EMPLOYMENT TRIBUNALS

Claimant: Mrs Armelle Tohou

Respondent: Hampshire County Council

Heard at: Southampton On: 7,8,9 November 2022

Before: Employment Judge Dawson, Ms J Killick, Mr P Flanaghan

Appearances

For the claimant: In person
For the respondent: Ms Gyane, counsel

RESERVED JUDGMENT

The claimant's claims are dismissed.

REASONS

Introduction and Issues

1. By a claim form presented on 14 April 2020, Mrs Tohou presented claims of unfair dismissal, discrimination on the grounds of pregnancy or maternity and on the grounds of disability and for unpaid holiday pay.

2. At a case management hearing on 8 December 2020, where Mrs Tohou was represented by Mr Wareing of counsel, Mrs Tohou informed the tribunal that she had ticked the box for discrimination on the grounds of pregnancy or maternity in error and no such claim was being pursued. The issues in the case were identified as set out below.

3. At a hearing on 19 August 2021 the claims of unfair dismissal and unpaid holiday pay were dismissed on the grounds that they were presented out of time but an extension of time was granted in respect of the claims of disability

discrimination and associative disability discrimination. Again Mrs Tohou was represented by Mr Wareing.

4. The issues in respect of discrimination were identified at the hearing of 8 December 2020 as follows (the paragraphs are copied and pasted without correction of the spelling of the names):

3 Direct Disability Discrimination (s 13 Equality Act 2010)

3.1 The claimant relies upon the fact of dismissal.

3.2 Was that less favourable treatment? The Tribunal will have to decide whether the claimant was treated worse than someone else was treated, known as the claimant's comparator. There must be no material difference between the circumstances of this comparator and those of the claimant. the comparator can be an actual person, or if there is no actual comparator then someone hypothetically. That is to say a hypothetical comparator whom the claimant says would not have been treated in the (less favourable) way in which the claimant was treated. The claimant relies on an hypothetical comparator.

3.3 If the claimant did suffer less favourable treatment above, was this because of her disability?

Direct Associative Disability Discrimination (s 13 Equality Act 2010)

4.1 The claimant relies upon two allegations of less favourable treatment when she says the respondent failed to agree her request to change her working hours and/or working days to enable her to look after her daughter Vicky who is disabled by reason of Autistic Spectrum Disorder. The two occasions are said to have taken place on 12 September 2019 when The claimant met Mrs Mel Brodason; and at some Stage during the week before 20 November 2019 when she met Jacqueline Cherryann.

4.2 Was that less favourable treatment? The Tribunal will have to decide whether the claimant was treated worse than someone else was treated, known as the claimant's comparator. There must be no material difference between the circumstances of this comparator and those of the claimant. The comparator can be an actual person, or if there is no actual comparator then someone hypothetically. That is to say a hypothetical comparator whom the claimant says would not have been treated in the (less favourable) way in which the claimant was treated. The claimant relies on an hypothetical comparator.

4.3 If the claimant did suffer less favourable treatment above, was this because of her daughter Vicky's disability?

5. At a further hearing on 19 July 2022, where Mrs Tohou was represented by her husband, the tribunal again set out the issues in respect of disability discrimination in identical terms to those identified on 8 December 2020.

6. The full merits hearing was listed for 3 days commencing on 12 September 2022. On 9 September 2022 that hearing was adjourned on the application of

Mrs Tohou because her husband had been unable to get a Visa to return to the UK

Matters arising at the outset of the hearing

Application to Adjourn

7. On the day before the hearing was due to commence, Mr Wareing sent an email to the tribunal stating that he had only received a copy of the bundle from the respondent very recently and that Mrs Tohou had been unable to pay for his attendance at the hearing (on a direct access basis) and therefore he was not formally instructed and could not act for Mrs Tohou. He stated, however, "in light of all these difficulties, I write now to support what I am given to understand will be an application by Mrs Tohou for adjournment and relisting of this full merits hearing".

