EMPLOYMENT TRIBUNALS

Claimant: Ms W Omi

Respondent: Ladbrokes Betting and Gaming Limited

Heard at: London Central (by CVP) **On:** 12, 13, 14 & 15 September 2023

Before: Employment Judge Emery
Members: Ms S Campbell
Mr A Adolphus

REPRESENTATION:

Claimant: In person
Respondent: Mr H Menon (counsel)

JUDGMENT

The Tribunal declares the claimant was unfairly dismissed.

The claim of direct disability discrimination succeeds in part.

REASONS

The Issues

1. There is no agreed list of issues. It is agreed that the claimant is a disabled person under the provisions of s13 Equality Act 2010, by way of the condition of Conns Syndrome. It is also agreed that the 1st claim contains one complaint of direct disability discrimination: an allegation that the respondent continually refused to return the claimant to a 30-hour week contract from a 17 hour a week contract, despite her requests, and hours being available and given to other staff members.

2. On the 2nd claim, there is one significant issue of dispute on the issues, whether her dismissal is an allegation of constructive unfair dismissal only (the respondent's contention) or whether the claimant was claiming her dismissal amounted to an act of direct disability discrimination.

3. On her 2nd claim form, the claimant ticked the unfair dismissal at Box 8.1 but did not tick the disability discrimination box (bundle page 45). The narrative at Box 8.2 states she resigned *"… due to direct disability discrimination and poor treatment … which made my working conditions intolerable. … The discriminatory treatment coupled with a lack of support led to the breakdown in the employment relationship … As a result I felt I had no option to resign."*

4. The Tribunal accepted that this wording expressly links the discriminatory treatment to the claimant's decision to resign. The claimant confirmed at the hearing that she intended to claim her dismissal was an act of discrimination. We did not accept that the lack of a tick at box 8.1 precluded what was, on the fact of the wording, a claim that her dismissal was *"due to"* the discrimination she alleges she faced, an allegation that her dismissal was an act of direct disability discrimination.

5. Judgment and verbal reasons were provided at the hearing; a request for written reason was made shortly after.

6. <u>Direct disability discrimination</u>

    1. Did the respondent

        (a) Fail to increase the claimant's contractual hours to 30 hours, from 17 per week
        (b) Dismiss her?

    2. Was that less favourable treatment? The claimant says that she was treated less favourably than Tejas Vasanka and Ajendra Kunduru.

    3. If so was this treatment because of the claimant's disability?

7. <u>Constructive dismissal</u>

    1. Did the respondent do the following things:
        (a) Discriminate against the claimant, as set out above
        (b) Treat her poorly including failing to take appropriate measures to address the hours issue; fail to support her
        (c) Create a hostile working environment?

    2. Was this conduct which was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent, or did the respondent have reasonable and proper cause for its conduct?

3. Did the claimant resign in response to the breach?

4. Did the claimant affirm the contract before resigning?

Witnesses and evidence

8. We heard evidence from the claimant and for the respondent from Mr. John Chiswell, Area Manager, Mr. Amran Ul-Haque, Area Manager, Mr. Satvinder Virdi, Shop Manager, and Mr. Faizul Kabir, Retail Support Manager. Mr. Kabir's evidence was not challenged.

9. There was also a statement from Mr. Naresh Dugroo, Shop Manager who, says the claimant, refused to increase her contracted hours on her repeated requests. He was on holiday abroad during the hearing, the respondent could not explain why, as he was informed of and told his managers he had diarised the hearing date shortly after this was sent to the parties on 23 January 2023. Despite the Tribunal's request, no explanation was forthcoming - whether the hearing date was discussed with him, when the respondent became aware he would not be available, and why no steps were taken to enable him to give evidence from abroad.

10. This judgment does not recite all the evidence we heard, instead it is confined to the findings to the evidence relevant to the issues for this hearing. The judgment incorporates quotes from the Judge's notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions.

The facts

11. The claimant was employed by the respondent as a Customer Service Manager from 13 December 2016 to her resignation in November 2022. Until November 2021 her place of work was the respondent's Cornhill shop (also referred to as 2962). Prior to the events in this claim, the claimant had significant disability-related time off work culminating in an operation and post-operative recovery.

12. In October 2021 the respondent announced that it was closing the Cornhill shop, and all staff were offered redeployment. The claimant had two consultation meetings with her Area Manager, Mr. Chiswell, 4 or 5 alternative shops were suggested by him.

