EMPLOYMENT TRIBUNALS

Claimant: Lucy Jane Dowding

Respondent: John Titcombe Limited

Heard at: **Bristol via CVP** **On: Tuesday 9th May 2023, Wednesday 10th May 2023, Thursday 11th May 2023 and Friday 12th May 2023.**

Before: Employment Judge Frazer
Tribunal Member Mrs L Simmonds
Tribunal Member Mr K Ghotbi – Ravandi

Representation
Claimant: Mr D Stewart (Counsel)
Respondent: Mr S Proffitt (Counsel)

JUDGMENT

1. The Claimant's claim for unfair dismissal is well founded and shall succeed.
2. The Claimant's claim for victimisation is well founded and shall succeed.
3. The Claimant's claim for a failure to make reasonable adjustments is well founded and shall succeed.
4. The Claimant's claim for discrimination arising from disability is well founded and shall succeed.
5. The Claimant's claim for harassment is not well founded and shall stand dismissed.
6. There is no *Polkey* reduction.

REASONS

This is the unanimous decision of the Tribunal.

The Hearing

1. The claim is for unfair dismissal and disability discrimination. We heard evidence from all parties over CVP and oral submissions from Counsel in closing. We heard from Lucy Dowding, Anthony White, Isobel Turner for the

Claimant and from Emma Sicolo and Mark Smith for the Respondent. We were provided with a hearing bundle which ran to 251 pages. We heard oral submissions in closing from both parties' representatives. There were no limitation issues.

The Issues

2. The issues are contained in the Case management order of EJ Halliday dated 29th September 2022 and start at page 65 of the bundle. It was accepted that there was no issue of contributory fault for the purposes of the unfair dismissal claim. It was also accepted by the Respondent that there was a procedurally unfair dismissal and that there had been a failure to provide a s.1 statement. The Respondent clarified that there was a *Polkey* issue relevant to the unfair dismissal claim in that the Respondent's case was that the Claimant was dismissed for SOSR and had a fair procedure been carried out she would inevitably been dismissed fairly within a matter of weeks.

The Law

Unfair Dismissal

3. The Claimant brings a claim that she was unfairly dismissed. The Respondent says that she was dismissed for SOSR which is a reason capable of being a potentially fair reason under s.98(1)(b) ERA 1996.

Burden of Proof

4. The burden of proof provision is contained in s.136 Equality Act 2010:

> (1)This section applies to any proceedings relating to a contravention of this Act.
> (2)If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
> (3)But subsection (2) does not apply if A shows that A did not contravene the provision.

Reasonable adjustments

5. The duty to make reasonable adjustments is set out in s.20 Equality Act 2010:

> (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.
>
> (4)The second requirement is a requirement, where a physical feature 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.

(5)The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.

6. Under s.21 a failure to comply with the first, second or third requirement is a failure to make reasonable adjustments.

7. It was noted by the House of Lords in its decision in **Archibald v Fife Council [2004] UKHL 32** (per Baroness Hale at para 47), that the duty necessarily requires the disabled person to be treated more favourably in recognition of their special needs.

8. In **Environment Agency v Rowan [2008] IRLR 20** in order to make a finding of failure to make reasonable adjustments there must be identification by the Tribunal of:

   (a) the provision, criteria or practice applied by or on behalf of an employer; or
   (b) the physical feature of premises occupied by the employer;
   (c) the identity of non-disabled comparators (where appropriate); and
   (d) the nature and extent of the substantial disadvantage suffered by the claimant.

9. In **Carrera v United First Partners Research UKEAT/0266/15** (7 April 2016, unreported), HHJ Eady QC stated that when construing a PCP *'the protective nature of the legislation meant a liberal, rather than an overly technical approach should be adopted'*.

