EMPLOYMENT TRIBUNALS

Claimant: Mrs D Bond

Respondent: Mrs Lesley Burgoyne

Heard at: **Liverpool** **On:** **13 December 2022**

Before: **Employment Judge Aspinall**
Mr D Williamson
Mr R Alldritt

Representation
Claimant: in person supported by her husband
Respondent: Ms Evans-Jarvis, Peninsula

JUDGMENT having been delivered orally to the parties on 15 December 2022 and sent in short form to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013 on 16 December 2022, the following reasons are provided:

REASONS

Background

1. By a claim form dated 18 June 2020 the claimant brought complaints of sex discrimination, a claim for notice pay, holiday pay and outstanding wages. After a first case management hearing before EJ Benson on 19 January 2021 the claimant withdrew her sex discrimination complaint and made an application to amend the claim to bring a complaint of disability discrimination by association under sections 13 and 15 Equality Act 2010. That amendment was allowed and there was then a preliminary hearing on 21 March 2022 at which EJ Ainscough decided that the claimant's daughter was a disabled person for the purposes of Section 6 Equality Act 2010. The section 15 complaint was withdrawn on the basis that associative discrimination does not extend to a section 15 complaint. The respondent submitted an Amended Response.

2. At each of the case management hearings Orders were made for preparation of the case for final hearing. There were many correspondences from the parties to the Tribunal. The claimant sought a witness order for a fellow carer who did not want to appear, AJ, which was granted by EJ Horne. The respondent made an application for the case to be heard by video, in full or in part, which was rejected. The claimant made an application to have some of

the respondent's witness evidence, that of carer SG, struck out. The respondent was finding the litigation extremely stressful and said that she had been taken to hospital in fear that she was having a heart attack. The correspondences were becoming unkind, with the claimant doubting and contradicting representations made about the respondent's health. On 9 December 2022 EJ Aspinall wrote to the parties to tell them to be ready to attend the final hearing and that outstanding matters would be addressed in person at the start of the hearing.

3. The respondent is the mother of a severely disabled 28 year old daughter, Miss AB, who requires 24 hour care, at home, from a team of carers. The claimant applied to be part of that care team and says that she was offered a 35 hours per week permanent contract at £ 12 per hour with a six month probationary period from 21 February 2020 and then had that offer withdrawn because the respondent found out the claimant had a disabled daughter herself.

4. The respondent says the claimant applied and was offered a 4- 5 week period of shifts during which time she would be assessed, as would two other candidates, by the respondent and care team leader Mrs Hunter, following which offers might be made and, if made, would be subject to a six month probationary period. When the claimant was offered only 9 hours per week, she rejected the offer and brought her claims. The respondent says she did not know the claimant had a disabled daughter until the application to amend to include disability discrimination by association.

5. At the outset of this hearing the respondent had not complied with the case management order to have the bundles here in time and the claimant had not complied with an order to provide an updated Schedule of Loss. It was agreed that the hearing would proceed, plans were made for outstanding orders to be complied with urgently and arrangements were made to make adjustment for the respondent and her witnesses to attend around the care needs of the respondent's daughter.

6. The witness the subject of the Witness Order, AJ, did not attend. The witness had written to the Tribunal saying she was unwell. The Tribunal explained to the claimant that the witness must either i) attend or ii) provide medical evidence of her inability to attend or she might face sanctions for breach of the order. A further option was given to the claimant that she might review the relevance of the evidence in the light of the List of Issues and could ask for the Order to be set aside. By the second day the witness had sent medical evidence and the claimant said she did not need the witness. The witness order of EJ Horne was set aside and the witness informed by the Tribunal that she need not attend.

The list of issues

7. A list had been agreed at case management stage as follows:

Wrongful dismissal / Notice pay
1.1 What was the claimant's notice period
1.2 Was the claimant paid for that notice period?

2. Direct disabilitydiscrimination (section 13Equality Act 2010)2.1 The claimant's daughter has dyslexia, autism, Irlems syndrome and anxiety andis a disabled

person for the purposes of section 6 of the Equality Act 2010.

2.2 Did the respondent do the following things:
2.2.1 Offer the claimant a contract of 9 hours per week?
2.2.2 Dismiss the claimant?

2.3 Was that less favourable treatment?The claimant says she was treated worse than the carer, who also has young children but who are not disabled,who was offered the full time contract.

If so, was it because the claimant's daughter is a disabled person?
2.5 Did the respondent's treatment amount to a detriment?
2.6 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant?
What should it recommend?
2.7 What financial losses has the discrimination caused the claimant?
2.8 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?
2.9 If not, for what period of loss should the claimant be compensated?
2.10 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

<u>3. Holiday Pay (regulation 14 Working Time Regulations 1998)</u>
3.1Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended?

<u>4. Unauthorised deductionfrom wages (section 13 Employment Rights Act 1996)</u>
4.1Did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted?

8. The parties' respective positions evolved during the hearing. The claimant's position on what was less favourable treatment was shifting so the Tribunal assisted her as a litigant in person in accordance with guidance in the Equal Treatment Bench Book to put her case. She was arguing that she had been given a full time permanent contract subject to a 6 month probationary period on 21 February 2022 and that the following were acts of less favourable treatment:

    a) Failing to timetable her for 35 hours per week during her employment that the claimant said had been agreed

    b) Failing to offer her the full time days or nights contract that was offered to other candidates, offering her only 9 hours per week,

    c) Ending her employment on 8 April 2022.