13. The parties agree that the claimant limited the shops and locations where she was prepared to work. We found that this limitation was partly because of her location preferences, primarily the City of London. It was also partly because the claimant considered the physical environment of some of the shops including in the City exacerbated her health issues; she believed having worked in these locations that one had damp issues, one was in a basement with poor air circulation. Medical advice supported her position (for example a medical certificate dated 23 December 2021).

14. At the 2nd consultation meeting on 10 November 2021, the claimant was told by Mr. Chiswell the only viable option given her location preferences was a 17 hours

per week contract at the Watling Street shop. The claimant queried whether additional hours were available, and was told no. Mr. Chiswell's evidence was that if there was a 30-hours contract available *"… she would have got it. Ideally, she wanted to move on her [30 hours] contract but there was no option at this time."*

15. The claimant's evidence, which we accepted, was that at this time she believed more hours would become available as there was often high turnover in the respondent's shops, she believed she would *"soon"* be able to increase her hours again. We accept that her words to Mr. Chiswell were along the lines of *"if there's nothing else available, I will take it for this moment"*. The minutes of meeting say the claimant was *"prepared to step-down"* to 17 weeks to find a suitable vacancy (82), and we saw no real divergence between this statement and the claimant's evidence of what was said at this meeting.

16. The claimant did not receive an updated contract, but we accept she was aware her contractual hours were reducing, the claimant believing she would be able to gain additional contractual hours when they became available.

17. On 29 November the claimant started work at the Watling St shop. Her manager, Mr. Dugroo, managed this and the Chancery Lane shop (a two-shop market). The claimant's evidence was that it was immediately apparent to her that other employees were working over their contractual hours. We accepted her evidence that there were *"… so many hours available",* that some staff were working significant overtime. The Watling St rotas in December 2021 show, members of staff the following discrepancy between hours worked and contracted hours, for example: 32.67 worked / 20 contracted hours; 46.50 / 20; 40.67 / 30; 47.50 / 35 (100, 103).

18. The claimant was offered and accepted overtime – for example the rotas show w/c 13 and 20 December she worked over 30 hours a week (101).

19. On 20 December 2021 Mr. Dugroo told the claimant that he wanted to formalise her contractual reduction in hours to 17 per week. The claimant objected to Mr. Dugroo, being of the view that her contract had not yet been changed, and there were plenty of hours available for her to work, and she said so to Mr. Dugroo, pointing out that in the following week there was 70-80 hours available overtime.

20. On 23 December 2021 the claimant went off sick. She saw her GP that day. Her GP's medical certificate says that when fit to return adjustments should include working afternoon or evening shifts; to work in 'high street' (i.e. not underground) shops. She returned to work 2 January 2022.

21. On 26 December 2021 the claimant sent an email titled contract hours and work condition to Mr. Ul-Haque, complaining about the reduction in hours, the overtime available, enclosing screenshots showing one colleague was working 60 hours on a 20 hour a week contract. *"I initially agreed 17 hrs because I was told by the manager that there are not enough hours available for 30hrs contract. Now that I can clearly see that is not correct, I don't want to reduce my contract hours. Instead stick to my original 30 hours…".* She complained about the rota being

changed without notice, including 4 changes in 5 days, and being required to work 26 December with little notice and when she had prior plans. She mentioned health issues and that she was unable to work at Chancery Lane because it was underground. *"I am happy to work at [Watling St] during any afternoon or evening shift as per my original contract hours of 30"* (85-6).

22. Mr. Ul-Haque responded; on the contract hours he said that it had been *"agreed"* her hours would reduce to 17. In response, the claimant reiterated that there are *"70-80"* hours overtime *"on average"* every week, *"So not having enough hours for my 30 hours contract is not right. Even I am doing overtime here on a regular basis."* (93-4).

23. No response appears to have been sent to the claimant, and Mr. Ul-Haque could not recall what he did next, but we accepted that Mr. Ul-Haque told her that any change in her contract hours was for Mr. Dugroo to agree, that he had *"no issues"* with this (the claimant repeats this in writing on 10 February, below). It appears that Mr. Ul-Haque spoke to Mr. Dugroo as the immediate issue of the short-notice change of rota was resolved.

24. It was put to the claimant that Mr. Dugroo offered her overtime and she refused; the claimant said she asked for overtime and that she was only occasionally offered overtime *"when no one else was available".* On one occasion she refused because she was being asked to go to another shop at the end of her shift and she could not. We accepted that the claimant requested overtime, was only occasionally given it, and that she refused overtime only on one occasion when it was offered at short notice.