10. In **Mid-Staffordshire General Hospital NHS Trust v Cambridge [2003] IRLR 566** the EAT held that a *'proper assessment of what is required to eliminate a disabled person's disadvantage is a necessary part of the duty, since that duty cannot be complied with unless the employer makes a proper assessment of what needs to be done.'* The EAT therefore found that an omission to carry out an assessment had amounted to a failure to comply with the duty to make a reasonable adjustment.

11. The EHRC Code of Practice on Employment 2011 lists factors which might be taken into account when deciding if a step is a reasonable one to take:

    Whether taking any particular steps would be effective in preventing the disadvantage
    The practicability of the step
    The financial or other costs of making the adjustment and the extent of any disruption caused.
    The extent of the employer's financial or other resources
    The availability to the employer or finmancial or other assistance to help make an adjustment (such as advice through access to work)
    The type and size of employer

12. The definition for discrimination arising from disability is set out in s.15 Equality Act 2010:

> (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.

13. The definition of harassment is set out at s.26 Equality Act 2010:

> 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.

14. The effect is to be judged objectively and in determining that the subjective perception of the Claimant is relevant as are other circumstances of the case. In **Richmond Pharmacology v Dhaliwal [2009] ICR** 724 it should be reasonable that the actual effect upon the Claimant has occurred.

15. In this case the Claimant contends that the conduct alleged was related to her disability.

16. In **Betsi Cadwaladr University Health Board v Hughes UKEATY/0179/13/JOJ** it was held that the words of the status '*violating dignity, intimidating, hostile, degrading, humiliating or offensive'* were significant words and that '*all those words look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence*' (per Langstaff J at paragraph 12).

17. The provision on victimisation is set out in s.27 Equality Act 2010:

> (1)A person (A) victimises another person (B) if A subjects B to a detriment because—
>
> (a)B does a protected act, or
>
> (b)A believes that B has done, or may do, a protected act.
>
> (2)Each of the following is a protected act—
>
> (a)bringing proceedings under this Act;
>
> (b)giving evidence or information in connection with proceedings under this Act;
>
> (c)doing any other thing for the purposes of or in connection with this Act;
>
> (d)making an allegation (whether or not express) that A or another person has contravened this Act.
>
> (3)Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

Submissions

Mr Proffit for the Respondent

18. On behalf of the Respondent it was submitted that the reason for dismissal was the Respondent's belief as to what the Claimant was willing to do and what the business was able to accommodate. It was particularly important for the workforce to be flexible at that time. This was the pandemic and the circumstances were exceptional. Whatever process he may have engaged in the parties would have ended up in the same situation. The dismissal was proportionate for the purposes of the s.15 claim. The reasonable adjustments claim PCP requiring the Claimant to attend for full days or full shifts did not work as a PCP as what was needed was for the Claimant to cover opening and closing. There was no PCP for requiring to stand. There were assigned chairs. If the Claimant was referring to Ms Sicolo's conduct, a PCP can't be specific treatment from one person. The text on 24th July was accepted as a protected act for the purposes of the victimisation claim as the Claimant suggested needing adjustments and said that she was not happy about what had been said at work. This did not operate on Mr Smith's mind as dismissal only arises after 25th July because the Claimant proposes arrangements that he can't accommodate. The allegations of harassment fall short of what is required as being 'serious and marked' as per **Betsy Cadwaladr v Hughes** and were taken out of context.

Mr Stewart for the Claimant

19. The burden was on the employer to show that it genuinely believed that trust and confidence had broken down and the reason was not whimsical or capricious. As at the end of June when the Claimant had said she could not do Wednesdays and Sundays Mr Smith did not indicate that he saw the relationship as anything other than continuing. There was no indication on 10th July that he saw her request for reduced hours as objectionable but after submitting the fit note there is a change in Mr Smith's tone. She says that she was looking for a practical solution. There is no mention of a breakdown in trust and confidence in the dismissal letter. The reason was the presentation of the fit note which requested adjustments and Mr Smith was frustrated. It was a capricious decision. The ACAS code applied as Mr Smith felt there was some culpability as the problem for her had arisen because of her lifts to work. The s.15 claim defence was not made out by the Respondent as they had not articulated the legitimate aim and there was no evidence to suggest it was proportionate to dismiss. There was a requirement for the Claimant to work full shifts as she was told that she was part of the full time sales team. The Respondent failed to adjust her hours or provide her with a chair. For the purposes of harassment the Respondent saw the Claimant as an inconvenience and that was why she construed the comments in that way. For the purposes of victimisation there was sufficient proximity between the protected act and the dismissal such that it would be difficult to separate out how the decision was not linked to the protected act.

