondent to continue with/ promptly implement a reasonable adjustment to her hours that would have enabled her to return to work much sooner. I*t is the claimant's case that had the respondent not removed the previously agreed early shift pattern and imposed a late shift pattern, she would not have taken sick leave and would have continued to work and earn her full salary. The cause of her absence was the failure to make adjustments to her shift pattern and putting her on late shifts caused her to be absent from work and unable to fulfil her contract of employment and at a substantial disadvantage as she was receiving no pay and had the potential to be dismissed/ disciplined for not fulfilling*

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

62. As to the last of these contended adjustments, the failure to continue full pay during absence - the facts of this case are such that O'Hanlon v Revenue and Customs Commissioners Employment Appeal Tribunal [2006] 8 WLUK 65 applies. The claimant

has not shown how receiving full pay would have practically assisted the disadvantage she faced in connection with the requirement to work late shifts. Clearly, receiving SSP rather than ordinary pay poses hardship during absence, but this was framed as a failure to make a reasonable adjustment of itself. It was not pursued with any vigour on behalf of the claimant and Ms Johnson could not advance any compelling basis to uphold this complaint. The claimant has not proven that she was more at risk of earning SSP than a non disabled colleague who, for example, had a long term absence connected with corrective surgery. Further, this respondent has no policy to continue full pay where reasonable adjustments are accepted to be required but cannot be made or are delayed. This complaint is dismissed.

63. That leaves us then with the remaining pleaded reasonable adjustment complaints, and these were not adjusted by the subsequent communication from the claimant's solicitor.

64. As for knowledge of disability, it is clear that by the December 2021 occupational health report the respondent ought reasonably to have known the claimant was a disabled person; it could reasonably have asked the claimant about the adverse effect on her day to day activities, or asked the occupational health clinician to discuss it, but instead it took her chronic pain condition and the disabling nature of it at face value. Equally her manager could reasonably have asked about adverse effect on day to day activities in 2019 when she communicated her conditions. He may well have. Her position was accepted. We find that the respondent had actual or constructive knowledge of disability at all material times. Dr Bendinger's August 2022 report, which arises after the material times, and with which we disagree on this point, cannot retrospectively affect the respondent's knowledge, or constructive knowledge at the material time – autumn of 2021.

65. Asking ourselves the question: did a requirement to work late shifts (there is no doubt that there was that requirement from October/November 2021) put the claimant at the disadvantages that she identifies? The claimant identifies three disadvantages:

(1) that her pain gets worse throughout the day;

(2) that she needs to take medication around 6.00pm; and

(3) that she gets drowsy after her medication.

66. Those three matters were all tackled and addressed by Dr Bendinger in July 2022. As to the second disadvantage, his view in July 2022 was that the timing could be changed without adverse effect. However the contemporaneous medical evidence in the claimant's GP medical notes was that the prescription of her amitriptyline and mirtazapine was for them to be taken in the evening, and indeed her GP confirms that for these proceedings.

67. There is some practical counter evidence: the claimant on one night a week at least (Saturdays prior to becoming unwell in November 2021) did work a late shift.

Indeed she accepted in oral evidence that she worked late shifts intermittently, perhaps two a week for a period in 2020 - so there was a time (perhaps before mirtazapine had been re-prescribed) when the claimant was able to adjust the amitriptyline to when she was home a little bit later, but not on five or more nights a week. The medical evidence until Dr Bendinger is supportive of the claimant's case on that, and industrial knowledge tells us also that a drowsy side effect is certainly a reason why (and her GP confirms it) mirtazapine is directed to be taken on an evening. We note that Dr Bendinger does not seek to deal with, this medication, because that is outside his field of expertise.

68. He does deal with the opiates, and his position is essentially that without the opiates the claimant would not feel drowsy of an evening – that is his medical and professional opinion, but as at November and December 2021 (and indeed until February 2022 and beyond) the claimant's medication regime was as agreed and prescribed by her GP: to take that medication in the evening. The Pain Clinic's recommendation was the same in respect of amitriptyline, and that is what she did.