25. In the January 2022 rota the claimant's hours were reduced to 17 per week. The rotas in the bundle for February 2022 show that a consistent pattern of two of the four CMSs working at least double their contracted hours (e.g. 44.58 worked / 20 contracted; 60.08 worked / 17 contracted). A third CSM was contracted to work 35 hours and worked around 40-50 hours a week; the claimant was the only CSM working close to their weekly contracted hours in this period (98-99).

26. On 10 February 2022 the claimant sent an email with attachments titled *"Discrimination at workplace & poor treatment"* to Colin Hughes, Regional Manager. She mentioned the regular overtime available for *"almost all the employees … yet for some reason, my manager doesn't have enough hours to give me. Even people coming from different shops to work here and getting overtime".* She said she did not agree the reduction in contract hours with Mr. Dugroo as *"I could clearly see"* the store had enough hours *"yet he had reduced my contracted hours to 17 without my consent"* and refused to allow her to work more hours. She said one employee on a 20-hour contract had resigned, that Mr. Ul-Haque had agreed that she regain her contract hours, yet Mr. Dugroo refused. She reiterated some of her earlier written complaint to Mr. Ul-Haque, that her treatment was *"not equal … I feel penalised, segregated, and discriminated against because of my illnesses…*". She asked for a *"formal; investigation"* into the *"workplace discrimination"* (95-7).

27. Mr. Ul-Haque's evidence was that Mr. Hughes forwarded the claimant's email to him and they subsequently discussed her complaint about the contract hours. In answer to question from the Tribunal, Mr. Ul-Haque said that he discussed the 30 hours issue with Mr. Hughes, that *"we discussed that there was no flex to allow us to do so".* The claimant was not sent an acknowledgement or response to this complaint; Mr. Ul-Haque said that he briefly discussed *"face to face"* with the claimant. The complaint of unequal treatment in allocation of shifts and overtime was not addressed.

28. Mr. Chiswell's evidence was that the claimant's contractual hours could not be increased because there was a set 'core' number of contract hours per shop, that unless a member of staff left there was no scope to increase contract hours. There are also overtime hours available and many employees work overtime. 'Shop flex' was introduced by the respondent; it was unclear on the evidence when - Mr. Ul-Haque believed it was in place by December 2021, the claimant believed end-March 2022. We noted that Mr. Ul-Haque had 'no issue' with the claimant and Mr. Dugroo discussing with the claimant a possible change in her contractual hours in December 2021/January 2022.

29. We concluded that whatever policy was in place from December 2021 onwards, there was no bar on a Shop Manager being able to put forward a business case with his Area Manager to increase a shop's or two-shop market's core hours and allocate these hours amongst current employees.

30. The claimant was referred to occupational health *"due to existing medical conditions and a request for a set shift pattern".* Mr. Ul-Haque received the OH report dated 23 March 2022, this referred to her diagnosis in 2019, surgery in 2021 and ongoing complications for which she was prescribed medication. The report says that she wanted to increase her hours to 30 hours; it recommended flexible working including avoiding early morning shifts and possible issues with reduced energy levels (112-3). Mr. Ul-Haque discussed this report with the claimant, at this and subsequent meetings the 'agreed actions' was to continue to give the claimant late shifts, and that she could not work in basement shops (116, 118).

31. There was evidence on the difference between single-site (one shop) and single-market (two-shop) contracted employees working under one Shop Manager, and 'multi-site employees'. It was agreed that a multi-site employee "sits above" the normal two-shop market to provide additional float and relief cover: their contracts provide more flexibility across shops and/or flexible shifts-patterns in the same shop. It was agreed that Adjinder Kumar a comparator of the claimant who often worked at Watling St, was a on a multi-site contract, as shown on the Watling St rota.

32. The claimant's 2nd comparator, Tejas, started working at Mr. Dugroo's two sites, Chancery Lane, and Watling St, in March 2022 on a 20 hour a week contract. He was not a 'multi-site' employee. On 16 June 2022 his contracted hours were increased, to 30 hours a week, based at Watling St.

33. It was put to the claimant that Tejas worked across 6 stores, hence this change in his contracted hours. The claimant's answer, which we accepted, was that it was common for single site (or two-shop market) employees to work across different stores at the outset of employment to gain experience, that she did the same in *"lots of different shops"* when she started work.

34. We noted that the timesheets show that prior to his transfer to Watling Street, Tejas worked 11 shifts at different stores; after his transfer he worked the majority of his shifts at Watling Street.