Findings of Fact

20. The Claimant was employed by the Respondent in its Bristol store as a sales assistant between 3rd June 2011 and 25th July 2020. She worked 42 hours a week. There was some issue as to whether she was contracted to have Wednesdays and Sundays as her non-working days. There was no written statement of particulars or contract of employment before us but the evidence that we heard was that over a long period of time it was generally the case that the Claimant would have those days off. The Respondent's position was that it tried to accommodate what the staff wanted. We find that this was a term that was implied by custom and practice over a period of time.

21. On 21st January 2020 the Claimant was commuting to work by bike when unfortunately, she was run over at a zebra crossing and accordingly sustained a tibial plateau fracture of her left tibia. Consequently, she had pins and plates inserted under surgery. She experiences chronic regional pain syndrome which causes her extreme stabbing and burning pain. She can struggle with weight bearing in the form of standing and walking and manages her pain by pacing her activities and by taking medication.

22. The Claimant was off sick and during this time had to re-learn to walk. She had the assistance of physiotherapy. She had contact with the Respondent. We noted that the messages were good-natured and that the Respondent enquired about the Claimant. The Claimant was paid in full for January and then went onto SSP. On 20th May the Claimant was furloughed. She was told that the shop was planning to open at the beginning of June but that only three members of staff would be able to come in.

23. On 15th June the Claimant was in the supermarket with her partner when Mr Smith of the Respondent asked her to call him. We find that she called him back. The Claimant describes Mr Smith as being 'incredibly aggressive' towards her and says that he asked her to work Wednesdays and Sundays. The Claimant responded to this by text asking for the Respondent to put to her (presumably in writing) the proposal of her working Wednesdays and Sundays from 1st July and the rest of her full-time wages being made up in furlough payments. Mr Smith responded saying that as discussed, the Respondent was asking her to restart back to work on Wednesday 1st July and then work on Sundays. He went on to say that the Wednesday was the start date but the Respondent would not be guaranteeing which day she would work as it would be dependent on business need. He said '*this will carry on through the short/ medium term whilst we get through this. We still hold the right to call you back for other days from furlough with the 24 hours notice period.*' Mr Smith went on to explain how the Claimant would be paid under the scheme.

24. We find that it was more likely than not that Mr Smith was not aggressive towards the Claimant in the phone call but was stating what the elements of his proposed working scheme would be from 1st July. We find that he may have been assertive in stating this but do not find it likely that he would be

aggressive. We do not find that plausible. The Claimant had been off sick. There was no reason for him to be aggressive. The communications between he and the Claimant had been cordial up to that point. The Claimant and Mr Smith had had a working relationship for a number of years. The Claimant does not say that there was any aggression in her whatsapp message only that the call was sprung on her whilst she was in the supermarket. We find in the circumstances that the Claimant may have mistakenly perceived it to be aggressive when it was not.

