



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms J Rusby

**Respondent:** Helping Hand Domiciliary Care Ltd

**Heard at:** Leeds

**On:** 22, 23 and 24  
November 2022

**Before:** Employment Judge Jones  
Mr G Harker  
Mrs N Arshad Mather

## REPRESENTATION:

**Claimant:** In person

**Respondents:** Mrs J Letts, Advocate

**JUDGMENT** having been sent to the parties on 25 November 2022 and a request from the claimant having been made in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the Tribunal provides following

# REASONS

## Introduction

1. These are claims for disability discrimination by way of direct and indirect discrimination, harassment, breach of the duty to make adjustments and discrimination arising from disability.

## The Issues

2. The parties, who were then both legally represented had submitted a document with an agreed list of issues at a preliminary hearing before Employment Judge Brain on 18 October 2021. They were, with minor rearrangements, as follows:

### Direct discrimination

- 2.1 Has the respondent subjected the claimant to the following treatment:

- 2.1.1 Giving the claimant work a significant distance from her home address with excessive travel;
- 2.1.2 Making remarks about the claimant's absence, her condition and indicating that she was lying about the extent of her disability;
- 2.1.3 Dismissing the claimant?

2.2 Was the treatment "less favourable treatment", i.e did the respondent treat the claimant as alleged less favourably than it treated others (comparators) in not materially different circumstances? The claimant relies on a hypothetical comparator.

2.3 If so, was this because of the claimant's disability?

#### Discrimination arising from disability

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

- 2.4.1 Her ability to travel distances;
- 2.4.2 Her attendance at work?

2.5 Did the respondent treat the claimant unfavourably by reducing her shifts and the work offered to her?

2.6 If so, was that because of an inability to travel distances or the claimant's inability to attend work?

2.6 If so, has the respondent shown that the unfavourable treatment as set out above was a proportionate means of achieving a legitimate aim?

#### Reasonable Adjustments

2.7. Did the respondent have a provision, criterion or practice (PCP) of requiring the claimant to travel long distances to work?

2.8 Did it put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who were not disabled at any time in that she could not travel long distances to work?

2.9 If so, did the respondent know or could it have reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

2.10 If so, were there steps that were not taken that could have been taken by the respondent to avoid such disadvantage? The claimant relies on the availability of work nearer to her home address to reduce travel or to work in the office.

2.11 If so, would it have been reasonable for the respondent to have to take those steps at the relevant time?

#### Indirect disability discrimination

2.7 Did the respondent have the PCP which resulted in her dismissal due to her absence from work?

2.8 Did the respondent apply the PCP to the claimant at the relevant time?

2.9 Did the respondent apply (or would the respondent have applied) the PCP to people who do not have the claimant's disability?

2.10 Did the PCP put persons with the same disability as the claimant at one or more particular disadvantages when compared with people with whom the claimant does not share that characteristic?

2.11 Did the PCP put the claimant at that disadvantage at any relevant time?

2.12 If so, has the respondent shown the PCP to be a proportionate means of achieving a legitimate aim?

#### Harassment related to disability

2.13 Did the respondent engage in conduct by making remarks about the claimant's disability, her absence and accusing her of lying about her condition?

2.14 If so, was that conduct unwanted? If so, did it relate to the protected characteristic of disability?

2.15 Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

#### Time Limit / Limitation Issues

2.16 Were all of the claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA")? Dealing with this issue may involve consideration of subsidiary issues including:-

2.16.1 Whether there was an act an/or conduct extending over a period, and/or a series of similar acts or failures;

2.16.2 if not, whether it was not reasonably practicable for a complaint to be presented within the primary time limit;

2.16.3 Whether time should be extended on a "just and equitable" basis;

2.16.4 When the treatment complained about occurred.

3. At this hearing the parties said that the indirect discrimination claim was an alternative to the reasonable adjustments claim. That is also how the claim was identified by the representatives of the parties and Employment Judge Brain at the preliminary hearing on 18 October 2021. That was how the matter was addressed in the closing argument of the respondent. The claimant, who was not represented at the final hearing but who had been represented previously, did not address the legal aspects to the complaints in

her closing statement. We make reference to this particular aspect of the case at paragraph 69 below.