8. At the outset of the hearing, Mrs Tohou applied for an adjournment on the bases that;

    a. Mr Wareing was not in attendance and she sought time in order to save for his fees,

    b. she did not believe that she was aware of the contents of the bundle and

    c. her husband had not been able to obtain a Visa to attend the hearing.

9. The application to adjourn was resisted and the respondent submitted (and subsequently produced evidence to show) that:

    a. A hard copy of the bundle was delivered to Mrs Tohou's address on 5 August 2022 (and signed for by Mrs Tohou's daughter).

    b. Further disclosure was sent by the respondent to Mr Tohou (who was acting as the claimant's representative) on 6 September 2022.

    c. On 31 October 2022 a copy of the bundle, with the additional disclosure which had been sent on 6 September inserted at the back, was sent electronically to Mr Tohou. (We are satisfied that the additional documentation was not significant in either volume or complexity and Mrs Tohou had good time to consider the final bundle prior to the hearing).

10. We are satisfied that it would not have been appropriate for the respondent to serve the bundle on Mr Wareing directly given that he was not instructed to represent Mrs Tohou on a continuing basis but only instructed for individual hearings on a direct access basis.

11. The respondent referred us to rule 30A(2) of the Employment Tribunal Rules of Procedure as well as the case of *Ameyaw v Price Waterhouse Coopers Services Limited* EA-2019-000480-LA and in particular paragraph 51.

12. For reasons which we gave orally we refused the application for an adjournment. Our reasons were as follows:

    a. The application was made within 7 days of the hearing,

    b. the respondent did not consent to an adjournment,

    c. we were satisfied that the application was not necessitated by an act or omission of the respondent.

    d. We did not consider that the inability of Mrs Tohou to pay for the services of Mr Wareing was an exceptional circumstance. Regrettably, many litigants cannot afford to pay for representation before the tribunal and the tribunal has been set up to recognise that fact. Part of the overriding objective requires us to ensure, so far as practicable, that the parties are on an equal footing even though they are not represented.

    e. We also did not consider that it was an exceptional circumstance that Mrs Tohou's husband was unable to attend. An earlier adjournment had been granted to allow Mrs Tohou's husband to attend but he had still not been able to obtain a Visa to attend.

13. Even if there had been an exceptional circumstance which would have permitted us to adjourn the hearing, we would not, in the exercise of our discretion, have done so for the following reasons:

    a. Mrs Tohou had already been given one adjournment to enable her husband's attendance.

    b. The application for an adjournment was only made at the outset of the hearing, a time which causes maximum inconvenience to the respondent and the tribunal.

    c. The case is old and includes allegations going back to 2017.

    d. The respondent had incurred the cost of attending the hearing with counsel and its witnesses.

    e. The respondent's witnesses had had the allegations hanging over them for a significant period of time.

    f. Mrs Tohou had adduced no cogent evidence that she would be able to save the £4000 required to pay for counsel's fees when to date she had only been able to save £400.

    g. Further delay was not in the interests of justice.

The way the Case was being put in the Claimant's Witness Statement.

14. Having taken the time to read the bundle and the witness statements, the tribunal was concerned that the witness statement of Mrs Tohou presented a case more recognisable as harassment and discrimination because of

something arising from disability, than direct discrimination. The claim of discrimination because of something arising from disability would be one based on an assertion that Mrs Tohou was dismissed because of her absence which arose from her disability or her daughter's disability. We raised this point with the parties. Mrs Tohou indicated that she wished to widen the issues to include those matters. The respondent resisted that application.

15. We considered the case of *McLeary v One Housing Group Ltd* and its requirement that "when, as in this case in my judgment, it shouts out from the contents of the Particulars of Claim that it is being alleged that there have been a number of acts of disability discrimination that have, along with other acts, contributed to an undermining of trust and confidence that has driven an employee to resign and the employee is effectively a litigant in person and has no professional representation, this is a matter that should, at the very least, be raised at the Case Management Preliminary Hearing so that clarification can be sought".

