



EMPLOYMENT TRIBUNALS

Claimant: Ms Merryn Turner

Respondent: Westcountry Home Care Ltd

Heard at: Bodmin (via VHS)
2022

On: 14TH, 15TH & 16TH November

Before: **Employment Judge David Hughes**
Ms Rachael Hewitt-Gray
Mr Ian Ley

Representation

Claimant: In person (assisted by Mr John Baggett, partner)

Respondent: Mr Tidy (solicitor)

JUDGMENT having been sent to the parties on 24.11.2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Respondent is a company that undertakes carer visits to service users in the community, at least insofar as its activities before us were concerned. The Respondent's business requires that it send carers to visit service users in the latter's homes.
2. The Claimant was employed by the Respondent as a Community Carer from 10.04.2020 to 18.12.2020. Although the Respondent in its ET3 gave the date of the Claimant's employment ending as 15.12.2020, the Case Summary included in a case management order gives the later date and, in any event, we do not think anything turns on the exact date.

What the case is about

3. The Claimant suffers from anxiety, and the Respondent admits that this constitutes a disability within the meaning provided for by s6 of the Equality Act 2010.

4. The Claimant says that her condition was made worse when pressured to accept more work that she felt able to undertake. She says that any illness absence was treated unsympathetically, which aggravated her condition. She said that, more than once she was pressured when, having shown coronavirus symptoms, she followed government guidance and isolated.
5. She says that she was assured that, if she chose to work over Christmas, her shifts would be short ones. She agreed to do so, but was then rostered to work full shifts on Christmas Day, New Year's Eve and New Year's Day. Her mental health suffered a further deterioration, and she resigned.
6. The Respondent's case is that the Claimant worked under a zero hours contract. It was aware of her condition of panic attacks and anxiety, and offered her additional support and assistance. Her shifts were structured around her childcare needs and her own requirements to manage her condition. She was offered extra shifts because of financial concerns that she had shared with the Respondent, but was not forced to take any extra shifts.
7. A Case Management Hearing was held before Employment Judge Livesey on 01.11.2021. At that hearing, the following issues were identified as being agreed:

1. Disability

1.1 The Respondent admitted that the Claimant suffers from a disability (anxiety) by an email dated 26 August 2021.

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

2.1 Did the Respondent do the things set out in paragraph 3.1 below.

2.2 Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated. The Claimant says she was treated worse than a hypothetical non-disabled comparator.

2.3 If so, was it because of disability?

2.4 Is the Respondent able to prove a reason for the treatment occurred for a non-discriminatory reason not connected to disability?

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

3.1 Did the Respondent treat the Claimant unfavourably by:

3.1.1 Pressurising her into accepting shifts outside of the periods when it knew that she could not ordinarily have worked;

3.1.2 Pressurising her into returning to work when ill and/or when isolating in accordance with government guidelines following the development of coronavirus symptoms and prior to receipt of negative test results;

3.1.3 Ms Russell criticising her for having had a period of disability-related absence July or about August;

3.1.4 Rostering her to work 3 full shifts of Christmas Day, New Year's Eve and New Year's Day when she was assured that such shifts were to have been short. 3.2 Did the following things arise in consequence of the

Claimant's disability? The Claimant's case is that her illness was exacerbated whenever she was pressurised into accepting more work, which made her ill and unable to work effectively or at all, for which she was then criticised and/or pressurised into returning to work.

3.3 Was the unfavourable treatment because of any of those things?

3.4 The Respondent does not seek to argue;

3.4.1 That any of the treatment was a proportionate means of achieving a legitimate aim;

3.4.2 That it did not know or could not reasonably have been expected to know that the Claimant had the disability.

8. The Tribunal canvassed with the parties whether these issues continued to fairly reflect the issues between them, and both parties agreed that they did.