### **The Evidence**

4. The claimant gave evidence. The respondent called Mr Robert Drabble, Director, Mrs Denise Jennings, Human Resources Consultant and Mrs Beverley Drabble, Director.
5. The parties submitted a file of documents of 274 pages.
6. The claimant produced two witness statements at the hearing. The factual material which was necessary to establish a number of the legal complaints set out above was not contained in either statement. We have commented upon that, where appropriate, in our analysis below.

### **Background**

7. The respondent is a company which provides domiciliary care in Ryedale, North Yorkshire. It is owned and run by Mr and Mrs Drabble who are the sole directors and shareholders. It employs 2 administrative staff and 19 carers. The claimant commenced working for them as a carer in June 2019. Her role involves providing support in the form of personal care such as washing and dressing, meal preparation, administering medication, household chores, and shopping. She was employed on a contract of flexible hours. Up until the beginning of March 2020, she worked between 11 and 20 hours per week.
8. The claimant has endometriosis which has created difficulties in her work. The history of the condition is described in an occupational health report prepared by Keremy Milligan, dated 6 October 2020. She began to experience abdominal bleeding and discomfort towards the end of 2018. Examination revealed endometrioses tissue on her ovaries. She was due to undergo surgery in March 2020 for removal of the ovaries but this was delayed because of the effect of the pandemic. From April 2020 the claimant had recurrent bladder infections with pain and bleeding. A bladder scan revealed endometriosis tissue had spread to the bladder. The claimant was told by her urologist that surgery would have to be undertaken but at least 3 months after she underwent the treatment for removal of the ovaries. She was treated with antibiotics. When she had infections of the bladder, which were periodic, she had a frequent need to urinate, nausea, poor sleep and fatigue. She also felt pressure in the stomach and pubic area.
9. The claimant was unable to work between March and the end of June 2020 because of her condition. She had a meeting with Mr and Mrs Drabble to discuss a return on 28 June 2020. We address this in detail when analysing the claims. A further fit to work note was provided from the beginning of July 2020. The respondent commissioned the occupational health report in October 2020. Ms Milligan advised that she believed the situation would significantly improve when the endometrioses tissue was removed. She said the main obstacle to a return had been the recurrent bladder infections. She recommended that once the claimant had commenced taking prophylactic medication and it had become effective, she should return to work on a

phased basis over 4 weeks, gradually increasing her hours. She recommended that the claimant should have support in a return to work discussion if she wished. Ms Milligan expressed the view that a return could be achievable within 4 weeks.

10. Documentation in the bundle indicates that a number of requests were made of the claimant to discuss the report with a view to a return. This was not immediately possible because of recurrent problems with infections. The meeting was ultimately held on 18 December 2020. By that stage the claimant had been informed that an outcome of the meeting might be the termination of her employment.
11. Mrs Drabble dismissed the claimant by letter of 18 December 2020. She stated that was because of the lack of any definitive timescale for her return. She stated that there were no suitable alternative available posts and no adjustments could be made. She stated that covering the claimant's duties with existing staff and paying overtime to do so was not feasible in the longer term. The claimant was provided with a copy of her P45.
12. She appealed the decision by email of 22 December 2020. Mr Drabble allowed the appeal on 5 January 2021. He concluded that the situation had changed insofar as the claimant was then on medication which managed it better.
13. The claimant returned to work on 24 February 2021. She had a meeting with Mrs Jennings who had recently started. Her availability was recorded on a planner. It was agreed the claimant would start on 2 days of caring duties per week, to be reviewed after 4 weeks.
14. On 8 March 2021 the claimant was suspended. She had only undertaken 3 shifts after her return. She had inadvertently accessed emails on a laptop which had been provided to undertake her work. The facts in this respect are detailed in the judgment of Employment Judge Knowles, are binding on us and we need not repeat them. He found the material the claimant saw was privileged and inadmissible.
15. After an investigation the claimant's suspension was lifted after 11 weeks. She returned to work on 24 May 2021. Mrs Jennings sent the claimant the details of the two shifts she was to work that week in an email dated 24 May 2021. The following day, the Tuesday, was to clients in Amplethorpe and on the Friday of that week, Scagglethorpe. Amplethorpe was 19 miles from where the claimant lives, in Malton. Scagglethorpe is only 1.5 miles away. These shifts had been planned for Kate, the assistant manager, but were given to the claimant because of the short notice of her return. The rota of shifts is prepared two to four weeks in advance.
16. The claimant replied to Mrs Jennings' email to say that Ampleforth was no good, she did not get a signal and had not been there for over a year. She said she and the clients were not being given a fair chance. Mrs Jennings replied within half an hour to say that Kate had informed her there was a signal in each of the clients' homes save for one, in which the claimant could use the landline. She stated that she appreciated the claimant might be