69. While the occasional slippage at different times might not put the claimant at a disadvantage, asking her to switch her routine wholesale by requiring late shifts routinely and frequently to be with her team, put her at that disadvantage, we find, at that time.

70. Supportive of that conclusion is Dr Bendinger's very careful and measured evidence about changing a medication regime: It needed to be done over time, with the removal of opiates **and** with support of practitioners.

71. It follows that she was put at a disadvantage at a point in time when she had an existing regime in place and it was going to require considerable support and planning to change a very established regime and (if Dr Bendinger is right about this) very established over-prescribing of opiates. Further, we accept the claimant's evidence of drowsiness after medication and pain becoming worse in the evenings.

72. The claimant has therefore established relative disadvantage from the requirement to work the late shifts at the material times in comparison with those without her disability for the reasons that we have explained.

73. As to knowledge of the disadvantages the claimant asserts she faced, these were both set out in fit notes and in the claimant's communications to the respondent - the precise issues that she was concerned with - and particularly in relation to medication.

74. Should the respondent have undertaken the pleaded adjustments?

75. We understand adjusting her hours of work to be adjusting her Replenishment Manager hours of work to between 6.00am and 6.00pm - essentially saying, “you do not need to work late shifts”. We do not conclude that the respondent ought reasonably to have done that in circumstances in which the store was in difficulties with its replenishment function, the team was an inexperienced team, and had not had the required training. We find that that was the position, and we accept that had been the position for some time.

76. Reallocating duties to the Floor Supervisor – it is simply not reasonable for the management duties (that is the coaching, leading, managing and being responsible for health and safety of a team of five to ten people, as well as all the other aspects of management in the claimant’s job description) could reasonably be delegated wholesale to an inexperienced supervisor.

77. Alternative ways of working – again, we are against the claimant in that it is plain on the evidence before us that “management by WhatsApp” was not a viable proposition for coaching team members through learning their roles fully and being a trusted team that could be left to get on with matters, when they plainly were not at this stage. The claimant had shown she could be inappropriate with this means of communication.

78. Training while the claimant was on shift – an overlap of an hour or two with her team was not reasonable to address the training and disfunction that existed.

79. Enabling certain duties to be carried out in the morning – this meant requiring the replenishment team to come in at the time that the claimant was able to work - early in the morning from 6 or 7am. These colleagues had been contracted to particular hours because of their particular arrangements, discussions and negotiations at the beginning of their contracts, Adjusting their hours to enable them to work and have proper supervision before the store opened would not have been an easy change to make, but even if that could have been done, there were insufficient hours before opening to enable replenishment to work effectively. We therefore do not consider that that would have been a reasonable adjustment for the respondent to have to make.

80. It follows from those conclusions that the claimant’s reasonable adjustments complaint is also dismissed. Our findings include that it was proposed to the claimant that there be a move of store, and/or a change in role, which would accommodate day shift working.

81. The claimant did not assert as a reasonable adjustment, providing her with 40 hours’ work at a store within the same or similar travelling distance at the same pay. We make this observation because the parties remain in a relationship with each other and the claimant is not bound to only those adjustments identified in the pleadings. This would, in our judgment, have been a reasonable adjustment to make but the claimant, through the chronology, effectively refused to contemplate a move of store. The respondent cannot therefore be found to have failed to make a reasonable adjustment at the material times, because its reasonable perception was that a move

of store was not something the claimant was willing to contemplate. That position may change.

Costs

82. The Tribunal having announced its decision above, a costs application was made on behalf of the respondent. Mr Lewinski put the oral application on three grounds:

1) That the claims had no reasonable prospects of success; and/or

2) That the claims were fundamentally misconceived; and/or

3) That the claimant's conduct of the proceedings (whether her own or her solicitors and counsel such that wasted costs might arise) has been unreasonable at particular points in the proceedings.

83. The essence of Mr Lewinski's application is that a reasonable adjustment such that a manager does not have to be present when her team are present, was never going to find success with the Tribunal.

84. As to that fundamental argument, disability discrimination complaints are often complex and given the complexity of the claimant's conditions and treatment, this one has become so – there was concern of completing the case such that the parties canvassed determining disability only in this hearing.

