EMPLOYMENT TRIBUNALS

Claimant: **Mrs A Yeates**

Respondent: **GT Plumbing Heating Ltd**

Heard at: **Bristol**

On:
Monday 13th March 2023
Tuesday 14th March 2023
Wednesday 15th March 2023

Before: **EJ Frazer**
Tribunal Member Meehan
Tribunal Member Williams

Representation
Claimant: In person
Respondent: Mr N Henry (Solicitor)

JUDGMENT

1. It is declared that the Claimant's particulars of employment further to s.12 ERA 1996 were as follows:

    1.1 The Claimant's core hours were Monday Wednesday and Friday 0900 till 1500 Monday and Friday and 0830 – 1630 on a Wednesday. The Claimant's hours were 20 hours a week with the Claimant working additional hours as and when required.
    1.2 The Claimant's start date for the purposes of continuous employment was 13th November 2019.
    1.3 The Claimant's remuneration was £12 per hour, reimbursement of fuel expenses and 10 per cent commission on the Respondent's profit margin for each successful job completed.

2. The Claimant's claims for unlawful deductions from wages for outstanding holiday pay, working hours on 21st September and commission and well founded and do succeed. The Respondent shall pay the Claimant the following sums due:

    Holiday pay **£160**

21st September	**£48**
Commission	**£3, 000**

3. The Claimant's claims for pay during furlough and her claim for wages for the week of 23rd March 2020 are dismissed.

4. The Claimant's claims for disability related harassment and a failure to make reasonable adjustments are dismissed.

5. The Respondent failed to provide the Claimant with full particulars of her employment pursuant to s.1 ERA 1996 and shall pay the Claimant the sum of **£480**.

6. The total amount that the Respondent shall pay to the Claimant is **£3, 688**.

REASONS

1. The Claimant brought claims for constructive unfair dismissal, marital discrimination, age discrimination, disability discrimination, unlawful deductions from wages, notice pay and holiday pay by way of an ET1 dated 2nd February 2021. The Claimant contacted ACAS on 5th December 2020 and the date of issue of the certificate was 8th January 2021. Conciliation period was 34 days. Anything presented prior to 30th September 2020 would be out of time. The claims for constructive unfair dismissal marital status and age discrimination were withdrawn and the existing claims before us today are for disability discrimination (harassment and a failure to make reasonable adjustments), unlawful deductions from wages, holiday pay and balance of notice pay. The Claimant claims she was not provided with a s.1 statement. The issues are as set out in the case management order of EJ Fowell dated 6th October 2021.

2. Disability was in dispute so we heard the Claimant's evidence on this as part and parcel of her evidence. We heard her evidence first thing on the first day and then heard from the Respondent's witnesses on the second day. We had a bundle of documents as well as a supplementary bundle. We heard submissions in closing (the Claimant had also provided a written document), deliberated and now provide our decision orally.

The Law

3. The definition of disability is contained in s.6 of the Equality Act 2010 which states that 'A person (P) has a disability if—(a) P has a physical or mental impairment, and (b)the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities'.

4. This is accompanied by Guidance on Matters to be taken into account when Determining Disability which expands on the meaning of the elements contained within the s.6 definition.

Knowledge

5. In order for there to be discrimination under s.21 the putative discriminator must have actual or constructive knowledge of the disability and the substantial disadvantage (**Donalien v Liberata [2018] EWCA Civ 129**). For the harassment claim to succeed knowledge of the disability must be possessed by the person alleged to have discriminated because it has to operate on his or her mental processes in order for the unwanted conduct to be related to disability (**UNITE the Union v Nailard [2018] EWCA Civ 1203**)

6. 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.

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

Duty to make adjustments

8. Under s.20 Equality Act 2010 an employer is under a duty to make reasonable adjustments 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.Under s.21 a failure to comply with the first, second or third requirement is a failure to make reasonable adjustments.

9. Under s.123 a complaint may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates or

within such other period as the employment tribunal thinks just and equitable. Under s.123(3) conduct extending over a period is to be treated as done at the end of that period.