nervous on her return but the visits were nicely spaced with plenty of travel time and clients with no complex needs. She said all information was in their care plans.

17. The claimant replied to state that she was not nervous and was looking forward to being back but wanted to be sure everything was right for her and her clients.
18. The claimant did the two shifts and another on 8 June 2021. She then became unwell and has been signed off since as a consequence. Although there has been a further report this month, this post-dates the events about which we are concerned and was only produced on the first morning of the hearing. The respondent objected to its admission. We were not satisfied it was proportionate to spend further time admitting that evidence, given its limited relevance to events before 24 June 2021.

## The Law

### Discrimination

19. By section 39(2) of the Equality Act 2010 (EqA):  
*An employer (A) must not discriminate against an employee of A's (B)—*
  - (a) *as to B's terms of employment;*
  - (b) *in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;*
  - (c) *by dismissing B;*
  - (d) *by subjecting B to any other detriment.*
20. In **Ministry of Defence v Jeremiah [1980] QB 87**, the Court of Appeal held that a detriment would exist if a reasonable worker would or might take the view that the treatment was in all the circumstances to his disadvantage. In **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337** the House of Lords held that an unjustified sense of grievance would not amount to a detriment.
21. By section 109(1) of the EqA, anything done in the course of a person's employment must be treated as done by the employer and by section 109(3) it does not matter whether the thing is done with the approval or knowledge of the employer.

### Direct discrimination

22. Direct discrimination is defined in section 13 of the EqA: *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.*
23. By section 23 of the EqA, *on a comparison of cases for the purpose of section 13, there must be no material difference between the circumstances relating to each case and the circumstances relating to a case for the purpose of*

*section 13 shall include a person's abilities if the protected characteristic is disability.*

24. By section 109(1) of the EqA, anything done in the course of a person's employment must be treated as done by the employer and by section 109(3) it does not matter whether the thing is done with the approval or knowledge of the employer.

#### Discrimination arising from disability

25. Section 15 of the Equality Act 2010 (EqA) provides:

(1) *A person (A) discriminates against a disabled person (B) if—*  
(a) *A treats B unfavourably because of something arising in consequence of B's disability, and*  
(b) *A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*

(2) *Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

#### Indirect discrimination

26. Section 19(1) of the EqA provides:

(1) *A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*  
(2) *For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if*  
(a) *A applies, or would apply, it to persons with whom B does not share the characteristic,*  
(b) *it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*  
(c) *it puts, or would put, B at that disadvantage, and*  
(d) *A cannot show it to be a proportionate means of achieving a legitimate aim.*

#### The duty to make adjustments

27. By section 39 (5) of the Equality Act 2010 (EqA) a duty to make adjustments applies to an employer and by section 21 of the EQA failure to comply with the duty in section 20 is a failure to comply with a duty to make reasonable adjustments which is discrimination against a disabled person.

28. Section 20 of the EqA provides:

(1) *Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*  
(2) *The duty comprises the following three requirements.*  
(3) *The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in*

*relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

29. By paragraph 2 of Schedule 8 of the EqA, *A is not subject to a duty to make reasonable adjustments if A does not know and could not reasonably be expected to know...that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.*

### Harassment

30. By section 40 of the EQA an employer must not harass an employee.
31. By section 26 of the EqA,  
(1) *A person (A) harasses another (B) if—*  
(a) *A engages in unwanted conduct related to a relevant protected characteristic, and*  
(b) *the conduct has the purpose or effect of—*  
(i) *violating B's dignity, or*  
(ii) *creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*  
(4) *In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*  
(a) *the perception of B;*  
(b) *the other circumstances of the case;*  
(c) *whether it is reasonable for the conduct to have that effect.*