9. The respondent was content that those allegations be addressed. The respondent conceded that the claimant was due notice pay in its Amended Response but at Tribunal the respondent's representative said that she was not as she had worked for less than one month. The respondent herself said she was in the hands of her advisers and would pay whatever was due. The Tribunal allowed some latitude and considered everyone's arguments on notice pay at Tribunal.

10. The claimant confirmed that the only deductions complaint was in respect of any outstanding notice pay or holiday pay.

The hearing

Documents

11. The Tribunal saw a bundle of documents of 466 pages together with a supplementary bundle of 38 pages. The documents arrived by 2pm on the first day and the first afternoon was spent reading the witness statements and looking at relevant documents.

Witness evidence

12. The respondent called Mrs Burgoyne who gave oral evidence. The tribunal found Mrs Burgoyne to be a wholly credible and consistent witness. She was careful to be accurate and to check her responses against her detailed witness statement and the documents in the bundle. She had a good recollection of events from February and March and April 2020 not least because it was a frightening time as she sought to manage the care needs of her extremely clinically vulnerable daughter in the face of the emerging COVID pandemic. She was clearly a devoted mother who put the needs of her adult child paramount when making decisions about employing people to care for her. She made the frank admission that she thought that the claimant was due notice pay and was willing to pay it and any holiday pay that might be due but was in the hands of her expert advisors. She remained courteous and sought to engage directly with the claimant to explain her decision making about employing people to care for her daughter, despite the claimant making allegations against her that she found professionally wounding; she is a former special educational needs teacher, and personally insulting as the mother of a disabled adult.

13. The respondent also called Ms Jennifer Hollingsworth who swore to the truth of her statement but was not questioned by the claimant so that her evidence went unchallenged. The respondent also produced a statement from Stacey Groom who did not appear and the respondent produced a statement but decided not to call Mrs Lorraine Hunter. It was agreed that it would be a matter for the Tribunal as to how much weight, if any, to attach to the evidence of Ms Groom and Mrs Hunter. In the event, no weight was attached to the evidence of Ms Hollingsworth because she was attesting only to her direct experience of the respondents and her opinion as to whether or not the respondent might be someone who would discriminate against an employee with a disabled child. Neither her experience nor her opinion were relevant to the matters to be determined on the list of issues. No weight was attached to the evidence of Mrs Hunter because the points on which she might have given evidence had she been called were also covered by the direct oral evidence given by Mrs Burgoyne under cross examination.

14. The claimant gave evidence. The tribunal found her to be a dishonest witness on two key points. The first was that she had constructed in her own mind a scenario in which on 21 February 2020 she was offered a full-time, permanent contract to work 35 hours per week caring for Miss AB, at £12 per hour subject to a 6 month probationary period. The tribunal did not believe her when she said this was what had been agreed because (i) of her own messages to the respondent prior to the interview in which said she could not work full-time shifts

and because (ii) when after the first week of working for the respondent she had been allocated fewer than 35 hours she did not raise the point, the same is true for each of the 6.86 weeks that the claimant worked for the respondent, she never said *we have an agreement in place that I work 35 hours per week, please allocate me my full shifts* and because of (iii) the messages exchanged between the parties in which the claimant asks if she will have a contract going forward. The tribunal finds it was disingenuous of her to seek to argue, after her employment ended and in this claim, that she had believed she had a 35 hour per week full-time permanent contract when her own messages from the relevant time show that that is not what she believed at that time.

15. The second point on which the tribunal found her to be dishonest was in relation to the conversation she alleged took place on 24 February 2020 in which she says she told the respondent that she had a disabled daughter. The tribunal finds Mrs Burgoyne's account of this meeting to be the more reliable account. Mrs Burgoyne was was seeking a candidate with hands-on experience of caring for the severely disabled. Mrs Burgoyne would not have missed that piece of information as it was directly relevant to the assessment she was making of the claimant at that time. The tribunal finds that the claimant has constructed this conversation retrospectively to substantiate her complaint that the reason for the less favourable treatment was because she had a disabled daughter. It is not plausible, on the claimant's version of events, that Mrs Burgoyne discriminated against her because she had a disabled daughter because Mrs Burgoyne went on after 24 February 2020 to offer the claimant more and longer shifts than she had had before that alleged disclosure. The claimant was not a reliable witness on the point of knowledge of disability.

16. There were two further issues that gave the Tribunal cause for concern about the reliability of the claimant's evidence.

17. The third issue was that the claimant produced a statement, on the second day, from a witness she had not previously identified as being relevant to the case, Zara Jones. The respondent objected to its late inclusion but commented that it was of little if any relevance to the issues on the List. Zara Jones had been employed by the respondent a month before the claimant was engaged. The claimant said that Zara Jones had contacted her overnight to offer a statement. The respondent disputed the fact that Zara Jones had only presented herself to the claimant the night before. The Tribunal felt this was improbable and enquired as to the contact between Zara Jones and the claimant. The claimant again stated that Zara Jones had contacted her the previous night. The Tribunal enquired as to how Zara Jones would know the case was underway and that a statement might be helpful. The claimant said that she did not know but that she had not phoned Zara. The Employment Judge asked if the claimant had her phone with her and would be willing to show the incoming call from Zara. The claimant was happy to show the Tribunal her call log. Before looking at the call log the Employment Judge asked were there any other things on the screen that the claimant did not want the Tribunal to see, there were not and she offered up her phone.