Unlawful deductions from wages

10. Under s.13(3) where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions) the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

11. Under s.27 wages can include commission and holiday pay.

12. Under s,23(2) an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with the date of payment of the wages from which the deduction was made.

13. Under s.23(2) where a complaint is brought under this section in respect of a) a series of deductions the references in subsection 2 to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

Working Time Regulations 1998 – Holiday Pay

14. Under Regulations 13 and 13A a worker is entitled to 5.6 weeks' annual leave entitlement a year. Further to Regulation 14 where a worker's employment is terminated during the course of his or her leave year where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired the employer shall make him or her a payment in lieu of leave. Under Regulation 13(3) a worker's leave year begins on such date during the calendar year as may be provided for in a relevant agreement or on the date on which employment begins and on each anniversary thereafter.

15. The **Working Time (Coronavirus) Amendment Regulations 2020** were brought into force with immediate effect on 27th March 2020. Regulation 13 (10) permits the carrying over of leave where it was not reasonably practicable for the worker to take some or all of his leave in the leave year as a result of the effects of Coronovirus. Under Regulaton 14 any payment in lieu on termination may include leave carried over under that provision. The Government Guidance was that workers on furlough continue to accrue statutory holiday and that workers on furlough can take holiday but the employer should consider whether the restrictions on movement would prevent employees from relaxing, moving and enjoying leisure time.

Findings of Fact

16. The Claimant was employed by the Respondent as a Showroom Manager/ Designer from 13th November 2019. The Claimant had been working at North Bristol Plumbing and had known Mr Gary Tweedie as he held an account there and would come into the shop. He mentioned that he had started a showroom. They spoke on a number of occasions. There was some dispute as to whether all the discussions about the job offer were contained in one discussion or whether they were spread out. However we find that this was not so much of relevance to us. What was relevant was that the Claimant said that she was thinking of leaving because the company was moving and Mr Tweedie offered her a position as a showroom manager/ designer in his relatively new showroom. He invited her to a meeting in or around September to discuss the role. It was agreed by both parties that the Claimant was offered £12 an hour and that the Respondent would reimburse her fuel costs. Part of her job role was to meet clients. The fuel expense benefit was not in the statement of terms and conditions at page 41 but we consider that it was a benefit insofar as it was payable as a means of reimbursement of petrol money.

17. There was no job description or offer letter for the Claimant's role. There were no staff handbooks available to employees at that time. Mr Tweedie accepted under cross-examination that at the time his HR administration was not optimal but has said that he has since had some input from an HR organisation to assist him with this. The size of the company (which was very small at that time) led to an informal approach to employees at the time and it was accepted by the Respondent via Mr Tweedie that there was then a lack of comprehension as to some aspects of HR practice. We are assured that this has since been remedied.

18. One of the issues we have to decide was what the Claimant's working hours were agreed to be. We find that the timesheets at page 138 show that the Claimant worked Mondays, Wednesdays and Thursdays initially and then swopped to a Friday. Her hours vary over the course of her employment with furlough hours being noted down as 20 hours. In August 2020 the core hours for holiday were down as 20 hours. We find that the parties agreed that the Claimant would work 20 hours as core hours with flexibility to do additional hours as and when required. The contract was wrong about these hours as that stated that the hours were 9 to 3. We find that both parties' understanding was that it was 20 hours. The Respondent agreed to pay back 3 hours when the Claimant was underpaid during furlough from 17 hours to 20 a week which supported that mutual understanding of a 20 hour week.

19. The Respondent has invited the Tribunal to attach weight to a document at page 41 which is termed Contract of Employment Statement of Main Terms and Conditions of Employment. We did not attach much weight to this document as the evidence of what the parties agreed despite particulars often being strong evidence of what the parties agreed. This is because it was not signed by both parties and there were a number of inaccuracies which conflicted with the corroborated evidence we heard about what had been agreed. The hours were incorrectly recorded. There was no commencement date for continuous employment purposes. It records that the Claimant had

advised that she would like to opt out of the company's pension system when that was not agreed. There is no record of the benefit of fuel expenses and we do not accept that this was something that was not relevant as it was something that was being paid. When the Claimant did not sign the document it was not followed up and similarly the Claimant did not chase for it. We find that the document was not thought out. The Claimant says that she had never seen the document before. We accept that it was likely that Mr Tweedie had provided it but it may have been that the Claimant overlooked it.