### Burden of proof

32. Section 136(1) of the EqA concerns the burden of proof: *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.* Section 136(2) provides that does not apply if A shows that A did not contravene that provision.
33. In **Laing v Manchester City Council and another [2006] ICR 1519**, the Employment Appeal Tribunal stated that if a tribunal was satisfied on the evidence that the respondent had provided a reason which, on a balance of probabilities, had eliminated any discriminatory cause, it was not necessary for the tribunal to trouble about whether the burden of proof had shifted in the first instance. In **Hewage v Grampian Health Board [2012] ICR 1054**, as later endorsed in **Efobi v Royal Mail Group Limited [2021] UKSC 33**, the Supreme Court stated that it was 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”*, per Lord Hope in **Hewage**.



## Analysis

### *Disability and knowledge*

34. It is accepted that the claimant has the disability of endometriosis. It is accepted the respondent knew of that at all material times and that it was a disability.

### The 29 June 2020 meeting: findings

35. On 29 June 2020 the claimant met Mrs and Mrs Drabble at the offices for a discussion about a return to work. It lasted about half an hour. Mrs Drabble led the meeting. Mr Drabble sat at the back. There is some agreement about what was discussed; the claimant's medical condition which had precluded her from work, the treatment she was to receive, the fact she had been reported by other colleagues to have worn her uniform when taking her son to school.
36. There was some disagreement about what was said. Although a record of the meeting had been taken, it was not produced. Mrs Drabble said she had converted it into her witness statement. We noted that several of the passages of her witness statement were identical, to the word, to that of her husband. That suggests collaboration in recounting what happened rather than the individual recollection of each witness. In spite of that we preferred that explanation to the claimant's. It better fitted the context, history and medical information which was given. The claimant's recollection of some important events was inconsistent. For example, the dates when she said she worked. She said she had worked two days a week from 24 May 2021 to 28 June 2021. She later acknowledged that she had not worked during Bank Holiday week of 31 May 2021, having taken time off for half term, but maintained she had not been off until the end of June 2021. Mrs Letts produced a fit to work note which confirmed Mrs Jennings' account that the claimant had not worked after 9 June 2021. We make no criticism of the claimant for these inaccuracies, but it was symptomatic of her recall, which was poor in a number of respects. When we have to decide upon conflicting accounts such inconsistencies may undermine the reliability of that witness as an accurate historian of events.
37. We find that the claimant informed her employers that she had endometriosis, that it had spread to her bladder and that it would require two operations, one to remove her ovaries and another on the bladder. She said these would have to be six months apart. Mrs Drabble asked whether the operations could not have been done at the same time because they sounded like they were in the same area. She also asked whether it would get worse until the claimant had had the operation. Mrs Drabble asked if the claimant would be able to drive on her medication and she said she would and would like to return to work immediately. The claimant became upset and turned her chair to face the wall. At that point we find Mrs Drabble said look at me when I am talking to you. The claimant had alleged it was Mr Drabble who kept saying in a loud voice, "*look at me when I am talking to you*". Mrs Drabble's acknowledgment of this remark and explanation of the context struck us as

more likely. The claimant's mistaken attribution of this to Mr Drabble must be seen in the context of a distressful meeting.

38. Mrs Drabble raised the question about the operations being carried out at the same time and queried whether the condition would deteriorate up until the operation. We find this was an enquiry to understand the claimant's condition and its impact on her capability to return to duties. The claimant took it as a challenge to her and an imputation that she was not telling the truth. We reject that. We do not find that the words used were as stated in the further particulars.
39. The issue of the claimant attending at school during lockdown to drop off her son was mentioned by both parties, the claimant saying that she had been told by the Drabbles that her son should not have been in school and she then obtaining confirmation of this. This was also connected to an allegation raised by her colleagues that she had been wearing her work uniform when dropping her son off at a time she was off sick. This part of the discussion does not form part of any alleged discrimination. We make no findings on it. The claimant acknowledged at the hearing that when she said the letter at page 92 was not relevant.