18. The call log revealed multiple calls between the claimant and Zara Jones on an at least daily basis over the past week. The claimant had a nick-name for Ms Jones that must have been saved in the claimant's contacts as it appeared alongside the calls. Having gone back one week the Employment Judge did not wish to look further.

19. It was apparent that the claimant could have requested a statement from Zara Jones a week ago and could have shared it with the respondent before the start of the hearing. In those circumstances the Tribunal decided not to allow the late introduction of the evidence of Zara Jones. The tribunal also noted from this exchange that the claimant was someone who had given a partial answer when asked about contact with Zara Jones, so that there had been a risk, had the tribunal not looked at the call log, that she may have misled the tribunal by omission.

20. The fourth cause for concern about the claimant's credibility arose out of the apparent inconsistency between her message to the respondent in which she said she had 9 years experience and her Claim Form in which she said she had been mentally unwell and unable to leave home for 9 years before she got the job. What concerned the tribunal was not that this was apparently inconsistent, the claimant is not a lawyer and may have made a mistake, but that her response was evasive, she sought to obfuscate, she talked about her maternity absences from a previous role and clung to both the assertions, that is that she had been at home for 9 years before getting the job and had worked for 9 years before that. For those two assertions to have been right the claimant would have had to start work (and she was evasive as to the nature of the work she had done, claiming to have cared for severely disabled people but also saying she worked as a cook) at age 14. When faced with that point she said she was confused and that what she had written was right and not inconsistent.

<u>Video evidence</u>

21. The respondent wanted the Tribunal to watch a video of the respondent's severely disabled daughter Miss AB so as to assess for itself the extent of disability. The tribunal was reluctant to do this. Mrs Burgoyne explained that her daughter had consented to the video being shown. The Tribunal's view was that it would be invasive of her privacy to watch a video that it did not need to see because it was not disputed by the claimant that the respondent's daughter was severely disabled, nor was it disputed that Mrs Burgoyne, having cared for her daughter single-handedly for 16 years and thereafter having been part of a care team, was best placed to know and manage the care needs of her daughter.

The Facts

22. Mrs Burgoyne has a 28 year old daughter living at home with significant care needs. She engages staff from time to time to work, with others to care for her daughter. She has Mrs Hunter, who is the care team leader, to support her in caring for her daughter and helping her to recruit, assess and manage the care team. On 5 February 2020 Mrs Burgoyne advertised for carers to contact her. The advertisement was silent as to any contract terms that might be offered.

23. Mrs Burgoyne received three responses to her advertisement and arranged to meet each of the candidates. There were messages exchanged between Mrs Burgoyne and the claimant. The Claimant said

I have 9 years experience within the care sector

I have worked in residential homes, and also day care centres

I have supported people with mental health issues, dementia, Alzheimer's learning difficulties and also special needs. I also have a disabled brother who has many special needs

my husband runs his own business and I have no childcare as my mum is disabled and she is our only family.

I am only available 9.30 – 2.30 as I have school runs and 5.30 -11.30 at night.

I understand most employers like a full 12 hour shift which is something I cannot offer

24. In fact, the claimant had not worked outside of her home since 2013. The work she had done in a residential home was as a cook. She had worked from age 17 until she gave up work after her second child to be a full time mum. The maximum number of years work experience she could have gained (including maternity absence times) was 7 years. She had lied in her application message explicitly in relation to the years and nature of experience she claimed and implicitly in suggesting that she had a level of experience in working with the disabled that she did not have.

25. Over the years Mrs Burgoyne has learnt that what a person says at interview is not always a good indicator of their skill level. The best way to find out who will be a good carer for her daughter is for her or Mrs Hunter to work alongside the candidate to assess the candidate on a range of shifts. In order to give a good indication of ability the candidate would need to be assessed at different times of day and night and over a period of not less than a month. This would give exposure to the changing range of needs and behaviours of Miss AB at different times of the month.

26. Mrs Burgoyne needed a full time night carer and a full time day carer but might have been willing to consider part time carers during the day for the right candidates. She invited the claimant to interview. An interview took place between Ms Burgoyne and the claimant on 17 February 2020. The claimant told Mrs Burgoyne that she was looking for full time work. Mrs Burgoyne said she would look at offering the claimant some shifts over the coming weeks. They would be at times to be agreed. She would be paid £ 12 per hour for her shifts. If the claimant were then to be offered a contract it would have a six month probationary period and be at an agreed hourly rate of £ 12.00

27. Other candidates SG and JW also applied for the post and were given a range of shifts some of which were assessed shifts. SG had a number of years experience of one to one care for a severely disabled young man with the same conditions and impairments as Miss AB. She was experienced in working with a client with cerebral palsy, epilepsy, life threatening seizures, scoliosis and autism. She had worked one to one at night. JW was the mother of two disabled, now adult sons. One of her sons had a partner with learning disabilities and together they had two disabled children so that JW was an experienced carer for her disabled sons and a "first responder", set up in agreement with social servcies, caring for her disabled grandchildren.