20. Further to s.12 ERA 1996 we confirm that even if the particulars were provided they were not sufficient and the correct particulars as to hours are as follows: Monday Wednesday Friday the Claimant's core hours were 9 till 3 Monday and Friday and 0830 – 0430 on a Wednesday. The Claimant worked a 20 hour week with the Claimant working additional hours as and when required.

21. There is also a dispute about the Claimant's entire remuneration and whether she was entitled to commission. The Claimant says in her ET1 that both Angela and Gary agreed at the meeting in September that she would be paid her hourly rate and 10 per cent commission. This position was responded to in the ET3, which, we heard, was filled out by Angela and Gary, as 'unpaid commission – Amy received commission on any jobs completed successfully. Unfortunately throughout her employment only one job was successful.' There was an attached list which was not with the document.

22. In their evidence before us Angela and Gary said that commission was never agreed. We noted that the Claimant did not raise a complaint about non-payment of commission during her employment or even when she had the first opportunity to do so in December 2020. However there was a whatsapp conversation on p.157 which she says was evidence of her chasing it. The Respondent, by contrast, says that the conversation related to one job that she had brought with her from her previous employer and was to be rewarded. We find that we could take that whatsapp conversation either way and we found it to be ambiguous and not very helpful.

23. We noted that in September 2020 when the Claimant was provided with a job offer for a new position which was to be less onerous for her she was offered a lower hourly rate of £10 per hour and 8 per cent commission and we find that it would be unusual where, in circumstances of her being given a lesser role, she would be given commission despite Mr Tweedie having said that this was to incentivise her in response to her poor performance issues or that he was 'chucking her a lifeline' to avoid terminating her employment. We did not accept that. We find that it was natural in that context for the employer to have dropped both the hourly rate and commission from £12 to £10 and from 10 per cent to 8 per cent accordingly. We take notice of the context of the Claimant's original job which involved selling and creating leads and we find that it was more likely than not that she was offered commission for that role but that the structure of this was never discussed. The Respondent, who operated the scheme said that this took effect on jobs completed successfully but that only one was ever completed successfully. We find it likely that the

Respondent's statement in the ET3 was correct and having heard evidence we find that what in fact was the case was the reason it was never implemented or paid was because Mr Tweedie was dissatisfied with the Claimant's work and considered that her shortcomings had lost him time and money in rectifying them. The finer details of that structure was never agreed. The matter was put on the back burner and never discussed between the parties.

24. We come now to our findings on what would have been likely to have been agreed as the scheme had the commission payments been honoured. When questioned about how the proposed scheme for the Claimant's new role would work, Mr Tweedie said that it would be on job completed on 8 per cent of profit margin of between 20 to 30 per cent. We find that it was likely that it would not on less favourable terms than what was offered for the 8 per cent role Had the parties looked into it we find it likely that Mr Tweedie would have adopted a similar approach to the commission structure with the Claimant. It would not make business sense for him to have adopted a scheme that gave the Claimant or any other employee any more commission than this (i.e. on gross receipts). Looking at it from an alternative standpoint it was an implied term of the contract that the commission would be calculated on 20 to 30 per cent of the Respondent's margins. That gave the term business efficacy.

25. Therefore we also make a declaration as the Claimant's remuneration being £12 per hour, reimbursement of fuel expenses and 10 per cent commission on the Respondent's profit margin for each successful job completed.

26. We find that further to s.23 ERA the Claimant's claim for commission is based on a series of deductions going up to termination because there was a running deficit on the face of each payslip. Therefore this claim is in time and we will need to ascertain the specific amounts owing on the basis according to which we have identified the structure as a remedies issue.