35. Mr. Ul-Haque's evidence was not same as the case put to the claimant. He was involved in a business case, suggested by Mr. Virdi (who was temporary looking after Mr. Dugroo's shops from March to August 2022): *"[Mr. Virdi] told me that because of staffing issues we should transfer Tejas to [Watling St] on a 30-hour contract. This was a business case decision, [the business case] referred to productivity issues …."* He said that he was involved with Mr. Virdi in putting this business case to 'head office'. He said that head office could have rejected it, *"but because the business case was strong enough, they accepted."* Tejas was given an increase in his contracted hours from 20 to 30. Mr. Ul-Haque accepted that the 'flex' policy was disapplied *"because the business case was strong enough to mitigate the change."*

36. On why the claimant was not considered for increased hours at this time Mr. Ul-Haque said *"when [Mr. Virdi] spoke to you about flexibility, you said no."* He accepted that the claimant sought a 30-hours contract but that she was *"not as flexible"* as Tejas, that Mr. Virdi *"made the decision based on availability. Also, Tejas was flexible over several shops.".* He said that Tejas *"was doing over 30 hours anyhow and due to his availability and flexibility he was given this opportunity."* He accepted that the business case was submitted for additional hours, and not for a particular employee.

37. Mr. Virdi's evidence was that he needed a flexible employee who could work across 4 stores, including the basement store at Chancery Lane, that the claimant was restricted by the hours she could work. He said that he was not aware that the claimant had been seeking a 30 hour a week contract when he discussed his business case with Mr. Ul-Haque, that it was agreed that these would be offered to Tejas. *"I said a candidate is available called Tejas, who is flexible and working in 4 shops who has no restrictions."*

38. Mr. Ul-Haque was asked about the usual practice when more core hours are given *"… these are allocated by the manager – manager will go around and offer the additional core hours to employees. Or we hire, or we recruit within the company."*

39. The respondent's case is that in June 2022 the claimant said she only wanted to work Monday to Wednesday as she was working in another role, this restricted her hours. The claimant accepted she needed to look for another job because her hours had been reduced and she needed the money. At this time, she was not working elsewhere but she was studying. In a text on 7 June, in response to a request from the respondent, she provided times/days she could work *"as*

examples" of the shifts she could work based on her contracted hours in the next few weeks.

40. We did not accept the respondent's case that the claimant was expressly limiting her hours in this text. She was asked for shifts she could work; she was contracted to work 17 hours and she gave an "example" of a shift pattern. We do not accept at this time the respondent believed the claimant had restricted herself to 17 core hours.

41. The respondent's case to the claimant is that she was not given as much overtime as other employees as she was limited to one shop and the late shift. The claimant did not accept this, that there were *"lots of hours"* available and staff often had preferred shifts; also that there were several of the 18 other shops in the City she could have worked at.

42. The case was also put that the respondent needed *"flexibility"* that the claimant could not provide; the claimant argued this was incorrect, giving an example of page 99, 'VJ' working 51 hours at Watling Street, he was a Barking based employee contracted 20 hours a week. This would she said have been planned in advance, that much of the overtime was *"pre-planned overtime"* agreed in advance with each employee.

43. The claimant found out that Tejas was working significant shifts and was based at Watling Street on a 30-hour contract when she looked at rotas at some point at the end of July 2022. By this date, the rotas show Tejas had worked 10 shifts at Watling Street between 17 June and 28 July.

44. The claimant went off sick on 1 August 2022 with depression submitting medical certificates. She remained in contact with her employer about her absence by text. She did not return to work until her resignation on 28 November 2022, when she wrote: *"Actually there was some issues at work I was trying to solve from long time. But I failed, nobody listened. It's actually affected my mental health so badly. So I have decided to resign."* (155).

45. The claimant was asked to reconsider her resignation and was given an opportunity to discuss her concerns *"…so we can look to resolve them for you."* The claimant did not respond, in her evidence she said she did not respond because *"I could not take it anymore. I was badly depressed…".*

46. In her evidence the claimant explained that one of the reasons she resigned was the repeated rationale she was given at the time and repeated in the respondent's witness statements - Mr. Dugroo "there was no budget we did not have a 30-hours contract…" (12 -14); Mr. Chiswell at paragraph 14, Mr. Ul-Haque at paragraph 7 that only 17 hours was available. She was told she said, "*and therefore the answer was no"*. She argued that this rationale did not match the reality - *"if there are no vacancies, why are they appointing 30 hour a week CSMs? It is only for me that there was no 30 hour a week contract. This is why I am depressed. When I was told there was no vacancy and then the role was*

advertised and available for other people. This is a clear as daylight I have been discriminated against."

Closing arguments

47. We address the claimant's and respondent's arguments in our Conclusions below.

Legislation

48. Equality Act 2010

13 Direct discrimination

(a) 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.