*Harassment (para 2.13)*

40. In respect of the claim of harassment, the comments which we have found were made by Mrs Drabble about the claimant's medical condition and operations was conduct which was unwanted. That is a subjective question. The claimant believed her employers did not believe she truly had this condition and the questions about whether the operations could not have been done at the same time or whether the condition would not be more likely to deteriorate before the operation reflected that, in her mind.
41. We find the remarks related to the disability, insofar as they concerned the claimant's medical condition and its impact on her work.
42. Did they have the purpose of violating the claimant's dignity or create an intimidating, hostile, degrading, humiliating and offensive environment for her? In other words, was that intended? We have found they were asked with a view to understand the condition. The claimant was not accused of lying, expressly or by implication. Mrs Drabble was voicing her thoughts that only surgery might cure the condition and that the site of the surgery was in a similar place. It was unwise for her to express her lay-person's views about complex medical matters. In doing so they were misconstrued as an attack on the claimant's integrity. We do not find that was intended.
43. That does not exclude unintended harassment. We must alternatively consider whether the remarks had the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating and offensive environment for her [the adverse effect]. We must consider the claimant's perception, all the other circumstances and whether it was reasonable for the conduct to have that effect.

44. The perception of the claimant to what had been said had the above adverse effect, as we have stated.
45. The remarks were from a layperson who had no previous knowledge or experience of this condition. Such questions would have been better raised with the claimant's medical advisors or the occupational health specialist. However, Mrs Drabble might reasonably have thought the claimant could provide her understanding of the proposed treatment. She did not appreciate her remarks would have been construed as an attack on the claimant's integrity. We are satisfied they were a genuine attempt to inform the employer of the claimant's condition insofar as it affected her ability to work as a carer and to facilitate plans for the claimant's work. Whilst recognising these discussions could have been handled more tactfully, less clumsily and with more empathy, we are not satisfied they could reasonably be said to have the adverse effect. On assessment of the three necessary considerations under section 23(4) of the EqA, we do not find the unwanted conduct had the adverse effect.
46. Telling the claimant to look at her was not related to the claimant's disability. It was said because the claimant had turned her face to the wall. It falls outside the definition of disability harassment.
47. The claims of disability related harassment are not established.

*Direct discrimination (para 2.1.2)*

48. In respect of this meeting, we do not find what was said was less favourable treatment of the claimant because of her protected characteristic. We must ask why Mr and Mrs Drabble had this discussion with the claimant and said what they did. We have found it was because they were concerned about the claimant's return and her condition. It was not because she was disabled although that was the background and content to the discussion. The two matters are distinguishable. This was not a case in which it was necessary to address the initial burden of proof question under section 136, as we were satisfied upon analysis that the explanation of the respondent eliminated the protected characteristic as a reason for the treatment.
49. The claimant took exception to the way she perceived Mr and Mrs Drabble to be challenging her. We recognise this was a difficult meeting for the claimant and, given the circumstances, one about which she was sensitive. In addition to our finding that the reason for the treatment was not because of the protected characteristic, given the findings we have made in respect of section 29(4) of the EqA we are not satisfied that the meeting and discussion amounted to a detriment for the purpose of section 39(2)(d) of the EqA.

*Discrimination arising from disability – offers of work in the summer of 29 June 2021 (para 2.5)*

50. We find that the claimant was not offered work on 29 June 2021 because Mrs Drabble had prepared the rota for the immediate future and could only provide work two weeks later. Thereafter the claimant had been signed off

sick again. The failure to offer work on 29 June 2021 was not because of something arising in consequence of the claimant's disability, but because Mrs Drabble had completed the rota for the following fortnight.

51. Thereafter the failure to offer work was because she was sick, which would be something arising from the disability. Even had Mrs Drabble created the opportunity for work we are not satisfied on the evidence that the claimant would have been fit to undertake it. Her GP then certified her unfit. The claimant has not suggested she wished to be offered work when she was unable to undertake it because of her ill health. Such an offer would be unwelcome because the claimant could not have taken it up. It would be different treatment to someone who was not able to take up work because they were incapacitated by ill health, but that would be neither unfavourable nor a detriment. We do not understand the claimant to be suggesting otherwise.