16. We also considered the case of *Chandhok v Tirkey* and the judgment of the Employment Appeal Tribunal that "The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond. A respondent is not required to answer a witness statement, nor a document but the claims made ".

17. The claim form in this case does not set out facts which shout out a claim of discrimination because of something arising from disability but does contain allegations which could be seen as claims of harassment. Nevertheless, the tribunal has held two case management hearings where the issues were identified. When the issues were first identified Mrs Tohou was represented by counsel. Thus the tribunal has done what was required of it according to the decision in *McLeary*. It was clarified that the only claims being made were of direct discrimination. The respondent should be able to rely upon a list of issues created in those circumstances.

18. We treated Mrs Tohou as making an application to amend her pleadings to add claims of harassment and discrimination because of something arising from disability but refused that application. Applying, in particular, the test in *Vaughan v Modality Partnership* UKEAT/0147/20/BA, there would have been very substantial prejudice to the respondent to allow any amendment at this late stage. The respondent had not attended the final hearing with the evidence that it would need to defend claims of harassment or discrimination because of something arising from disability. If Mrs Tohou had been given permission to amend the claim form, it would have been necessary, in the interests of justice, to allow the respondent an adjournment to answer those claims. It is likely that disclosure would have had to be carried out again, the respondent would have needed to bring more witness evidence (which would have required the exchange of further witness statements) there would be a substantial delay and a substantial increase of costs for the respondent. Whilst there was prejudice to Mrs Tohou if the amendment was not allowed, that prejudice is mitigated by

the fact that Mrs Tohou has had the opportunity to present all of her claims and could have raised them at any one of the 3 previous hearings but did not do so. At two of those hearings Mrs Tohou was represented by counsel. In those circumstances the application to amend the claim form was refused.

19. The claim, therefore, proceeded on the basis of the issues as identified.

The Law

20. The following are relevant sections from the Equality Act 2010.

> **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.
>
> **109 Liability of employers and principals**
>
> (1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.
>
> (2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.
>
> **136 Burden of proof**
>
> (1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

21. In considering questions of causation, in Nagarajan [1999] IRLR 572, the House of Lords held that that if the protected characteristic had a 'significant influence' on the outcome, discrimination would be made out. The crucial question in every case was, 'why the complainant received less favourable treatment … Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job?'

22. In Chief Constable of Greater Manchester v Bailey [2017] EWCA Civ 425 it was held at para 12: “Both sections use the term “because”/“because of”. This replaces the terminology of the predecessor legislation, which referred to the “grounds” or “reason” for the act complained of. It is well-established that there is no change in the meaning, and it remains common to refer to the underlying issue as the “reason why” issue. In a case of the present kind establishing the reason why the act complained of was done requires an examination of what

Lord Nicholls in his seminal speech in Nagarajan v London Regional Transport [2000] 1 AC 501, referred to as "the mental processes" of the putative discriminator (see at p. 511 A-B). Other authorities use the term "motivation" (while cautioning that this is not necessarily the same as "motive"). It is also well established that an act will be done "because of" a protected characteristic, or "because" the claimant has done a protected act, as long as that had a significant influence on the outcome: see, again, Nagarajan, at p. 513B."

23. In Madarassy v Nomura International plc [2007] IRLR 246, the Court of Appeal held, at paragraphs 56-57,

> "The court in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.
>
> 57 'Could conclude' in s.63A(2) must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this Stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by s.5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment.

24. In Hewage v Grampian Health Board [2012] UKSC 37, the Supreme Court held "Furthermore, as Underhill J pointed out in *Martin v Devonshires Solicitors* [2011] ICR 352 (para 39) it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

Findings of Fact

25. We accept that while Mrs Tohou worked for the respondent she was disabled by reason of asthma and a heart condition and her daughter was disabled by reason of Autistic Spectrum Disorder.