28. The claimant was offered and worked the following shifts.

Friday 21 February 2020: 4.75 hours
Saturday 22 February 2020: 3.5 hours
Sunday 23 February 2020: 3.5 hours

29. On Monday 24th February 2020 the claimant worked 4 hours 40 minutes during the day and returned for an evening shift of 3.5 hours. During the evening she was working with Miss AB and Mrs Burgoyne was also present. They were in the family kitchen and were chatting. The claimant did not tell Mrs Burgoyne that she had a disabled daughter.

30. On 22 February 2020 a carer on the team left so that more hours became available to be filled than would ordinarily be offered to candidates on trial shifts. On 26th February 2020 the claimant messaged Mrs Burgoyne saying

    I'm happy to take all available shifts if you and Lorraine are happy for me to do that. Can I ask if I get a contract after my probation what are my hours likely to be and what days ?

    Mrs Burgoyne replied,

    I am not sure yet let's see how you feel about doing the different shifts and which suit you best.

    This meant both suit the claimant best from her perspective of working pattern and importantly meant *to which you are best suited* that is to say that Mrs Burgoyne wanted to see the claimant's ability to cope with Miss AB's differing needs at different times across the period of at least a month.

31. The claimant worked

    Friday 28 February 2020: 3.75 hours
    Saturday 29 February 2020 9.25 hours

32. On 1 March the claimant messaged to say that she had been at hospital with her daughter Miss LB and that her older daughter Miss EB was also unwell as were she and her husband. Between Sunday 1 March and Tuesday 10 March the claimant was unable to work any shifts, Mrs Burgoyne replied

    Don't worry at all. I have covered your day shift today…if you are able please work Thursday 9.15 – 6pm…let me know on Wednesday morning if this looks possible

    It wasn't, the claimant was not available to work as her daughter was still unwell.

    Further messages in which the claimant explained why she wasn't available resulted in Mrs Burgoyne replying

    Don't worry….it is really important that I keep {MissAB} well. So don't start work again until you are all completely well.

33. On 3rd March, in addition to the shortfall because a carer had left, Mrs Burgoyne had hours to fill going forward because another carer broke her ankle. Mrs

Burgoyne offered shifts to the candidates to try to cover the gaps.

34. On Wednesday 11 March 2020 the claimant worked 3 hours. On 11 March 2020 the claimant went to meet Mrs Burgoyne who explained that the claimant had bonded well with Miss AB and that it would be good to build on that so she consulted the claimant about the possibility of offering the claimant three, three hour shifts per week in the evenings. Mrs Burgoyne suggested that this could be "nice" time in which the claimant did things like nail care for Miss AB and Mrs Burgoyne even offered the possibility of training in holistic therapies to support Miss AB.

35. On 12 March the claimant messaged to ask

Will this be a permanent routine with guaranteed weekly hours and a contract ? At the minute I will address that I am slightly concerned that I have no contract in place or the same hours that I will be expected to work each week. Am I on a zero hour contract or classed as a casual worker ? As discussed I am looking for as many hours as possible and would like security in my job, is this something that can be offered to me as I know you have new starters and I get the impression I may not have full time hours or the same hours weekly if the new starters are more capable of the work. Will I be expected to just cover for people who are off sick ? If you could please message me back and explain in detail that would be wonderful so I know where I stand. I hope you don't take this the wrong way but I need to know what's going on. Thank you.

Mrs Burgoyne replied

I have 3 x staff on trial shifts assessing where they will be best placed in terms of hours and how long before they have the manual handling skills to be safe and competent. Lorraine and I are in the process of deciding who is best placed where and {Miss AB} will also be asked who she would like where. Next week I will be making job offers and providing 6 month probationary contracts which if completed successfully will lead to permanent contracts. I understand your concerns but the reason for trial shifts is so we make the right appointments for {Miss AB}. So next week I will be making job offers to the team members that are on trial shifts….clearly {Miss AB} likes being with you so you will be offered a job next week but 2 x other staff are also on trial – that will dictate the shifts offered as 1 is a very experienced night worker having hoisted alone for 4 years. If {Miss AB} likes her she will get a night job. Lorraine and I will sort it by next week, hope this reassures you.

36. The claimant replied in a long message, the crux of which was to ask,

so to clarify next week I will have guaranteed weekly hours ?

37. By this point Mrs Burgoyne had decided that the night shifts were going to be offered to SG and the day shifts to JW both of whom were better qualified than the claimant.

38. The claimant also worked:

Thursday 12 March 2020, 2.5 hours
Friday 13 March 2020: 3 hours
Saturday 14 March 2020: 3 hours
Sunday 15 March 2020: 1 hour, then 3.75 hours
Tuesday 17 March 2020: 9.5 hours, then 2 hours

Wednesday 18 March 2020: 9.5 hours.

39. The claimant worked 16 March and asked could she have the evening shift off for rest. She worked two shifts on 17th March 2020. The claimant worked on the 18th March 2020 and asked could she have a contract as she hadn't signed anything yet. Mrs Burgoyne replied to make a final check about shift patterns if the claimant would prefer more evening shifts 8pm – 11pm or day shifts 8.30 am – 6pm. Mrs Burgoyne alluded to the difficulties with schools closing and the looming COVID pandemic.

    The claimant replied that she would not agree to do any more shifts until she had a contract. She said

    At the minute I do not have a secure job and regular hours which is something I need and I hope you can understand this.