85. The respondent took issue with whether the claimant was a disabled person and sought expert evidence. In contrast there was no identification in its pleading or case management applications that the reasonable adjustments complaint was fundamentally flawed, in the way that is now being argued, from the outset.

86. The lack of prior deposit or strike out applications is not an insurmountable hurdle to a costs application, but it is an indicator. The Tribunal's factual findings were going to have to address the nature of this retail operation and to examine the position in Driffield and why day shift working could be frequently accommodated for the manager there. In essence, Driffield was the exemplar of a manager who did not work alongside his team all or even most of the time. The claimant was entitled to have that evidence tested with the respondent's witnesses, and the respondent's evidence was

that Driffield was unique and the manager worked a mix of shifts – contrary to the impression of the linked in post he had made. The claimant was entitled to test such a position. That is where matters stood at the start of the hearing.

87. Mr Lewinsky pointed to the observation of the claimant's trade union representative in a meeting concerning the flexible working appeal, that she “100% understood” (or words to that effect) the idea of a manager being with her team. That observation was made in a setting which was seeking to resolve matters in the workplace. Understanding the respondent’s position does not equate to accepting that adjustments cannot be made in some circumstances and it is not sufficient that we can find the reasonable adjustments complaint had no reasonable prospects of success at the outset.

88. Moving to the impact of correspondence between the parties indicating that a costs application might be made, this again was at a position in the proceedings when disability was not being conceded. A determination was reasonably going to have to be made of that.

89. Moreover the evidential position had not become fully settled after the exchange of witness statements - the Driffield manager did not himself give evidence. The evidence of our last witness, Ms Holliday, as to the Driffield situation and whether a Facilities Manager could manage a team without being present for all of the time working day shifts, was something that was reasonably to be ventilated and tested (it seems to us) after the exchange of witness statements. The apparent difference between her evidence and the reasonable impression from the LinkedIn note was not settled by the exchange of witness evidence. It could not be said that the proceedings had no reasonable prospects of success or were fundamentally misconceived at this point; nor could it be said that the claimant acted unreasonably before the start of this hearing.

90. The third point in time at which unreasonable conduct is alleged is at the close of the claimant's evidence, when she had made a number of concessions. Mr Lewinsky relied on an open offer made at that stage for consent to dismissal on withdrawal without an application for costs. Ms Johnson properly took instructions on that offer and her instructions were to continue.

91. As to the claimant’s evidence, it is fair to say that she was frank and honest in some of the exchanges, but it is also fair to say that she attributed a reason for her store being in chaos (for that was the nature of the concession). She laid that very squarely at Ms Jones’ door, and the parties will remember that the Tribunal wanted to explore that issue with Ms Armitage – that is to understand properly whether it was

right that Ms Jones coming in as a new Store Manager had rather put matters into chaos, when they had not been previously.

92. Ms Armitage's evidence was the reverse, relying on the workings of the respondent's replenishment systems such that Ms Jones could not have had the effect described by the claimant, and we accepted it. No party could have known how the Tribunal might determine these factual issues at the end of the claimant's cross examination, but before the respondent's evidence. Whether it is reasonable for an employer to make a particular adjustment in all the circumstances is a judgment, and had the claimant established that Ms Jones had caused the chaos that would have been a factor in assessing whether it was reasonable for the respondent to have to make the principal adjustment contended for: permitting the claimant to remain at the store as a day shift replenishment manager. The claimant had attributed reasons for the difficulties in the store which, to our mind, were relevant to the determination of the factual landscape against which we were going to make our findings.

93. We would always encourage consent judgments, in accordance with Rule 3, if the parties can resolve their differences, whatever stage of the proceedings. In this case the proposed open offer of a consent judgment following withdrawal after the claimant's evidence does not appear to have been made on the basis of consent to a declaration that the claimant was a disabled person at the material times.

94. For these reasons, and applying Rule 76, the costs application is refused because the threshold tests are not made out: the adjustments claim did not have no reasonable prospects of success (nor was it misconceived), nor was there unreasonable conduct of the proceedings in continuing after witness statement exchange, and costs warnings.

Employment Judge JM Wade

Date: 29 November 2022