26. Mrs Tohou started working for the respondent in November 2015. Initially she had been employed via an agency and was a good worker. There is no dispute that Mrs Tohou was good at her work and had good relationships with residents in the care home where she worked.

27. Pursuant to Mrs Tohou's job description, just under half of her time was to be spent key-working, which included acting as a key worker for a number of residents so that a special relationship was forged and maintained with them to promote their physical, emotional and social well-being. We accept the respondent's submission that continuity is important in establishing such a special relationship and periods of absence by members of staff can affect the maintenance of that relationship. We also accept the submission of the respondent, and find, that absence of staff puts additional pressure on colleagues who either have to cover for an absent member of staff or work with agency staff. We also accept that using agency staff to cover for absent staff adds to the cost of maintaining the home.

28. The respondent has a Managing Sickness Absence Policy. It deals with short-term sickness absence and long term sickness absence differently. There is, also, a how-to guide for managing sickness absence. The policy and the Guide are designed to work together. The Guide requires the employee's manager to consider whether the employee has reached or exceeded a trigger point and if so to take steps. The trigger point for short-term absence is 6 working shifts over 2 or more occasions in the previous 12 month period. The first step is an informal Stage, followed by a formal Stage if matters do not improve. At Stage 1 of the formal process the Guide provides for an employee to be given a 12 month review period following a Stage 1 meeting and a 12 to 24 month review period following a Stage 2 meeting. The policy refers to the review period but also to a written warning being given at Stage 1 and Stage 2. In essence it requires that a warning is given that the employee must not exceed a certain level of absence within a period of 12 months or more. At Stage 3 an employee can be dismissed on the grounds of medical capability.

29. On 21 June 2017 Mrs Tohou's manager, Ms Cherian, wrote to her stating that she had had 10 shifts of sickness absence in 5 episodes during the last 12 months. A meeting had taken place under the respondent's formal process and Mrs Tohou was issued with a Stage 1 formal warning. The warning was only to remain in force until 1 September 2017 and Mrs Tohou was required to take no more than one shift's sickness absence in that 3 month period. Mrs Tohou was told that if she failed to achieve that target consideration would be given to moving to a Stage 2 meeting. Mrs Tohou was given the right to appeal against that decision but did not do so.

30. We have been provided with a document entitled SAP Sickness Information which shows absence for the "last 36 months" printed on 26 September 2019. That document records absences which, it is not disputed, were inputted by Mrs Tohou when she returned to work after her absence. It shows absence of one shift between 16th and 17 December 2016 and 5 shifts between 21st May and 27th May 2017. It does not, therefore, quite match the content of the letter of 21st June 17. That may be because the SAP document does not cover the period before 26 September 2016 (since it only shows the 36 months absence

prior to the date it was printed) but in any event Mrs Tohou did not challenge what was set out in the letter of 21 June 2016 either at the time or before us. Even on the SAP document the trigger of 6 working shifts over 2 occasions had been met.

31. The respondent submits that it was a matter of kindness by Ms Cherian that the claimant was only given a 3 month review period at that stage rather than a 12 month one. In essence if Mrs Tohou was able to manage 3 months without more than one further absence she would have complied with the Stage 1 warning. Ms Cherian did not give evidence as to why she selected a 3 month period rather than a longer one and we place little reliance on that fact.

32. A further meeting took place on 8 September 2017 between Mrs Tohou and a manager (this time Ms Jacobs) because Mrs Tohou had been absent from 24 August 2017 to 6 September 2017 being a period of 7 shifts. The reason for absence was chest pain and stress. The review form showed that over the previous 12 months Mrs Tohou had 22 days absence and the review form set out how that was calculated. We accept that it is accurate. It appears that no action was taken until a further review took place with Cicy Zachiarias, deputy manager, on 29 November 2017. Instead of requiring Mrs Tohou to progress to Stage 2, Mrs Tohou was given a further warning and told her that she must have no more absence than 6 shifts on 3 occasions for the next year.