25. The Claimant responded to say that she had personal commitments on Wednesdays and Sundays. Mr Smith then clarified with her whether she was saying she was unable to come back to work on those days. The Claimant then said that she was posting a recorded delivery letter. On 16th June 2020 she wrote to the Respondent stating that she had taken legal advice and that by custom and practice her non-working days were Wednesdays and Sundays. She went on to say that she objected to the proposed changes for the following reasons: *'I have expressed on numerous occasions over many years that I am unable to attend work on either Wednesday or Sunday due to a range of personal commitments, and those personal commitments remain unchanged. On top of the above, the changes will also impact on my access to appointments which relate to my accident/ injury which I have scheduled to fit around my usual working week. If you change these days unlawfully without any previously agreed terms and conditions you will be in breach of contract.'*

26. Mr Smith then responded by letter dated 22nd June 2020 to say that the Respondent would now like to provide her with part time hours under the flexible furlough arrangement. He said that since the Claimant had made it clear that she was not available on Wednesdays and Sundays he would attempt not to include her on those days. He said '*however I do need to meet the needs of the business with all my staff so I may request that you work on these dates during the flexible furlough period. I will confirm any agreed requirement for you to return to work on flexible furlough in writing.'* He also said *'I understand that you are still having appointments in relation to your accident. Before you return to work I wish to talk to you about how your recovery is progressing to see if there are any reasonable adjustments that we need to put in place to support you.'*

27. The Claimant replied by letter dated 24th June 2020 and said that she continued to disagree with the proposal. She also said *'I don't think there is anything at this point that we need to discuss reference the accident, if anything arises it would be nice to address the situation then.'*

28. In or around late June 2020 the Respondent then wrote to the Claimant as follows (p.131): *'Dear Lucy, With current social distancing guidelines we are currently unable to offer you full time work. I am also mindful that you have not returned to work since your accident in January. In order to support you to return to work, I propose a return to work for 2 hours of 12pm to 2pm. Monday, Tuesday, Thursday, which we will use as lunchtime cover. We may also be able to make one of these days a full day of employment. We will pay in full for the hours that you work and the remainder of your salary will be*

made up using the flexible furlough payments.' The Claimant was then invited to call Mr Smith about this by 31st Junie 2020.

29. The Claimant then called Mr Smith on 30th June to discuss her return to work. During the call Mr White requested the Claimant came in at 1130 instead of 12 as previously mentioned in the letter. We do not consider that this had the effect of creating a proscribed environment or was related to disability. The Claimant's hours were simply extended by half an hour.

30. The Claimant returned to work on 6th July. At 0746 Mr Smith texted the Claimant stating that her start date the following day was now 0900. This affected the Claimant as it was a further change to what had been agreed and she was concerned about how she would be able to travel to work. While we accept that the change would have been unsettling to the Claimant, we do not find that it was such that it reasonably created a proscribed environment or that it was related to her disability. The context was the flexible furlough letter wherein Mr Smith had said that he required three staff to cover at any one time and on that day he required the Claimant to come in to make up the three. That said, we found that this was not consistent with the agreement that this was a phased return to work even though Mr Smith had said one of the days could be a full day. A phased return is an easing in gradually to the workplace environment, building up hours so that the employee can see how they adapt to a return to work.

31. After the Claimant arrived in the shop Mr Smith approached her to further discuss her return to work. The Claimant says that she was completely taken by surprise as this conversation was conducted on the shop floor and in front of Ms Sicolo. She said that the conversation had left her feeling shocked, embarrassed and very uncomfortable. We are satisfied that Mr Smith spoke to the Claimant in front of Ms Sicolo as she came in. However there was only Mr Smith and Ms Sicolo on the shop floor both of whom were managers and both of whom had had some prior contact with the Claimant while she was off sick. Therefore we do not find that there was anything overtly wrong with the choice of location to speak to the Claimant. We find that there was a discussion about the Claimant's return, keeping her safe in terms of COVID and about her injury in the context of the return to work. We find that it was reasonable for Mr Smith to have had such a discussion with her in the circumstances as she had been off work for a long period of time. It would be natural to ask how she was managing. We do not find that this would reasonably have had the effect of creating a proscribed environment for her.

32. We heard from the Claimant that she attempted to cycle in to work on 9th July as she had been unable to get a lift in from her partner. However we accept Mr Smith's evidence that had she spoken to him about difficulties with lifts he would have arranged something. She did not speak to him prior to coming into work. We do not find that the change of hours would reasonably have created a proscribed environment for her or was related to her disability.