The hearing

9. The hearing took place remotely, via the Video Hearing System. The Tribunal heard live evidence from the Claimant and her partner, Mr John Baggett for the Claimant, and from Hayley Russell and Kelly Rogers on behalf of the Respondent. There were witness statements from two others, David Kite and Amy Kite, who were unable to attend to give evidence. The Tribunal was asked to read their statements and has done so, the Respondent agreeing that this should be done, but in considering their evidence the Tribunal is mindful of the fact that they were not cross-examined.
10. The Claimant herself had not made a witness statement, but asked the Tribunal to treat a document attached to her ET1, and included in the hearing bundle at pp16-17, as her statement. The Respondent made no objection, and we agreed to do so.

What happened

11. The claimant told us that she had advised the respondent of her anxiety and panic attacks when interviewed for her former job. She said that she was told that the respondent would ensure that her needs would be met, and that she would not be treated differently from any other members of staff. She describes herself as being "over the moon" when she was successful in getting the job.
12. The Claimant told us that, when she started, the respondent was fairly accommodating with her. She was allowed to start at 17:45 hours and finish work at 22:00 hours. She found it difficult at first, because this was her first job after having children, but she says that she managed to battle through her anxiety and do the job to the best of her ability. She was initially employed during the lockdown. When her partner was not at work. This allowed her to undertake more work than she originally contemplated. She says that it was when her partner returned to work that problems started.
13. That the Claimant was initially happy in her job is supported by a document dated 06.05.2020. In this document, which records the

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conversation between the claimant and Ms Rogers, it is recorded that the claimant was feeling okay and everything was running smoothly, that the claimant was enjoying the work and the work environment, but a little anxious about her first single visits to take place later that evening. The Claimant was offered support by Ms Rogers, and told her that her anxiety medication had recently been reduced so she was feeling “a little wobbly,” but happy to continue working knowing that support was available at the end of a phone. The note recorded that the claimant was happy with her shift pattern but was available to help mornings if needed.

14. The hearing bundle included medical records for the Claimant. Those records indicate that the Claimant was taking Mirtazapine in a dose of 30mg, once a day, in January 2020. On 20.04.2020 – that is, 10 days after starting work – the Claimant is noted as having contacted her GP surgery, to discuss the dosage. An entry for the following day notes that she had been “*taking more*”, and another entry for that day records that she had been taking 60mg per day and feeling better.
15. On 11.05.2020, there is an entry showing a dosage of 45mg, once a day.
16. On 12.05.2020, there is an entry recording that the Claimant had contacted the surgery about her dosage “...*as feeling more anxious and at edge – new job...*”.
17. There are entries for July, August and October 2020, each referring to a 45mg dose.
18. These entries are in some tension with the Claimant’s account, that she was initially happy at work but that her mental health deteriorated after a few months as increasing pressure was put on her to undertake work she did not consider herself able to do. We do not doubt the genuineness of the Claimant’s condition, nor do we doubt the sincerity of her recollection. But sincerity is not the same thing as reliability. The tension between the dosages shown by the records and the Claimant’s recollection leads us to conclude that she experienced – understandably – increased anxiety around the time she started her job. But we do not find that her mental health deteriorated some months after starting her job, as a result of pressure to undertake more work.

Pressure to undertake more work

19. The Claimant described to us a working environment in which she would receive regular calls and messages about working additional hours and/or shifts. The claimant described these calls and text messages to us as “excessive and said that she felt pressured by them to accept work that she did not feel she could do.
20. The Respondent’s position is that it was, as Ms Rogers in her evidence and Mr Tidy in his submissions acknowledged, a somewhat disorganised employer. We accept Ms Roger’s evidence and find that it was often struggling to meet its obligations, because of a lack of carers available to undertake particular shifts or visits. When this happened, the respondent would contact its employees, primarily by text message but also by

telephone, to seek to meet its obligations. The Claimant was, we accept, often in receipt of such text messages and/or telephone calls.

21. The Claimant told us, and we accept, that she would often ignore such messages and not answer such calls. She says that, in doing so, it should have been apparent to the respondent that she did not wish to undertake the shifts/visits that it was seeking to cover.
22. A number of instances were put to the respondent's witnesses as examples of messages sent in short succession, which may have had the intention of pressuring the claimant to undertake shifts that she did not feel capable of doing. We were referred to text messages on page 108 of the hearing bundle.