33. It was put to Mrs Tohou in cross-examination that Ms Cherian could have progressed to a Stage 2 meeting at that stage. Mrs Tohou did not deny that but said that she thought Ms Cherian was happy with the way things were happening.

34. According to the SAP report, Mrs Tohou was then absent from work between 27 January 2018 and 6 April 2018 due to an allergic reaction – a total of 48 shifts. No action was taken against Mrs Tohou when she returned to work.

35. Mrs Tohou was then absent from work between 29 May 2018 and 4 June 2018 and the reason given on the SAP report is Chest/Bronchitis. At that stage the respondent implemented a Wellness Action Plan to assist Mrs Tohou as is apparent from page B14 of the bundle. In her evidence Mrs Tohou accepted that that was an attempt to support her in remaining at work.

36. Mrs Tohou was then absent from work between 15 June 2018 and 19 June 2018, being a period of 3 shifts. On Mrs Tohou's return she had a meeting with Cicy Zachiarias who discussed with Mrs Tohou referring her to occupational health and also asking HR to assist with a Stage 2 process.

37. On 10 July 2018 a second Stage 1 meeting was carried out with Ms Cherian; thus it cannot be said that the respondent was rushing Mrs Tohou through the different Stages of the sickness absence policy. Mrs Tohou was provided with another Stage 1 formal warning to remain in force until 10 July 2019 with a target of no more than 6 shift's sickness absence over 2 episodes within the next 12 months. Mrs Tohou was given the right to appeal. She did not do so.

38. The referral to occupational health took place and a report was provided on 1 November 2018. In the meantime a risk assessment had been carried out on 13 September 2018 by Mrs Tohou's grandparent manager, Ms Brodison, which recorded that Mrs Tohou was not to push manual hoists, she could decide for herself whether she was well enough to push meal trolleys and for her to use the bell system to call staff to provide assistance when she needs it.

39. Mrs Tohou was then absent between 29 November 2018 and 9 December 2018, missing 4 shifts due to Chest/Bronchitis and between 28 December 2018 and 14 January 2019, missing 7 shifts due to "ENT including cold and flu". In her evidence Mrs Tohou agreed that that level of sickness was unacceptable.

40. A Stage 2 meeting then took place on 1 February 2019 between Mrs Tohou and Ms Cherian. The minutes of that meeting record that Mrs Tohou had said that she was happy with the hours she was working but that Ms Cherian had suggested that if health issues were ongoing the claimant could consider going part-time or doing half shifts instead of a full shift. Those minutes are confirmed in the letter sent following the meeting on 8 February 2019 which recorded that there had been discussion about the rota and Mrs Tohou was to consider changing to half shifts. Mrs Tohou was provided with a Stage 2 warning for unacceptable attendance which set a target of no more than 6 shifts or 2 occasions of absence in the next 12 months.

41. Mrs Tohou was then absent between 5 May 2019 and 8 May 2019 (1 shift) and between 20 May 2019 and the 12 June 2019 when she was absent for 9 shifts. In addition, not recorded on the ASAP form, Mrs Tohou agreed that she was off work on 15th July for one shift due to her daughter's illness.

42. Mrs Tohou was then absent from 26 August 2019 to 12 September 2019 (7 shifts).

43. Mrs Tohou met with Ms Cherian on 12 September 2019. The minutes of that meeting record the following "discussed about rota, the number of hours working? Casual shift – said would get back after having a thought about it." In that meeting Mrs Tohou told Ms Cherian that she was very depressed as her daughter was unwell and the GP came to her home to see her daughter about mental health.