Notice pay and Unpaid Wages

27. When is the Claimant's effective date of termination? The Claimant gave notice on 7th September 2020 which was expressed at that point to be 1 month's notice. We have asked ourselves whether there was an agreement for one month's notice between the parties. We find that it was not likely that the parties reached agreement on there being a month's notice. It was also not in the Respondent's contract document from the employee's perspective. This was significantly over and above the minimum statutory requirement. There was no acknowledgment of the Claimant's resignation in writing. Gary says there was a discussion where the Claimant and Gary agreed that there would be a parting of the ways on 21st September because the Claimant wanted to get started with her own company (with some assistance from Gary). We accept that this is the date when the contract came to an end by agreement. At page 49 there is a note made by the Respondent of her leaving date and that she worked on 21st September for 4 hours. The Respondent's response to her not having been paid the 4 hours was that it was recorded on a timesheet at page 146. Angela agreed that the Claimant worked it. The

Claimant was not paid this amount in her final payslip and is therefore awarded £48 as unlawful deductions from wages.

Holiday Pay

28. The Claimant we find was not an atypical worker and had core hours of 20 hours a week. We find that her annual leave year aligned with that of the Respondent company and started on 1st January and ran to 31st December each year. The Claimant claims the 4 bank holidays from the furlough period and the 2 from her notice period. The Respondent's case is that her holiday entitlement plus 2 extra have been paid to her already.

29. What was her pro rata entitlement? It was 16.8 days based on a 20 hour week. Bank holidays are included in 5.6 weeks and unless it was agreed otherwise that is the position. We find that it was unlikely that the parties agreed that the Claimant would get an additional entitlement over and above what would normally be allocated within the framework of the Working Time Directive/ WT Regulations 1998. We also do not consider that it would have been in either party's contemplation to distinguish between the 4 weeks derived from the Working Time Directive and the 1.6 from UK law as reflected in 13 and 13A of the WT Regulations.

30. How much leave had the Claimant been entitled to? The Claimant had 12 days pro-rata'ed from 8 months. It was agreed that she had taken 8 days already.

31. There was an issue is surrounding the 4 days during furlough which were 4 bank holidays. The Respondent says she took them as holiday and she says she would have been entitled to carry them forward. We agree that she ought to have been allowed to take the holidays during a time when she would be able to enjoy them more fully as per the Government guidance. The Claimant was paid at 100 per cent rather than 80 per cent and we take that into account.

32. The Claimant also took 2 days holiday during her notice period – p.146. Therefore she is owed 80 per cent of two bank holidays. She was paid in full for the period during furlough and we offset the amount that she was overpaid against that. (6.6 hours x 2 equals 13.3 hours at 12 an hour equals £160). The Claimant is owed £160 for her holiday pay.

Furlough
Period – Start of furlough

33. The Respondent via Angela accepts that the Claimant commenced work on 1st April. We find that furlough did start then as the evidence that we heard was that she was doing full work until 1st April and until she handed her laptop and phone to the showroom on 1st April. Therefore she is owed 20 per cent of a week's pay, which we calculate to be £40. The deduction would have arisen in the April or May payslip If pay date at the latest was 30th May then limitation would be 29th August 2020. She presented on 2nd February 2021. There was

no evidence before us that it was not reasonably practicable for her to have presented within the time limit. We therefore find that the claim was presented outside the time limit.

34. The remaining claims have been presented in time as the last payslip was on 30th September which fell within the limitation period.

Work done during furlough

35. The Claimant produced whatsapp messages which covered the period while she was on furlough. These show that there was frequent contact by Angela in particular about a number of work-related enquiries. On 29th March via a whatsapp message the Claimant had shown willing to assist the company over the furlough period. She carried on helping out during furlough without objection. All of the enquiries were work-related. She dealt with ad hoc enquiries during furlough further to her offer to help the company out. She did not do her entire duties. We do not find that there is any payment owing during this period.

Was the Claimant disabled?