33. On 10th July the Claimant had a day off. On that day she did speak to Mr Smith. She explained to him about the pain that she was experiencing and

requested to work reduced hours and finish at 3.30pm. She explained that she would need to sit on a chair as needed when doing her work. During that conversation Mr Smith agreed for the Claimant to work reduced hours and to sit as needed on a chair. We find that the Claimant having made it explicit what she needed, Mr Smith complied on that occasion. We do not see how that agreement was unwanted conduct in the circumstances or would have created a proscribed environment.

34. The Claimant then went on annual leave between 11th and 17th July. She returned to work on 18th July. The Claimant was allocated a desk with a chair on the first floor of the shop. The Claimant had to walk up 16 steps to get to this desk. There were other desks on the ground floor. We find that the Claimant was there to do stock taking duties. We do not consider that she was deliberately isolated from her colleagues as alleged. It was considered by the Respondent that this workstation would be preferable as she was on the same level as the toilets and would not need to be going up and down the stairs, which may have been required more had she been stationed downstairs. We accept that. We do not find that the allocation of this workstation would create a proscribed environment for the Claimant.

35. The Claimant said that she told Ms Sicolo that she was sitting on one of the bar stools as it helped to alleviate some of the pain and discomfort. She says that Ms Sicolo said to her '*not every Saturday will be like this'* in a confrontational and aggressive manner. We heard evidence from Ms Sicolo and found her to be a credible witness. She said that she had checked in with the Claimant and each time she had said that she had been fine. She said that she cannot remember saying those words but that she thought that if she had said them, they had been taken out of context. We find that it was likely that they were taken out of context and that even if they were said that they could well have been an innocent remark. We find that the Claimant is likely to have perceived this comment erroneously because she was feeling vulnerable at the time. Therefore we do not find that the comment, if made, had the purpose or effect of creating a proscribed environment.

36. We also heard that there was an issue as to whether the Claimant asked to leave at 3.30. Ms Sicolo could not remember but did not think that this would have been a problem as herself and Ms Danehar would be able to cover. We find it more likely than not that the Claimant did not ask. We find this was not plausible. If Ms Sicolo had rolled her eyes upon the Claimant's request when the Claimant had already agreed the time with Mr Smith, it was implausible that she would not have pressed Ms Sicolo about the arrangement.

37. On 20th July the Claimant came in. She alleges that Ms Sicolo commented to her '*oh you have enough energy to walk home'* as if to suggest that she had been exaggerating her symptoms. We accept Ms Sicolo's evidence that she would always have made an enquiry about how people were going home and that if she had said this, it would have been innocent. She denied that she would have said anything in a way which would suggest the Claimant was exaggerating her symptoms. We accept this. We find it unlikely given that Ms Sicolo had been friendly towards the Claimant during her sick leave and it

would be unlikely that she would suddenly change attitude towards her in such an extreme way. Again, we find that if this comment was made it was taken out of context by the Claimant and did not have the effect of creating a proscribed environment.

38. The Claimant went into work on 23rd July and says that on that day Ms Sicolo asked her confrontationally whether she had finished all her tasks. Ms Sicolo's evidence was that the Claimant had sat down at 4pm and made herself a cup of tea which was why she asked her the question. The Claimant told her that she had spreadsheet eyes and Ms Sicolo asked her to clean things down. She says that she may have spoken louder because of the social distancing, but that it made no sense for her to be resentful towards the Claimant. We accept this and we find that again, this comment was taken out of context and misperceived by the Claimant. It did not have the effect of creating a proscribed environment.