44. Ms Cherian then wrote a report relating to Mrs Tohou's absence for the purposes of progressing matters to a Stage 3 meeting. The report is a largely factual report setting out Mrs Tohou's role, her disabilities and her absence. The report records that Mrs Tohou has stated that her recent absence was a result of her daughter's health which had caused her stress and also set out certain operational considerations. It stated that the amount of absence was having a significant impact on service provision and a significant effect on the continuity of services to residents. The conclusion of the report was that it was recommended that a Stage 3 formal meeting should be held to consider dismissal on the grounds of medical capability.

45. A Stage 3 meeting was held on 2 December 2019. Mrs Tohou was represented at the meeting and the meeting, according to the minutes, took over 2 hours. It

is apparent that Mrs Tohou's representative and Mrs Tohou were able to raise any matters they wished to.

46. The decision maker was Gill Nother who has now left the respondent's employment and from whom we did not hear. She sent a reasonably detailed letter confirming her decision on 4 December 2019 which was that Mrs Tohou should be dismissed on the grounds of medical capability. The letter stated "You were on a final written warning following a Stage 2 meeting that took place on 1 February 2019, at which point you were set a target of no more than 6 shifts or 2 occasions of sickness absence in a 12 month period. Since then, you have been absent for a total of 4 occasions totalling 20 days".

47. Mrs Tohou has not made any allegation that Gill Nother was motivated by the fact that she or her daughter were disabled rather than because of the level of her absence and we have been referred to no evidence that would support such an allegation. There is no evidence to suggest that the reason for dismissal given in the letter of 4 December 2019 was not the real reason.

48. Because of the allegations made in this claim we set out additional relevant findings of fact.

49. We find that for a considerable period Mrs Tohou had been unhappy with her management by Ms Cherian. She had complained about Ms Cherian to Ms Brodison. Ms Brodison told us that because Mrs Tohou had complained about Ms Cherian, she ensured that supervision and support was provided to Mrs Tohou by Cicy Zachiarias and, on a day-to-day, basis Mrs Tohou would be supported by assistant practitioners. She does not appear to have attempted to make any decision as to whether the complaints were fair or not but, we accept, simply took a pragmatic route to deal with the complaints raised by the claimant.

50. There is no objective evidence before us that Ms Cherian was bullying or harassing Mrs Tohou. Mrs Tohou says that Ms Cherian was following her around, looking for mistakes. Ms Cherian denies that, however she does accept that spot checks would be carried out for the maintenance of standards. Mrs Tohou said that Ms Cherian would pick her up for not wearing dark shoes but would allow other staff not to do so. Ms Cherian denied that and said that she would mention to anybody who was not wearing their uniform properly that they should do so. Mrs Tohou said that Ms Cherian would deduct her salary if she came in late but has provided no evidence that that had happened and Ms Cherian denied that she had the power to do that.

51. At no point during the sickness absence process has Mrs Tohou suggested that her absences have been wrongly recorded or regarded by Ms Cherian or that her absence was connected to bullying by Ms Cherian. Mrs Tohou did not suggest that the report which had been prepared by Ms Cherian for the purposes of the Stage 3 hearing was inaccurate or manipulated in order to cause her dismissal.

52. On the evidence before us it appears that Ms Cherian was not pushing for Mrs Tohou's dismissal during the period from 2017 until she wrote the Stage 3

report. If Ms Cherian was seeking to achieve the dismissal of Mrs Tohou she could have pushed much harder at the early stages of the proceedings.

53. Mrs Tohou also says that she had asked Ms Cherian for changes to her working pattern to enable her to care for her daughter, including that she should start working at 9 AM instead of 7:30 AM. Ms Cherian denies that. We note that Mrs Tohou was given the opportunity to consider half shifts in February 2019 but did not pursue it. There is no written evidence of Mrs Tohou seeking to vary her hours in the way she suggests and we are not satisfied, on the balance of probabilities that she did so.

54. Mrs Tohou says that says in the week before 20 November 2019 she met with Ms Cherian and asked for long weekend shifts only, to enable her to care for her daughter. Ms Cherian, in her evidence, denies that she knew about Mrs Tohou's daughter's illness until the 12 September 2019 meeting. She denies refusing to change Mrs Tohou's working patterns or allow her to go part-time and asserts that she repeatedly asked Mrs Tohou to consider those avenues and Mrs Tohou said she would think about it but did not come back to her.