    Mrs Burgoyne replied

    I will have a contract ready for 10am Friday morning for you to read and sign. The contract will give specific days and hours for you to work each week … you would be expected to work alongside any member of the staff team including myself…

40. On March 18th the claimant messaged Mrs Burgoyne to say

    I don't feel comfortable working alongside you when Miss AB will take it out on me that I am taking her mummy time off her. Today was the first negative experience for her and me and I thing coming tomorrow would just add fuel to the fire….I hope you understand…I will be back on Friday to do a shift alongside Lorraine.

    Mrs Burgoyne replied to see that the pattern had changed and the 19th would now be working with another carer, Andrea and the 20th would be with Mrs Burgoyne. The claimant then changed her reason for not wanting to work on 19th saying that the other carer had COVID symptoms and that she did not want to come into contact with someone with COVID symptoms because of her asthmatic daughter Miss EB. The claimant did not work on 19th for the respondent.

41. She was due to work on 20th March 2020 but the claimant declined to work alongside Mrs Burgoyne on shift. The claimant chased up her contract and Mrs Burgoyne replied

    I am on a 36 hour solid shift with {Miss AB} and trying to run a shop too so absolutely exhausted. No time for contracts and employment stuff today. Sorry. 4 x staff off sick now.

42. By this time Mrs Burgoyne and Mrs Hunter had assessed the candidates and had met to make their decision. SG was the best candidate for night time having worked with a similarly, severely disabled young adult one to one before. JW was offered the day shifts and was also a very experienced carer for disabled adults and children. The claimant was not the best candidate from either a skills or an hours match perspective but Mrs Burgoyne wanted to have some additional flexibility and thought that the claimant was pleasant and might

be someone who could be trained up. The claimant could be engaged to do the "nice" things for Miss AB, during the evening shift, nail care and holistic therapies, rather than the lifting, handling, washing, feeding, medication duties that she was not qualified nor experienced in.

43. On 22 March Mrs Burgoyne offered the claimant three, three hours evening shifts per week. She did this by message saying

    I am offering a contract for 9 hours per week. This 3 hours per evening 8 till 11pm on a Tuesday, Friday, Saturday evening. Due to your family commitments I am unable to offer any day hours given the very serious but uncertain future ahead of us all. The contract is a 6 month probationary contract.

44. The claimant replied, in direct contradiction of what she had said in her application message saying

    I am very flexible, I have childcare……I was on the understanding you could offer me 2 Saturdays a month, as well as evenings and discussion of 9.30 – 2.30 was also mentioned….I have said on many occasions I need full time hours. I know Jackie has quit so there is only me and Stacey on trial so I don't understand why I have not been offered more hours as I know there is more hours available. It wouldn't be financially worth my time to do 9 hours a week. I like my job …..but not for 9 hours a week sorry, thank you.

45. Mrs Burgoyne then had holiday time with Miss AB. On 5 April the claimant messaged her wanting to know if she would be paid for the 37 hours she had worked and why she had been ignored. She said

    As it stands I take it I have no job anymore ….can I have an explanation

    Mrs Burgoyne replied saying the claimant would be paid for work she had done and that all staff had been laid off to protect Miss AB during the pandemic.

46. Mrs Burgoyne said on 8 April 2020

    I have asked payroll to process your pay today that relates to your trial shifts. I have withdrawn the offer of employment to you at this time and will arrange for payroll to process your P45 asap.

    The claimant then sent long messages demanding explanations for withdrawal of the offer. She argued that she had agreed to do only a one day trial shift. She said that the reason the offer of the 9 hours had been withdrawn was because she had asked for more hours. She said she wanted the reason for the decision to dismiss her in writing and that she would seek legal advice for being unfairly dismissed. She did not mention her daughter's disability, disability discrimination, sex discrimination, child care or family commitments or any other discriminatory reason. She was clear that she believed the reason she had not been given full time hours was because she had asked for more hours.

47. Mrs Burgoyne explained that she was now caring for Miss AB 7 nights a week and 3 days a week, with just two other carers who had agreed to isolate to keep everyone safe and asked the claimant not to contact her again.

48. The claimant wrote to Mrs Burgoyne on 16 May 2020 chasing up her outstanding wages. She said

I will be pursuing this with no further warning to yourself and would request that you do not contact me about this matter. All correspondence ..has been gathered….to be used as evidence against you if needed

49. The claimant was paid on one payslip £471 and on a second payslip £ 444. She was also paid 4.74 hours of accrued annual leave entitlement. She was sent a P45.

50. The claimant provided the requisite information to start early conciliation to ACAS on 19 May 2020. She commenced proceedings on 18 June 2020. In her Claim Form she said that she had been at home unable to work for 9 years, afraid to leave the house, prior to her role with Mrs Burgoyne due to her mental health. She did not mention disability discrimination. She claimed sex discrimination alleging that she had not been offered shifts due to her family commitments. Her Claim Form said

    She has penalized me for having children and less favourable for other members of staff that might not have young children.

51. At some point after the Claim Form was lodged, but before she was aware of it, Mrs Burgoyne was photographed playing in her garden with the young children of another carer who was on site caring for Miss AB. That carer posted the photographs on Facebook. Mrs Burgoyne subsequently came to believe that the claimant saw those photographs and realized that this could be used as evidence that Mrs Burgoyne supported carers with young children and so the claimant might struggle in a claim for discrimination based on being a parent or discrimination because she had children. The claimant subsequently amended her claim to withdraw sex discrimination and include disability discrimination by association.