- (a) The first of these is timed at 13:15 hours, the second at 16:59 hours.
- (i) The first reads, "*Hi Merryn. On Monday, 5 October Heather will be in Launceston from 9-5. You just need one observation from Heather and your care certificate will be completed:;) could you do a couple of visits on this day so Heather can observe meds support and use of equipment? 10:40 – 12:00 would be fab as you could go to redacted and redacted if not is there another time that would suit you on this day and I'll try to arrange suitable clients x*".

(ii) The second was in exactly the same terms.
We did not consider these messages to have been sent in short succession, and do not consider that they placed any unreasonable pressure on the claimant to undertake shifts;

- (b) We were referred to messages on page 109 of the hearing bundle, the first of which was timed at 11:40 hours and the second of which at 13:24 hours.

(i) The first read; "*Hi Merryn. You've got X2 double handed calls on Monday morning as agreed for your care certificate ops. 10:40 – 12:00. Could you stay out and do a couple of single-handed lunch calls also please X*";

(ii) The second read was again in the same terms.
Although these messages are closer together in time than the ones on the previous page, we do not think it would be right to describe them as having been sent in close succession, and we do not think that they place any unreasonable pressure on the claimant to undertake any visits;

- (c) The third example to which we referred was found on page 110 of the hearing bundle. There was a text message at 10:14 hours, and another at 11:24 hours.

(i) The first read; "*Hi Merryn, Is there any chance you could do some visits on Monday at all please? School hours x*";

(ii) The second read; "*Hi Merryn. Next week I have work available in school hours on Monday, Wednesday and Friday. Could you help us out on any of those days please? X*"

Ms Rogers in her evidence conceded that these messages had been sent in short succession. The content of these messages, however,

does not include any undue pressure on the claimant to undertake any shifts or visits.

23. We find that the Respondent was indeed a somewhat disorganised employer, and one that struggled to meet its obligations. We find that it struggled to staff the shifts and visits it was required to make. We find that, as a consequence, it did contact staff members to seek volunteers to cover shifts and visits on a regular basis. These contacts included the Claimant.
24. We do not agree that the messages that the Respondent sent out were excessive. The Claimant received regular communications of this sort, but if anything received less than a typical employee might receive. This was because the Respondent, we find, tried to not offer her visits or shifts at times when she had indicated she could not work. There may have been times when she was offered such shifts or visits, but the Respondent was largely successful in its efforts not to offer her shifts for times she could not work.
25. We also find that the Respondent was operating in what was at the time an employees' market. Its need for staff to perform its workload. It was not in a position to be picky.

Time off sick

26. The Claimant had to take time off sick. Three instances in particular were discussed before us. One related to July or August and we will call that "*the summer incident*". The dates of the other two were not discussed with any precision, but we do not think that anything turns on that, because the parties were clear as to the instances. We will refer to them as "*the stomach bug incident*" and "*the covid test incident*".

The summer incident

27. This incident the subject of much less discussion in the hearing than the other two. The Claimant had some time off for reasons related to her condition at some point in July or August. On her return to work, she was called into a meeting with Ms Russell, who, she says, told her to consider the problems she was causing the Respondent when she had a panic attack and couldn't work. The message that she says Ms Russell communicated to her was to 'get over it and get back to work'. We think it probable that the Respondent was keen to have the Claimant return to work. But we think it unlikely that the Respondent would have jeopardised the likelihood of that happening by making remarks of this nature to the Claimant. The Claimant referred to having received "passive aggressive" text messages from the Respondent. None of the text messages shown to us – with the possible exception of the message sent following a Facebook post (see below) can fairly be described as "passive aggressive".