55. Ms Cherian's evidence is consistent with the contemporaneous minutes of the meetings we have set out above. However, Mrs Tohou's evidence is not entirely consistent with the minutes of the Stage 3 meeting.

56. In that meeting Mrs Tohou said that she did not want casual work but went to the deputy manager (Ms Cherian) and proposed to her that she could do shorter hours but Ms Cherian refused. She was asked whether that was after the Stage 2 meeting and Mrs Tohou said that it was after a week when "they came to the home to listen to everybody". Ms Nother then said "I just need to refer to it, to see the agreed outcomes and action plan at point 5. You would consider taking half shifts and need some time to decide. The date of this discussion was 1/2/2019 you set a target."

57. Mrs Tohou replied "no I asked Melanie last month." Shortly afterwards Mrs Tohou said "the day I am talking about, I went to Melanie, JC [Ms Cherian] told me she wanted to see me. My deputy said you want casual. I said listen to me Melanie, I don't want to do casual hours. I said Melanie I applied for permanent job I have to be careful, what happens tomorrow, and you don't have shifts. If you want, I don't want casual can we reduce my hours….".

58. In those minutes Mrs Tohou is not shown as making any reference to a discussion with Ms Cherian in the week before 20 November 2019.

59. Thus on balance we prefer the evidence of Ms Cherian in this respect.

60. It is accepted by the respondent that Mrs Tohou asked Ms Brodison about the possibility of changing her hours to start at 9 a.m. instead of 7:30 a.m. because of her daughter's need to take medication but Ms Brodison's evidence is that conversation took place in 2018. The request was declined because the respondent needed staff for the whole shift to meet the resident's needs, particularly at mealtimes. Ms Brodison says that she offered Mrs Tohou the opportunity to do half late shifts instead that Mrs Tohou declined.

61. Ms Brodison also accepts that there was a discussion with Mrs Tohou shortly before the Stage 3 meeting about reducing Mrs Tohou's hours or working on a casual basis but at that time, because the Stage 3 meeting was fixed, she said to Mrs Tohou that she needed to go through the Stage 3 process and the panel would decide on the outcome. Ms Brodison denies there was any discussion about Mrs Tohou's daughter at that time.

62. Again there is little contemporaneous evidence to assist us in deciding whose version of events we prefer. The respondent places weight on the fact that in the Stage 3 meeting Mrs Tohou's representative stated "fortunately, the situation regarding her daughter's mental health has improved hugely and she is attending school. In light of medication and in light of this AT's [Mrs Tohou's] health is positively moving forward and improving. Her last spell of illness is the flu, I myself have had this, it goes around."

63. The respondent submits that it is unlikely that Mrs Tohou would have been requesting a change in her hours, because of her daughter's health, when she met Ms Brodison shortly before the Stage 3 meeting, when at that time her daughter's health had improved "hugely". That is a submission that we treat with some caution given that the fact that Mrs Tohou's daughter's health had improved does not mean that she did not need to take medication. However, it is noteworthy that, in the meeting, neither the claimant not her representative made reference to needing a variation in hours because of her daughter or referred to that being a cause of absence. If those things were not mentioned in the meeting, that is evidence which suggests that they may not have been mentioned shortly before when Mrs Tohou met Ms Brodison. On the balance of probabilities we prefer the evidence of Ms Brodison.

64. In any event, there is no evidence from which we would conclude that Ms Brodison refused the request to vary hours because of Mrs Tohou's daughter's disability.