Relevant Law

The notice pay claim

52. Section 86 Employment Rights Act 1996 provides that

    (1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more—

        (a) is not less than one week's notice if his period of continuous employment is less than two years,

        (b) is not less than one week's notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years, and

        (c) is not less than twelve weeks' notice if his period of continuous employment is twelve years or more.

(2) The notice required to be given by an employee who has been continuously employed for one month or more to terminate his contract of employment is not less than one week.

The holiday pay claim

53. The Working Time Regulations 1998 set out the entitlements to annual leave. Regulation 13 provides that a worker is entitled to four weeks annual leave in each year and stipulates that it may not be replaced by a payment in lieu except where the worker's employment is terminated. Regulation 13A expands on this entitlement providing for additional annual leave of 0.8 weeks provided that the aggregate entitlement provided for in Regulation 13 and 13A is subject to a maximum of 28 days. The Regulation 13A leave may also be converted to a payment in lieu on termination of employment.

The direct discrimination complaint

54. Section 13 Equality Act 2010 provides

(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.

55. Harvey on Employment Law comments that the prohibited ground or reason for the conduct complained of will usually relate to the personal circumstances of the complainant. However, Section 13 does not require that that should be so: the less favourable treatment simply has to be *because of* a protected characteristic, it does not actually have to be a protected characteristic of that complainant. Read in this way, section 13 ensures compliance with the requirements of EU law, as the ECJ made clear in the earlier (disability) case of *Coleman v Attridge Law* C-303/06 [2008] IRLR 722, [2008] ICR 1128, in which it was held that 'associative discrimination' on the grounds of disability was unlawful.

Applying the law to the facts

The holiday pay claim

56. The Tribunal finds that the claimant was continuously employed from 21 February 2020 to 8 April 2020. For the purposes of the Working Time Regulations 1998 she was a worker entitled to annual leave. No express agreement as to annual leave entitlement was made between the claimant and Mrs Burgoyne at their 17 February meeting nor in their exchanged messages. In the absence of express agreement, applying the Working Time Regulations, regulation 13 and 13A, provides for 28 days annual leave per year for a full time worker. That would give a weekly accrual rate of entitlement to holiday pay at 0.54 days per week for a full time worker. The claimant, worked an average (calculated by dividing the total hours worked 70.16 by the number of weeks worked 6.86) of 10.23 hours per week worked during her short employment. Assuming a full time working week of 35 hours, the Tribunal calculated 10.23 hours as a percentage of 35 hours so as to pro rata the accrual rate. 0.16 is the pro rata accrual rate of annual leave per week for the claimant.

57. The claimant was continuously employed for 6.86 weeks so she accrued 6.86 x 0.16 giving 1.09 days annual leave. She did not take any leave and was

therefore entitled on termination of this short employment to be paid in lieu of those days.

58. Her daily rate of pay was calculated by dividing total pay received by number of days worked. She worked total hours 70.16 x agreed hourly rate of £ 12 being £ 841.92 divided by 13 days giving £ 64.76 as a daily rate. Although on most of the days the claimant worked she did not work enough hours to achieve payment of £ 64.76, over the period this is an averaged notional rate for the purposes of this calculation. 1.09 days due at £64.76 per day gives an entitlement on termination of employment of £ 70.58. The respondent is entitled to off-set payments made. The claimant was paid for 4.74 hours at £12 per hour being £ 56.88. At oral judgment the Tribunal said that if this matter goes to a remedy hearing the provisional view of the Tribunal is that the claimant will be due £ 13.71.

59. Mrs Burgoyne has said throughout this litigation that she was in the hands of her advisers as to the correct calculation. There is no criticism of her for the shortfall now due and no criticism of those advisers in this calculation. This is a notoriously tricky area of employment law with a Supreme Court decision awaited on the proper basis of calculation of annual leave. The Tribunal has set out the basis of calculation here in the liability judgment so that it may be challenged if the parties think it appropriate, at the final hearing the respondent accepted the basis of calculation and agreed to make payment so that there is no need for a remedy hearing.

<u>The notice pay claim</u>

60. The Tribunal finds that the agreement made between the claimant and the respondent amounted to a verbal contract of employment that the claimant would be employed to work such shifts as the parties agreed between themselves at an agreed rate of £12 per hour. The claimant accepted the offer of employment on 21 February 2020 when she agreed to work a shift. The contract was silent as to entitlement to notice so that the statutory protection in section 86 Employment Rights Act became an implied term of the contract.

61. The offer was made and accepted on 21 February 2020. Section 86 refers, not as the respondent suggests to a calculation of duration of employment based on the elapsed time from the date of the first shift worked which in this case was 21 February 2020 to end of last shift date, which was 18 March 2020, as the respondent calculated, but to the period during which the claimant was "continuously employed". The Tribunal finds that the employment began when the contract was entered into on 21 February 2020 and ran until termination of the employment when the claimant read Mrs Burgoyne's email telling her she would be sending a P45 on 8 April 2020.

62. The claimant was continuously employed from Friday 21 February 2020 to Wednesday 8 April 2020. For the purposes of Section 86 that is more than a month so that the claimant is entitled to a week's notice pay. The claimant worked different shifts each week. The average number of hours worked was 10.23 hours per week. The agreed rate of pay was £ 12 per hour. The claimant was due one week's notice pay being £ 122.76.