### Duties and travel

#### *Reasonable adjustments and indirect discrimination (para's 2.4 to 2.12)*

52. The provision, criterion or practice (PCP) is a requirement to travel long distances to work. It is accepted that there was a requirement for carers to travel to towns and villages throughout Ryedale. The example given was Ampleforth which is 19 miles from Malton. It is said Wass is further but we were not told how much.
53. It unclear whether this placed the claimant and those who shared her disability at a substantial disadvantage. In the hearing the claimant said that she had difficulties if she could not use the toilets of the clients and this had been a difficulty in lockdown. No specific examples were given. The claimant had worked for two weeks at the beginning of the pandemic and three shifts in February or early March 2021 when restrictions remained in place, but she gave no evidence about problems on those occasions with travel or not being able to access toilets. The problems of a frequent need to urinate when there was a bladder infection is referred to in Ms Milligan's Occupational Health report, but she did not propose an adjustment to address that or a difficulty in travelling particular distances.
54. What was unclear was the extent to which the need to use the toilet arose when the claimant did not have an infection or whether she did work with an infection and if so when, what she did any shifts at that time, how far she was able to travel and when any problems arose. The claimant said, in evidence, that she had to relieve herself behind a bush on one occasion, but it was unclear when or where. She also said that she used pads.
55. No help is derived from the medical report or the claimant's witness statement or any other documentation as to the limitations which arose from a sudden need to use the toilet or other manifestation of incontinence in the discharge of her duties.

56. The potential for a problem to arise appears to have been known to Kate, because she had informed Mrs Jennings that all the clients had agreed to carers using their toilets. Whether this query had been raised with clients because of the claimant's individual situation or for carers generally was not clear. What is peculiar, is that the claimant never spelled out this particular difficulty and the limitations it imposed to her employers or Ms Milligan. Although she said it was raised with Mrs Jennings on 24 May 2021, in respect of the next day's trip to Ampleforth, we preferred Mrs Jennings' account that this was never mentioned. If it had been it seems to us it would have been also included in the email the claimant sent expressing her reservations. Mrs Jennings demonstrated empathy and support in her response to that email and we accepted her evidence that if she had been told of the claimant's difficulty travelling in connection with incontinence and lack of toilet facilities, she would have addressed it.
57. For the reasonable adjustments claim, even if the claimant had been placed at a substantial disadvantage by the PCP of travelling long distances, which is unclear for the reasons we have expressed, we are not satisfied the respondent knew or ought reasonably to have known of that. An employer is dependent on the employee to explain fully the difficulties they have in order then to accommodate them. It would be inappropriate for the employer to assume what limitations arose; for them to do so risks jumping to stereotypical conclusions and may itself cause offence. We find there was nothing said by the claimant or contained in any medical report reasonably to put the respondent on notice of this disadvantage. Having regard to paragraph 8 of Schedule 2, the duty did not apply.
58. For the purpose of the indirect discrimination claim, such knowledge is not a requirement. The issue is whether the claimant could undertake a journey of a particular distance without a break because of an urgent need and discomfort arising for use of the toilet in addition to those who shared her protected characteristic. That has not been satisfactorily addressed in the evidence, for the reasons we have summarised above. The evidence focussed upon the use of toilets whilst at clients' houses or other public utilities. The impression given was that the claimant could manage a 19 mile journey by car and could manage such a shift if she could use a client's toilet. The only example of a long journey was 25 May 2021, when the claimant travelled to Ampleforth. No detail was provided about any problems encountered by the claimant that day. We are satisfied it is likely that the clients gave permission for their toilets to be used, as Kate had understood.
59. The claimant has not established at the material time that travelling particular distances placed her and those who share her disability at a particular disadvantage. We would have expected Ms Milligan to have stated travelling particular distances was a problem, were that the case. For us to reach that conclusion would be for us to speculate on a matter which requires establishment by evidence.

*Direct discrimination (para 2.1.1)*

60. A claim for direct discrimination is made in the context of less favourable treatment in giving the claimant work a significant distance from her home address with excessive travel. That claim is hopeless. There is no evidence at all that the claimant was given longer distances than any other carer. She was not treated less favourably than others who were not disabled.