36. Does the Claimant have an impairment? On the balance of probabilities the evidence of the online test indicates that she does have an impairment. She has stated that she had it at school. We accept that it was long-term. The Respondent disputes that it has a substantial adverse effect on her day-to-day activities. The test is more than minor or trivial (s.212 Equality Act). There was no evidence presented to contradict what she said in her statement about how her condition had affected her. We took notice of the way she conducted herself during the hearing. We noted that she would struggle with accessing information and finding the way to express herself. We find it more likely than not that she was a disabled person by reference to the definition in s.6 Equality Act 2010.

Knowledge

37. Did the Respondent have actual or constructive knowledge of her disability? There a direct dispute of fact on this. The Respondent says that it was not informed at any point about the Claimant's condition. The Claimant says that she did tell the Respondent as she stated that paperwork was not her strong point as she had dyslexia. We find that she was likely to have said paperwork was not her strong point but not that it was because of her dyslexia.

Actual Knowledge

38. There was a meeting on 12th July 2020 which the Respondent called because it had concerns about her performance. Following that the Claimant issued her with a verbal warning for 6 months and set out its expectations going forwards. If dyslexia had been mentioned we are surprised that it was not mentioned in either that letter or the resignation letter as the subject area was paperwork and it would have been an opportunity for it to have been

mentioned in some way. The Respondent expressed in that letter 'you expressed the reasons for mistakes happening was because you were not in control' and we accept that. Dyslexia was not mentioned by the Claimant in her resignation letter on 15th July, which would also have been a point at which it would have been reasonable for her to raise it. There was a further meeting on 7th September 2020. The Claimant was offered what was effectively a demotion by letter that was pre-drafted on 5th September 2020 and nothing was mentioned in that letter about dyslexia. There was also nothing written on the document filled in by Angela under 'medical conditions' or elsewhere on page 45 which would indicate nothing had been discussed prior to that date. The Claimant then resigned.

39. The Claimant said that the Respondent employed a school leaver named Paige to provide her with assistance. Mr Tweedie says that Paige was employed as a favour for the Claimant as she was a family friend. We find that it was more likely than not that she was employed to provide assistance to everyone and not just the Claimant. Mr Tweedie explained that having someone like that was important as he could then go off and do a job instead of cleaning the showroom for example and we accept that. We do not accept that Paige was employed as an adjustment or as assistance specifically for the Claimant. We also find that the Claimant introduced a software system designed by her husband to assist her but did not say why to the Respondent. We did not find that she indicated to the Respondent that this was because of any disability but rather that the purpose of the introduction of that software was because of what she had used and been used to in previous jobs and that she found the Word template not very user friendly.

40. We find the Respondent did not have actual knowledge of the Claimant's disability.

Constructive knowledge

41. Ought the Respondent to have reasonably known that she had dyslexia? The Claimant was making errors such as not including customers' names on quotes. The Respondent was a small employer with no centralised HR or Occupational Health department. They held meetings with the Claimant to explore the performance issues. The Claimant expressed the reasons for why the mistakes were occurring and no disability was mentioned or came out of it. We do not find that the Respondent ought reasonably to have made any further enquiries as there was nothing to put it on notice that the cause of the performance issues was an impairment.

42. Given that the Respondent had no knowledge of the Claimant's disabilities those claims must fail.

Remedy – Commission

43. The parties queried the basis of the remedy and we indicated that we had found that it was commission payable on all jobs completed successfully as per the evidence that we heard and the Respondent's statement in the ET3.

We directed that it would be calculated accordingly on the basis of all sales that had the Claimant's name on which had been completed and that the calculation would be 10 per cent on the profit margin (estimated to be between 20 and 30 per cent). We sent the parties out to reach agreement on the figure as we indicated that we did not consider that it was proportionate or in accordance with the overriding objective to have a remedies hearing on this. The parties' agreement is set out in the judgment.

Employment Judge A Frazer
Dated: 16th March 2023

AMENDED 30th June 2023

AMENDED JUDGMENT & REASONS
SENT TO THE PARTIES ON:
17 July 2023 By Mr J McCormick

FOR THE TRIBUNAL OFFICE