The stomach bug incident

28. A return to work interview form dated 28.09.2020 records as the reason for absence:
- Merryn was feeling unwell with upset stomach and thinks her anxiety had a big part of it as well, no other members of her family has had an upset stomach.*
29. The Claimant said that she was told by Ms Rogers that she could not have a stomach bug because it was not the season for such illnesses. Ms Rogers' account was that she had asked the Claimant whether she thought the reason for her upset stomach was anxiety or a stomach bug. In her answer to questions, she said that the Claimant had not said it was "for definite" a stomach bug, but rather had said that she didn't know what it was.
30. The entry on the return to work form does not appear to us to be consistent with Ms Rogers' account. It has the appearance of having been drafted with a view to dispelling any concern that the Claimant might have had a stomach bug. Its assertion that no other members of her family had fallen ill is at odds with the Claimant's account, although it may be that those relatives fell ill after the meeting that this note purports to record.
31. On balance, we find that, at the meeting that the note purports to record, the Claimant probably did tell Ms Rogers that she was suffering from a stomach bug. The Claimant had been open with the Respondent about her anxiety, and there is no reason to believe that, if she thought anxiety were causing her stomach upset, she would simply not have said so.
32. We do not think that Ms Rogers was being deliberately dishonest in the record she made of the meeting, or in her evidence before us. We find that the probable explanation is that Ms Rogers was simply not receptive to a message that the Claimant sought to convey, that she did not think the cause of her upset stomach was anxiety, but rather a stomach bug.
33. Ms Rogers was pressed about this meeting in her evidence. Responding to questions from Mr Baggett, who asked questions on behalf of the Claimant, she observed that the Claimant had an opportunity to read the record of the meeting and could have refused to sign it. We do not find this persuasive. The Claimant's anxiety was obvious, even in what we hope was a hearing conducted with appropriate consideration, and, we find, genuine. We do not accept that the Claimant was pressured into signing the document, but we accept that the anxiety she is likely to have felt when faced with a colleague apparently unreceptive to her views as to the cause of her stomach upset, is likely to have caused her to feel under some compulsion to sign the document.

The covid test incident

34. The Claimant developed a bad cough and a temperature. She took a covid test. She called the Respondent, and said that she had taken a test and needed to isolate until she knew the result. Although there was some disagreement about the detail of the relevant guidance and regulations at

the time, that much was not in dispute and what was in dispute seems to us to have little relevance to the matters we have to decide.

35. The Claimant says that she was told that she would have to work pending receipt of the test result. Ms Russell denied that.
36. It is fair to say that Ms Russell at times in her evidence gave the impression of seeking to argue the Respondent's case for it. That said, we do not find that the Claimant was told that she had to work pending the result of the covid test. We think that her inability to work for this time – which may well have been a very short time – was probably the cause of some frustration to the Respondent, and that frustration may well have been expressed to the Claimant. But we do not accept that the Claimant was told she had to work during this period.
37. The Claimant tested negative for covid. However, she continued to feel unwell, and on contacting her doctor, was advised to take another test. The Claimant said that she was again pressured to work whilst waiting for a result. We do not accept that this was so. We find that the Claimant was not subjected to pressure to work whilst awaiting the covid test result.
38. The Claimant was subsequently diagnosed with a chest infection. She says that she was subjected to "*guilt trips and pressure to return*" and that, on her return, she was met with a return to work form that recorded her as having a cough.
39. The return to work form was in the hearing bundle at p82. It is dated 08.12.2020, and is signed by the Claimant and by Hayley Russell. The reason for absence box reads as follows:

Merryn was advised to take a second covid test by her GP as she was still coughing. Test was negative – Merryn was then given anti-biotics for a chest infection.
40. The note is at odds with the Claimant's account that it was recorded that she "*had a cough*". It clearly records that she had a chest infection, for which she had been prescribed antibiotics.
41. The Claimant also told us that she was shivering and sweating in the meeting, and had a hacking cough, and was offered a cough sweet, which was linked with a request that she "*try not to freak out the clients*".
42. We do not accept the Claimant's account of this meeting. The form is not consistent with any attempt by the Respondent to play down the Claimant's condition. We accept that Ms Russell probably did offer her a cough sweet, but without any sinister implication. And whilst the Claimant may well have been coughing during the meeting, we think it improbable that she was sweating or showing significant and obvious symptoms.

Relevance of the incidents

43. The relevance of these meetings, and the ill health that led to them, lies primarily in that they are said to support the Claimant's contention that she

was pressured to do work that she did not feel able to do. We do not accept that, and find that the Claimant was asked to undertake shifts or visits, but was not pressured to do so.