*Discrimination arising from disability (para 2.5)*

61. The complaint is that the claimant's shifts were reduced and she was offered less work because of her inability to travel distances and inability to attend work. We have addressed this in respect of June 2020.
62. In respect of February 2021, the claimant returned to work and undertook 3 shifts before she was suspended. The suspension for 11 weeks was not because of something arising from her disability. It was because she had been suspected to have accessed private emails without permission.
63. The reduced shifts in February 2021 had been planned on the recommendation of Ms Milligan. Mrs Jennings discussed this with the claimant and the claimant agreed with the proposal. The claimant did not ask for more shifts at that time. It does not constitute a detriment and unfavourable treatment in those circumstances.
64. She complained in her evidence that there was never a review. That was because she never worked for a sufficient period of 4 weeks for the review which had been agreed.
65. The same can be said of her return in May. There is no evidence the claimant requested extra shifts. The phased return was recommenced, but finished after only 3, when the claimant again became unwell.
66. In summary the phased return was one which had been agreed with the claimant as an adjustment to assist in her return to work from ill health. As such, it would not be regarded as a disadvantage by a reasonable worker. It is not a detriment within section 39(2)(d) of the EqA. Nor is it treatment which was unfavourable under section 15 although it was different treatment. The discrimination arising from disability complaint does not succeed.

The dismissal

*Direct discrimination (para 2.1.3)*

67. The dismissal was clearly connected to the claimant's disability, insofar as the reason for it was that the claimant was unable to give a clear indication of when she would return at the meeting on 16 December 2021. The view of Ms Milligan, that the claimant would have been able to return within 4 weeks of 4 October 2020 had been overtaken by events and the claimant's ill health. Her operation had been delayed because of Covid and the prospect was unclear for when a return would have been feasible.

68. The appropriate comparator is someone who had the same capabilities as the claimant but not the disability. That would mean someone who did not have the claimant's disabilities but who had also been off work for several months and whose outlook for a return to duties was uncertain for other reasons. We are satisfied that Mrs Drabble would have dismissed such a person in the same or similar circumstances. She did that because of her desire to plan the care provision to secure as much certainty as was possible and to avoid substituting for the claimant for significant periods. To her mind that level of consistency was more beneficial for other carers, clients and the business. The reason was not because of the claimant's disability. This was not a case in which it was necessary to address the initial burden of proof question under section 136, as we were satisfied upon analysis that the explanation of the respondent elimination the protected characteristic as a reason for the treatment.

*The dismissal – other legal complaints*

69. In the preparation of these reasons, it became apparent that the list of issues suggests the dismissal was an act of indirect discrimination. That was not an argument raised at the preliminary hearing on 18 October 2021 at which both parties were represented nor at the final hearing. At both hearings the indirect discrimination claim was summarised as an alternative to the reasonable adjustments claim. No PCP was identified in respect of the detriment of dismissal for the purpose of such an indirect discrimination claim or explored at the final hearing in argument or in the evidence. At the preliminary hearing, at paragraph 7.2, the PCP was said to be the same as in the claim under section 15 and the disadvantage the same, namely a reduction in working hours.
70. It is also noted, in the preparation of these reasons, that the claim form includes a complaint under section 15 of the EqA in respect of the dismissal. That was not a claim which had been identified by the parties' representatives in the list of issues and nor was it raised as one of the claims at the final hearing. At the preliminary hearing, at paragraph 7.1, the unfavourable treatment was only identified as the reduction in working hours.
71. The Tribunal determined this case as it understood the complaints as they had been refined at earlier preliminary hearings, one of which dealt with admissibility of evidence, and as finally clarified by the parties at the final hearing. If either party wishes to raise any issue arising from paragraphs 69 and 70 above, an application for reconsideration supported with written grounds should be made.

*Time limits*

72. In the light of our findings that none of the claims succeed, it is not necessary to address issues relating to time.

Employment Judge D N Jones  
Date: 9 January 2023  
REASONS SENT TO THE PARTIES  
ON

FOR THE TRIBUNAL OFFICE

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