63. The total payment due to the claimant for her outstanding annual leave entitlement shortfall and notice pay, if this matter goes to a remedy hearing is likely to be £122.76 plus £13.71 being £ 136.47 less £ 73.08 which the parties

had agreed had been overpaid in error, being £ 63.39 due to the claimant.

The discrimination complaint

Turning now to the discrimination complaint.

Protected characteristic

64. The claimant relies on the protected characteristic of her daughter Miss EB's disability. As set out in the law section above she is entitled to claim disability discrimination by association, it does not have to be her own disability that she relies on.

Knowledge

65. In order to be discriminated against because of your daughter's disability, the respondent discriminator would have to know that your daughter was disabled. This was a major stumbling block in this case for the claimant. The Tribunal prefers the oral evidence of Mrs Burgoyne as to her state of knowledge. The claimant had said at case management hearing before EJ Ainscough that when applying for the role she had not told Mrs Burgoyne she had a disabled daughter as she thought it might be a deterrent. The Tribunal accepts that Mrs Burgoyne did not know that the claimant had a disabled daughter when she made the decision to offer 9 hours per week and when she subsequently dismissed the claimant, and that she only came to know that the claimant's daughter was disabled when the claimant made an application to amend her complaint. Mrs Burgoyne's evidence was corroborated by the claimant, who in cross-examination when asked had she told Mrs Burgoyne that her daughter was disabled said "Why would I?" There was also corroboration in the long and very detailed messages sent from the claimant to Mrs Burgoyne about health issues for all of her family. There was no mention of disability or the conditions that amounted to disability in any of the messages the Tribunal saw. The claimant would have us believe that she told Mrs Burgoyne her daughter was disabled on 24 February 2020 face to face. The Tribunal rejects that assertion, it is not credible for the reasons set out above and the Tribunal finds that it is a fabrication made after the event.

66. The respondent did not know of the disability and therefore any less favourable treatment could not be because of a protected characteristic so the discrimination complaint must fail.

67. If the respondent had known, then the Tribunal has gone on to consider whether or not any treatment was less favourable and was because of the protected characteristic.

Less favourable treatment

68. The Tribunal assisted the claimant to set out the following alleged less favourable treatment

    A: Failing to timetable her for 35 hours per week during her employment that the claimant said had been agreed

    B: Failing to offer her the full time days or nights contract that was offered to other candidates, offering her only 9 hours per week,

    C: Ending her employment on 8 April 2022.

69. Allegation A did not amount to less favourable treatment because the Tribunal finds that there was no agreement for 35 hours per week ever made. The claimant had an aspiration to work 35 hours per week, but Mrs Burgoyne was very clear in her message on 26 February 2020 saying

    I am not sure yet let's see how you feel about doing the different shifts and which suit you best.

    And again in her message on 11 March 2020 set out in full above. Mrs Burgoyne's evidence at Tribunal was entirely consistent with her position in the messages that she was trying people out, over a period of not less than four weeks, to see how they got on, before making any permanent offers. The claimant not getting the shift patterns she hoped for is not less favourable treatment in law because Mrs Burgoyne had not promised her a fixed shift pattern or minimum number of hours at that time. It is akin to the claimant having an unjustified sense of grievance in the law on detriment.

70. Allegation B would not have amounted to less favourable treatment because there was no 35 hour per week agreement, as reasoned above. In relation to the claimant not being offered hours that were offered to others, also part of allegation B, that would have amounted to less favourable treatment. In relation to allegation C, being dismissed on 8 April, that would have amounted to less favourable treatment.

71. Next, if the complaint had succeeded on knowledge, which it did not, the Tribunal would have had to consider comparators so as to be able to decide whether or not the less favourable treatment was because of the protected characteristic.

<u>Appropriate comparators</u>

72. The claimant advanced SG as a comparator. The Tribunal finds that she is not an appropriate actual comparator because there was a material difference between SG and the claimant which was that SG had hands on one to one experience and skill in caring for a severely disabled adult in the home. The claimant did not have those skills or that experience.

73. The claimant advanced JW as a comparator. The Tribunal finds that she is not an appropriate actual comparator because in addition to the material difference of experience in caring for disabled children in their homes, JW was herself the mother and grandmother of disabled people and therefore shared the protected characteristic of the claimant.

74. The Tribunal assisted the claimant in constructing a hypothetical comparator being a candidate for care work for a severely disabled young adult at home with the same skill level and experience as the claimant but without a disabled child.

75. The Tribunal asked itself, would Mrs Burgoyne have offered that hypothetical comparator 35 hours per week care work, addressing the less favourable treatment at allegations A and B. The Tribunal found she would not because the work required high levels of skill, without those skills the life of Miss AB would be at risk. The work required experience in managing challenging behaviours, for example strategies for distracting and diverting, heading off and

deescalating. Mrs Burgoyne had assessed the claimant as not being good and doing that because she had said that she had had what she described as a "negative experience" working on shift with Mrs Burgoyne because Miss AB preferred to have her mum care for her, and had refused to work alongside Mrs Burgoyne on shift on 19th March or 20th March for that reason. That signalled to Mrs Burgoyne that the claimant did not have the skills needed for managing Miss AB's challenging behaviours across a range of contexts. The hypothetical comparator, with the same skills and experience as the claimant, would not have been offered 35 hours per week.