Financial difficulties

44. In addition to suffering from anxiety and panic attacks, the Claimant was experiencing apparently significant financial difficulties at the time that concerns us. The nature and exact extent of those difficulties was not gone into and does not concern us, but there is a reference in her medical records to the possibility of debt collectors turning up at her house – see medical record entry 27.10.2020, hearing bundle p128.
45. In or around September 2020, the Claimant advised the Respondent about the financial difficulties she was experiencing. The Claimant was offered the possibility of doing additional work, in order to assist with her financial predicament. We find that she expressed a willingness to do so. We find that the Respondent made this offer in good faith, although it would undoubtedly assist the Respondent to have the possibility of the Claimant doing more work.
46. We find that the Claimant was not pressured into doing additional work, although she was offered it.
47. Although there is reference to increased anxiety in the records that is linked to her employment, this was early on (see para 16 above). There is no reference to pressure to undertake more work. We are mindful that medical records are not verbatim accounts of what the Claimant has said. But we also note that the records include the following:

Summary Care Record Update – This patient's preference is for only core items to be included in their Summary Care Record. This has been overridden so that additional items will be included in this patient's Summary Care Record.
48. In cross examination, the Claimant accepted that the medical records were a full medical record. Had the Claimant expressed to her doctor a view that work pressures were causing an increase in her panic attacks, we think it likely that that would be reflected in the records. It is not.
49. We find that it is more probable than not that any increase in the panic attacks the Claimant experienced during the course of her employment was due to her financial difficulties, rather than her employment.

Pressure generally

50. The Claimant was in the habit of not returning messages, or answering calls, when she felt they were becoming too frequent. It was put to the Respondent's witnesses that the Respondent should have inferred from this that the Claimant did not want to be contacted. We do not agree that that was an obvious inference. It was one possible inference, others being that simply that the Claimant did not wish to respond to the message or call in question, or was otherwise occupied and unable to respond. Far

from it being apparent that the Claimant did not wish to be bothered with so many offers of additional work, or that she felt she was being pressured, we find that the Respondent was simply offering the Claimant work that it had available, and needed covering.

Christmas 2020

51. After the Claimant returned to work following the covid test incident, she was asked what shifts she could work over the festive period. Although she normally worked on a Thursday evening, she told the Respondent that, because of her young children, her priority was to be free on Christmas Eve – which the parties agreed was a Thursday – and the morning of Christmas Day. She indicated that she could work later on Christmas Day, and on New Year's Eve and New Year's Day.
52. The Claimant said that, although she'd said she could work later on those days, she found that she was scheduled to work what she described as a "full shift" on each of those days. Ms Russell's evidence was that there took place what she described as a negotiation with the Claimant. She described a situation in which there was uncertainty about the extent of work that would need to be done, because there were often cancellations over the Christmas period and it was unclear whether people would be able to see family members, due to the covid situation. She said that the Claimant's earliest possible start time on those days would be 15:45hrs, and that this was made known to the Claimant.
53. No rota for the days in question was put before us.
54. We find that the Claimant did indicate that she was willing to work on Christmas day, New Year's Eve and New Year's Day. We find that she was content to do so, and offered to do so, possibly because of her financial situation. We note that the pay rate was higher than normal, which may have been of some importance to the Claimant. We do not accept the suggestion made in cross-examination that the Claimant was scheduled to work those days as some sort of punishment.
55. That the Claimant came to be unhappy about these working arrangements is not in dispute. The Claimant made a Facebook post, no copy of which was put before us, but which led to her receiving a message from Ms Russell (although we understand it was sent to her via another person).
56. The Claimant said that she had posted on Facebook because she was upset about missing Christmas dinner. The Claimant forgot that her post was public, and when this was pointed out she took it down and apologised. About 30 minutes later, she received a call from the Respondent's on-call carer, asking her to go and see Ms Russell the following morning.
57. The message that Ms Russell caused to be sent to the Claimant was in the bundle, at pp102-103. It read:

Hi Merryn. I've been made aware that you are posting negative comments about your rota on Facebook. Please can you refrain from doing so. I have

not put you down for anything that we did not discuss and agree. When we spoke about Christmas shifts you told me that you really wanted Christmas Eve off (a Thursday – a day you usually work) and also Christmas morning. You agreed that you would work on Christmas day evening which we discussed MAY be shorter depending on cancellations but the worst case it would be a 4pm start as usual. I have tried to be fair to everyone and worked with people's requests. You specifically told me that it was more important to you to be at home on Christmas Eve PM so I have made sure that you have this off. The rotor has been on the board for a week now so I am shocked and disappointed that you have not spoken to me directly but instead have chosen to post about it on a social media platform. This is very unprofessional and extremely unnecessary given that I have only put you down for the shifts that your previously requested/agreed to do. Please come to the office tomorrow so we can discuss this further. Thank you. Hayley

58. In her evidence, Ms Russell said that the point of the meeting she sought with the Claimant was to discuss her concerns over the substance of what had upset her, rather than her making the Facebook post. We do not accept that that is an accurate reflection of the position. As Ms Rogers put it in her evidence, the Respondent's need for employees to meet its commitments meant that it was probably more lenient than it might otherwise have been regarding some matters, but it is clear from the message that Ms Russell caused to be sent that the Facebook comment had concerned her. Although the Claimant's working hours were to be discussed at the meeting, we think it probable that the Facebook post was also to be discussed.

Final meeting

59. The Claimant attended a meeting with Ms Russell the following day. She was accompanied by Mr Baggett. The Respondent agreed to him being present. This was presented as an indulgence of sorts to the Claimant, but we do not think it would be fair to so describe it. The Claimant was visibly anxious throughout the hearing, and we think it probable that she would have been very and visibly anxious about the meeting. It was understandable that she wanted to be accompanied to it.
60. There was also discussion as to where exactly Mr Baggett sat during the meeting, a detail we do not consider relevant or find helpful when determining the matters that are relevant. We think it more probable than not that Mr Baggett would have sat somewhere near Ms Russell's desk, rather than remaining in the corner as he said he had. We do not think there is anything sinister in this, it would merely facilitate his aiding the Claimant in the meeting.
61. What happened in the meeting was a matter of considerable dispute. In her statement, the Claimant said that she attended the meeting having already decided to leave the job, because she felt she was being punished for having taken time off sick. We have already found that her Christmas period shifts were not allocated as any kind of punishment, but we accept that the Claimant came to believe that that was so, and had decided to leave the job for that reason.

62. The Claimant's statement has her attempting to explain her reasoning to Ms Russell, who became defensive, saying it was a "*spur of the moment*" decision, that the Claimant should think it over because her decision would impact on vulnerable people. The Claimant said that Ms Russell's comments appeared designed to make her feel more guilty than she already did.
63. The Claimant's answers in cross-examination were not entirely on all fours with her statement. She said in answers to Mr Tidy that she had attended the meeting and tried to explain that the other employee who had seen the Facebook post may have misunderstood, that she'd been having a "*moan to a friend rather than bashing the company*". She had Ms Russell saying that she – Ms Russell – had not misunderstood. She described that as the "*straw that broke the camel's back*".
64. Ms Russell's account of the meeting was at variance. She has the Claimant putting all of her things on Ms Russell's desk at the start of the meeting and telling her that she was leaving. She says that the Claimant refused to discuss the matter any further. She denied using the words put to her, "*so you're ok to leave vulnerable people at Christmas*", but did point out that the Respondent looks after vulnerable people, had a care team working extremely hard, and that she felt it was irresponsible for someone to walk out at that time of the year. She denied cutting the Claimant off when trying to say things, saying that she'd been hopeful that they would have a conversation and attempt to resolve issues.
65. We find that the Claimant attended the meeting having formed a decision to leave the job. We find that she attempted to explain why she was doing so to Ms Russell. We think that, once she appreciated that the Claimant was leaving, Ms Russell probably did use something like the words that were put to her, to express her unhappiness at the Claimant leaving, and that she expressed herself in unsympathetic tones. We find that Ms Russell had probably hoped at the start of the meeting to resolve matters, but that once she appreciated that the Claimant was leaving, any need for sympathy towards her had gone.