39. The Claimant had a telephone appointment with her GP on 22nd July and the GP issued her a fit note. This note is at page 139 of the bundle and recommended that the Claimant was fit for work with a phased return, altered hours and workplace adaptations. The note said '*to prevent future injury and worsening of pain please allow Lucy to have an appropriate place to sit during her shift if necessary. Please allow Lucy to do reduced hours at present and gradually increase hours as achievable with her pain.'*

40. The Claimant whatsapp'ed this note to Mr Smith on 24th July on his return from leave. The whatsapp conversation that then ensued over 24th and 25th July is at page 141. Mr Smith replied; *'Hi Lucy, Hope you had a nice holiday? Are you still struggling then? When we spoke on your return you said no special dispensation was necessary and we also gradually brought you back as we didn't return you from furlough until July and we started with short days. Your sick note ran until May; this was almost 2 months ago.; do you have any idea when you are likely to be able to do your standard full hours? Are we talking a few more days or a couple of weeks*? The Claimant's reply was *'The doctor's note is dated until 31st August for a phased return to work and then I will review with my GP again if necessary. I have had major surgery as you are aware with plates and pins and yes there is a lot of pain. The GP did suggest that sometimes it can be helpful for an occupational therapist to review the workplace also.* She went on to say *'I'm not being awkward or difficult with any of this, it's just about finding a practical solution for my return to work.'* On the morning of 25th July the Claimant clarified the adjustments that she was requesting '*for the phased return to work 3 days (from my usual working days) from 9 until 3.30pm. With the days being set properly in advance. This would be ideal to start with as per your previous letter in June. This would enable appropriate rest days for recovery and physiotherapy exercises.'*

41. By that message it would have been clear to the Respondent what adjustments the Claimant was requesting. The Claimant asked for a rota plan for the phased return for July and August.

42. The Claimant returned to work at 9am shortly after she had sent the message. Mr Smith asked for members of staff to be witnesses. We accept that he said that the request for reduced hours was unacceptable as it was: Mr Smith was unable to accept them. He dismissed the Claimant on the spot and told her that a letter would follow. We do not find that he was angry but do find that the dismissal was carried out abruptly.

43. The letter from the Respondent dated 30th July gives reasons for failing to accept the Claimant's request for reduced hours. The reasons given were that three people were required in for opening and closing for security reasons; for reasons of customer consistency; that the Respondent was unable to pay furlough if it was for health reasons and that it was not possible to give notice of days off in advance because of the pandemic. He went on to say that the shop could only function from 9 till 6.

44. The Claimant appealed on 27th July 2020 and also raised a grievance on 31st July 2020. The Claimant was informed that Croner's Face2Face Consultants would hear her appeal on 12th August and her grievance on 13th August. On 7th August 2020 the Claimant wrote to the owner Mr Titcombe to say that she was on leave and would not be available until early September. The Claimant was then invited to send in representations as to why she was unable to attend by video or mobile by 12th August. The Claimant did not respond and did not attend the hearings. Neither the Claimant's grievance nor appeal were upheld.

Conclusions

45. We add here that knowledge of disability was not pursued an issue before us and we find that materially the Respondent had knowledge of the Claimant's disability and the substantial disadvantage at the point of dismissal.

Harassment

46. For the reasons given above we have found that none of the Claimant's allegations amounted to harassment as they did not have the proscribed effect and were not related to the Claimant's disability. The claim of harassment must fail.

Victimisation

47. We find that the Claimant's whatsapp messages on 24th July with her sick note were a request for reasonable adjustments. We also find that the Claimant's message on 25th July was a clarification of what adjustments she said that she required. We find that the tone of Mr Smith's message on 25th July was one of frustration as it was clear he was saying that he had assumed the Claimant had said she had not needed any adjustments. We take this into account. The Claimant was then instantly dismissed a matter of hours after having clarifying the adjustments that she required. The burden shifts to the Respondent to provide a non-discriminatory explanation for the dismissal.

48. We find that the Claimant made a protected act under s.27(2)(c) in that she made a request for reasonable adjustments, both in terms of submitted a request initially on 24th July and clarifying the adjustments she was seeking on 25th July. It would be artificial for those messages to be separated out in terms of how they operated on the mind of Mr Smith – as has been contended for by the Respondent - particularly in view of the initial response from Mr Smith on 25th which displayed some element of frustration that the Claimant had asked for adjustments when she had previously said she needed none.