76. The Tribunal finds that the hypothetical comparator would have been offered only 9 hours, and would have had the same treatment, not less favourable treatment, as the claimant.

77. In relation to allegation C of less favourable treatment, the decision to end the employment on 8 April 2020 the Tribunal finds that, if the claimant had succeeded in establishing knowledge, the hypothetical comparator would have been dismissed. The protected characteristic played no part in the decision to dismiss. By the time of the dismissal decision Mrs Burgoyne was having to keep Miss AB in isolation due to her extreme clinical vulnerability to the coronavirus. The care team was reduced and the decision was made not to offer employment to anyone other than the carers who had been appointed and agreed to go into isolation themselves to support Miss AB.

78. For all of those reasons, if the complaint had not failed on knowledge it would have failed on the *because of* point. The claimant's status as the mother of a disabled child played no part at all in Mrs Burgoyne's decision making about care for Miss AB.

79. The Tribunal has not addressed the burden of proof in Section 136 Equality Act 2010 in any detail, there were no submissions made on this point. If the claimant had established knowledge, it is unlikely on the evidence the Tribunal heard that she could have established a prima facie case of discrimination. This is because of the clarity of the messages between the parties.

<u>The family commitments comment</u>

80. When the claimant brought her complaint she initially said she was being discriminated against because of her family commitments. That phrase is quoted from Mrs Burgoyne's message to the claimant from 22 March, which said,

I am offering a contract for 9 hours per week. This 3 hours per evening 8 till 11pm on a Tuesday, Friday, Saturday evening. Due to your family commitments I am unable to offer any day hours given the very serious but uncertain future ahead of us all. The contract is a 6 month probationary contract.

81. The phrase "family commitments" here alludes to the claimant's assertion in her message at the outset that she could work 9.30 -2.30 then 5.30 -11.30. This was because of the school run. The claimant seized on this phrase and attempted to twist this phrase to substantiate a complaint of sex discrimination and later, associative disability discrimination. It ought to have been apparent to the claimant, as it is to the Tribunal when reading the full exchange of messages, that Mrs Burgoyne was referring to the claimant's preferred working

hours. The Tribunal finds it was not credible that the claimant could have thought “family circumstances” was because of the disability of her daughter because

a. The claimant hadn’t told Mrs Burgoyne she had a disabled daughter
b. The claimant didn’t mention this allegedly discriminatory phrase when subsequently offered the 9 hour contract
c. The claimant did not mention it in the long emails pursuing full time hours after the 9 hour offer.
d. The claimant did not mention it on termination of employment
e. Nor when pursuing payment of holiday or notice pay
f. Nor when commencing proceedings

82. It was only later, after Mrs Burgoyne appeared in a photograph on Facebook looking after the children of one of her staff, did the claimant decide this phrase meant associative disability discrimination.

<u>The allegation that the documents had been falsified</u>

83. The Tribunal was concerned that in closing submission the claimant said that Mrs Burgoyne had falsified care logs and assessment sheets and that Mrs Burgoyne had manipulated Mrs Hunter to falsify care logs and assessment sheets. This was a most serious allegation to make. The claimant had hinted that the assessment sheets could have been made up after the event during her own evidence but the points had not been put to Mrs Burgoyne. If they had been then the respondent may have chosen to call Mrs Hunter. For that reason the Tribunal explained to the claimant, who was not a lawyer, that it would not make any finding in relation to the falsification allegation. It was not necessary to determine the issues in the case. The Tribunal had heard evidence from Mrs Burgoyne that she keeps a log and that she and Mrs Hunter created assessment sheets. The Tribunal saw the care log and assessment sheet entries. They appeared credible. The Tribunal found it unlikely that Mrs Burgoyne, with the demands that she faces every day, would find time to falsify a log. That would require a significant amount of effort to go back and change the documented history in what was a bound desk top diary book. Further, the Tribunal found it implausible that she would encourage the person she trusted to accurately record interventions with her daughter, life threatening matters such as administration of medications, to falsify the very records that they rely on to communicate with each other so as to keep Miss AB safe. What really mattered though was that the care logs and assessment sheets were immaterial to the Tribunal’s decision which was made based on the oral evidence of Mrs Burgoyne as to her reasons for not offering the claimant anything other than the 9 hours and for dismissing the claimant. This allegation of falsification was a most unkind and wholly unsubstantiated allegation but one on which the Tribunal did not need to make a finding.

Conclusion

84. The claimant’s complaint of outstanding holiday pay and notice pay succeeds.

85. The claimant’s discrimination complaint fails. She was not treated less favourably because of her disabled daughter. She has been dishonest about the contract that was entered into (her own messages from the time are the most compelling evidence against her) and she has fabricated a conversation in which she says she told the respondent her daughter was disabled. She commenced litigation and changed the protected characteristic on which she

relied so as to maximise her chances of success.

86. She has subjected Mrs Burgoyne, who the Tribunal has found to be a wholly credible witness, to two years of very stressful and unpleasant litigation.

87. The respondent made a costs application. The Tribunal listed that application and separate case management orders and notices of hearing will be sent out to prepare for that hearing.

Date 16 December 2022

REASONS SENT TO THE PARTIES ON
22 December 2022

FOR EMPLOYMENT TRIBUNALS