Law

66. S6 of the Equality Act 2010 (EA) provides as follows:

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.*
- (5) *A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).*
- (6) *Schedule 1 (disability: supplementary provision) has effect.*

67. EA s13 provides as follows:

13 Direct discrimination

- (1) *A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*
- (2) *If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.*
- (3) *If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.*
- (4) *If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.*
- (5) *If the protected characteristic is race, less favourable treatment includes segregating B from others.*
- (6) *If the protected characteristic is sex—*
- (a) *less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;*
- (b) *in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.*
- (7) *Subsection (6)(a) does not apply for the purposes of Part 5 (work).*
- (8) *This section is subject to sections 17(6) and 18(7).*

68. EA s23 provides as follows:

23 Comparison by reference to circumstances

- (1) *On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.*
- (2) *The circumstances relating to a case include a person's abilities if—*
- (a) *on a comparison for the purposes of section 13, the protected characteristic is disability;*
- (b) *on a comparison for the purposes of section 14, one of the protected characteristics in the combination is disability.*
- (3) *If the protected characteristic is sexual orientation, the fact that one person (whether or not the person referred to as B) is a civil partner while another is married is not a material difference between the circumstances relating to each case.*

(4) *If the protected characteristic is sexual orientation, the fact that one person (whether or not the person referred to as B) is married to, or the civil partner of, a person of the same sex while another is married to, or the civil partner of, a person of the opposite sex is not a material difference between the circumstances relating to each case.*

69. EA s15 provides as follows:

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.*

70. EA s39 provides as follows:

39 Employees and applicants

(1) *An employer (A) must not discriminate against a person (B)—*

(a) *in the arrangements A makes for deciding to whom to offer employment;*

(b) *as to the terms on which A offers B employment;*

(c) *by not offering B employment.*

(2) *An employer (A) must not discriminate against an employee of A's (B)—*

(a) *as to B's terms of employment;*

(b) *in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;*

(c) *by dismissing B;*

(d) *by subjecting B to any other detriment.*

(3) *An employer (A) must not victimise a person (B)—*

(a) *in the arrangements A makes for deciding to whom to offer employment;*

(b) *as to the terms on which A offers B employment;*

(c) *by not offering B employment.*

(4) *An employer (A) must not victimise an employee of A's (B)—*

(a) *as to B's terms of employment;*

(b) *in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;*

(c) *by dismissing B;*

(d) *by subjecting B to any other detriment.*

(5) *A duty to make reasonable adjustments applies to an employer.*

(6) *Subsection (1)(b), so far as relating to sex or pregnancy and maternity, does not apply to a term that relates to pay—*

(a) *unless, were B to accept the offer, an equality clause or rule would have effect in relation to the term, or*

(b) if paragraph (a) does not apply, except in so far as making an offer on terms including that term amounts to a contravention of subsection (1)(b) by virtue of section 13, 14 or 18.

(7) In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment—

(a) by the expiry of a period (including a period expiring by reference to an event or circumstance);

(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.

(8) Subsection (7)(a) does not apply if, immediately after the termination, the employment is renewed on the same terms.

Conclusions on the issues

71. Looking at the issues identified above, we have found that the Respondent did not pressure the Claimant into accepting shifts outside of the periods when it knew she could not ordinarily work.
72. We have not found that the Respondent pressured the Claimant into returning to work when ill and/or when isolating in accordance with government guidelines following the development of coronavirus symptoms and prior to receipt of negative test results.
73. We do not accept that Ms Russell criticised the Claimant for having had a period of disability related absence in July or August 2020.
74. We have found that the rostering of the Claimant on Christmas Day, New Year's Eve and New Year's Day was done at the Claimant's request and following discussion with her.
75. In the light of those findings, the question of whether they arise in consequence of the Claimant's disability falls away.
76. We find that the Claimant was not subjected to any unfavourable treatment because of her disability, or because of anything arising from her disability.

Employment Judge David Hughes
Date 01 December 2022

Reasons sent to the Parties: 07 December 2022

FOR THE TRIBUNAL OFFICE