49. We find that the Claimant was therefore victimised by way of her dismissal.

Discrimination arising from disability

50. The Respondent did not hold any meeting with the Claimant to consider her request and how to proceed. If such a consultation had been held then there would have been an opportunity to discuss what accommodations could be made for the Claimant. While we appreciated that this was a difficult time for the Respondent in an unfolding pandemic, we also noted that the Respondent did not seek HR advice about the Claimant's request which suggested to us that the needs of a disabled employee was not so much of a priority to the Respondent.

51. The law does require employers to afford special treatment to disabled employees and to consider how to organise its affairs in order to accommodate them. There was no real attempt to sit down with the Claimant and work out solutions in circumstances where we find that the Claimant was willing to do this. For example, we find that there may have been an opportunity to agree a temporary variation to part time hours and furloughing the Claimant if she was unable to come into the shop to close it, as the restriction would then be related not to her being off sick but to her being unable to fulfil the operational requirements of the business because of her hours, which was consequent upon the pandemic. There could have been some sort of trial period of Mr Smith accommodating the Claimant's hours by having contingency plans for closure in the event of a member of staff being 'pinged', including himself, or other staff members agreeing to cover to close up in those circumstances. We noted for example that there had been a temporary agreement to the Claimant working till 3.30 on 10th July so this was not an insurmountable obstacle. There is an obligation on employers to go the extra mile but the Respondent did not have an open mind to this. Trial periods were on the table to start with from the Claimant's perspective by way of the agreement to curtail hours on 10th July so we see no reason why things could not be looked at on a short-term basis initially with some review built in. There may have been some discussion about assistance that could be provided from Access to Work or the services of an occupational therapist that may have fed into the process and provided both employer and employee with more information about what was required to assist the Claimant.

52. Accordingly we do not find that the Respondent can avail itself of the proportionality defence in s.15 Equality Act 2010 as there was no evaluative consideration of whether there was a non-discriminatory alternative to

dismissal. The dismissal was not proportionate. The Claimant was unable to work full days and was dismissed as a consequence.

Failure to make reasonable adjustments

53. The Respondent applied to the Claimant a PCP which was the requirement to work full shifts. We accept that this can be a PCP and see no problem with this: the requirement is set out in the dismissal letter of the Respondent. This put the Claimant at a substantial disadvantage because she was unable to manage her pain effectively over a long period of time and because for her, symptoms started to worsen towards the end of the day. The Respondent was under a duty to accommodate her by holding a meeting and varying her hours as necessary. The Respondent breached this duty and therefore we find that there was a failure to make reasonable adjustments.

54. We don't find that there was a PCP of requiring the Claimant to stand as we find that she was able to sit as and when she needed to. We dismiss this element of the claim.

Unfair Dismissal

55. We did not find a potentially fair reason of SOSR in the circumstances because the Respondent had not explored all possibilities for the retention of the Claimant so it could not reasonably be said that the working relationship had reached an impasse in our view. We found that the real reason was because the Claimant had requested adjustments and the Respondent was frustrated with this.

Polkey

56. We do not find that had the Respondent carried out a fair procedure the Claimant would have been dismissed within a matter of weeks (to allow for the procedure) as the Respondent had not had a meeting with her and opened its mind to exploring possibilities which may have meant that she remained in employment.

57. That said, we are receptive to the parties' arguments on the period for any loss of earnings and will hear those as part of the remedies hearing.

ACAS Uplift

58. We do not find that the uplift applies viz the disciplinary procedures as this was not misconduct or SOSR. However we invite the parties' submissions on whether there was a breach of Code in respect of the grievance.

Employment Judge A Frazer
Dated: 15th May 2023

Sent To the Parties On
26th May 2023 by Miss J Hopes

For The Employment Tribunals