65. In the course of evidence Mrs Tohou made reference to 3 people who she says were treated more favourably than her. One of them, named Julie, had an ill mother. Mrs Tohou said that she stayed home with her mother for 6 months and then was allowed to continue working. She also referred to another man whose wife was off and who had a huge absence but was allowed to come back. Finally she referred to a lady who was off sick for pregnancy-related reasons for one year, came back to work and was then allowed time off again because she was pregnant. The respondent says, and we accept, that the first two situations would have been dealt with as situations of long-term absence and were therefore different to Mrs Tohou's. If somebody has one period of long-term absence but then is able to return to work without further absence that person may well not be dismissed. They are in a different position to somebody has a lot of short-term absences. We do not consider that people who have long-term absence are appropriate persons to whom we can compare Mrs Tohou.

66. It is, also, inappropriate to compare Mrs Tohou with somebody she was pregnant. A person who is pregnant is not be treated as if she were sick. The

law gives particular protections for people who are pregnant which do not apply to people who are sick.

Conclusions

67. We give our conclusions by reference to the list of issues, using the same numbering as appears above.

68. In respect of issue 3.1, it is not in dispute that Mrs Tohou was dismissed.

69. In respect of issue 3.2 we accept that dismissal is unfavourable treatment.

70. We must consider whether Mrs Tohou was treated less favourably than somebody else would have been who was in the same circumstances of Mrs Tohou but who was not disabled.

71. We find that the respondent's focus, through a number of different managers, over a significant period of time was on Mrs Tohou's absence. The reason for the dismissal was Mrs Tohou's absence. There is no evidence that any of the respondent's managers acted in anything other than good faith. Mrs Tohou has not proved any facts from which we could find that a person who was not disabled but had the same absence record as Mrs Tohou did would have been treated any differently to Mrs Tohou.

72. Having heard the respondent's evidence we are satisfied that the reason for Mrs Tohou's dismissal was the level of absence she had sustained. On the balance of probabilities it was Mrs Tohou's absence that motivated Ms Nother to dismiss her, as set out in the letter of dismissal. Had Mrs Tohou been disabled but been able to attend work to an acceptable level we are satisfied that she would not have been dismissed. Likewise we are satisfied that anybody else in Mrs Tohou's position would have been dismissed, whether they were disabled or not.

73. In respect of issue 4.1, we accept that Mrs Tohou requested a change in working hours from Ms Brodison in the lead up to the Stage 3 meeting, however she did not say that the reason for requesting the change was her daughter's ill health. We do not accept that Mrs Tohou requested a change in her hours from Ms Cherian at that time (or at all).

74. Mrs Tohou's request to Ms Brodison in 2019 to change hours did not, on the balance of probabilities, refer her daughter. It was, however, made at a time when she was facing a Stage 3 process. It would have been reasonable, at that Stage, for Ms Brodison to deny any request to change hours until the Stage 3 process had been completed. We accept her evidence that that is what motivated her. Mrs Tohou has not proved any facts from which we could conclude that Ms Brodison declined her request at that Stage because of her daughter's disability. We find that anybody in the position of Mrs Tohou, whether they had a disabled daughter or not, would not have been allowed to change their hours.

75. Further, and for the sake of completeness, we accept Ms Brodison's evidence as to the reason why she did not allow a change of hours in 2018, namely that it was necessary for staff to be present for the whole shift, especially around mealtimes. Again there is no evidence that, at that stage, she was motivated by the fact that Mrs Tohou's daughter was disabled. Whilst Mrs Tohou's daughter's disability is part of the relevant factual background and was the reason why Mrs Tohou made the request to change her hours, that alone does not mean that the reason for the refusal was her daughter's disability.

76. In those circumstances we conclude that

    a. The claimant was not dismissed because of her disability
    b. The claimant's request to change her hours was not refused because of her daughter's disability.

77. Therefore, the claims must be dismissed.

Employment Judge Dawson

Date: 28 November 2022

JUDGMENT SENT TO THE PARTIES ON
13th DECEMBER 2022 BY Miss J Hopes

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recoupment

The recoupment provisions do not apply to this judgment.