39 Employees and applicants
(1) …
(2) 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;
…

136 Burden of proof

1. This section applies to any proceedings relating to a contravention of this Act

2. If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred

3. But subsection (2) does not apply if A shows that A did not contravene the provision.

49. Employment Rights Act 1996 – Dismissal

s.94 The right

a. An employee has the right not to be unfairly dismissed by his employer

s.95 Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . ., only if)—

i. …
ii. …
iii. the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

s.98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show

a. the reason (or, if more than one, the principal reason) for the dismissal, and
b. that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) …
(3) ….

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)

a. depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
b. shall be determined in accordance with equity and the substantial merits of the issue

Relevant case law

50. Direct Discrimination

1. Has the claimant been treated less favourably than a comparator would have been treated on the ground of her race? This can be considered in two parts: (a) less favourable treatment; and (b) on grounds of the race (*Glasgow City Council v Zafar [1998] IRLR 36)*

2. The requirement is that all *relevant* circumstances between complainant and comparator are the same, or not materially different; the tribunal must ensure that it only compares 'like with like'; save that the comparator is not disabled (*Shamoon v Chief Constable of the Royal Ulster Constabulary [2013] ICR 337*)

3. The tribunal has to determine the *"reason why"* the claimant was treated as he was (*Nagarajan v London Regional Transport [1999] IRLR 572)* and it is not necessary in every case for the tribunal to go through the two stage procedure*;* if the tribunal is satisfied that the prohibited ground is one of the

reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial *(Igen v Wong [2005] EWCA Civ 142). "*Debating the correct characterisation of the comparator is less helpful than focusing on the fundamental question of the reason why the claimant was treated in the manner complained of.*" (Chondol v Liverpool CC UKEAT/0298/08)*

4. Was the claimant treated the way she was because of her race? It is enough that her race had a 'significant influence' on the outcome - discrimination will be made out. The crucial question is: 'why the complainant received less favourable treatment … Was it on grounds of [race]? Or was it for some other reason?" *Nagarajan v London Regional Transport [1999] IRLR 572, HL*. "What, out of the whole complex of facts … is the "effective and predominant cause" or the "real and efficient cause" of the act complained of?" (*O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School [1996] IRLR 372*, *[1997] ICR 33)*

5. *London Borough of Islington v Ladele*: *[2009] EWCA Civ 1357* provides the following guidance:

   a. In every case the tribunal has to determine the reason why the claimant was treated as he was. As Lord Nicholls put it in *Nagarajan v London Regional Transport [1999] IRLR 572, 575*—"this is the crucial question". In most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator

   b. If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial: see the observations of Lord Nicholls in *Nagarajan* (p 576) as explained by Peter Gibson LJ in *Igen v Wong [2005] EWCA Civ 142*, *[2005] ICR 931*, *[2005] IRLR 258* paragraph 37

   c. As the courts have regularly recognised, direct evidence of discrimination is rare and tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test, which reflects the requirements of the Burden of Proof Directive (97/80/EEC). These are set out in *Igen v Wong*

   d. The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one.

e. It is not necessary in every case for a tribunal to go through the two-stage procedure. In some cases it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the *Igen* test: see the decision of the Court of Appeal in *Brown v Croydon LBC [2007] EWCA Civ 32*, *[2007] IRLR 259* paragraphs 28–39.

f. It is incumbent on a tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are.

g. It is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The proper approach to the evidence of how comparators may be used was succinctly summarised by Lord Hoffmann in *Watt (formerly Carter) v Ahsan [2008] IRLR 243*, *[2008] 1 All ER 869* … paragraphs 36–37) …"

6. *Essop v Home Office (UK Border Agency) and Naeem v Secretary of State for Justice [2017] UKSC 27, [2017]:* 'even if the protected characteristic is not the overt criterion, there will still be direct discrimination if the criterion used … exactly corresponds with a protected characteristic … and is thus a proxy for it.' The terminology used in EU case law is that the ground for less favourable treatment must be 'inextricably linked' with the protected characteristic.

7. *Dziedziak v Future Electronics Ltd UKEAT/0270/11, [2012] EqLR 543:* Requiring an employee not to speak “in her own language” was in effect a proxy for nationality, the use of these words “… demonstrated an intrinsic link with nationality and was sufficient in itself to pass the burden to the respondent to establish that there was another, non-discriminatory, explanation for the instruction, which it had failed to do.

8. *Chondol v Liverpool CC UKEAT/0298/08*, *[2009] All ER (D) 155 (Feb), EAT*: A social worker was dismissed on charges which included inappropriate promotion of his Christian beliefs with service users. His claim for direct religious discrimination failed as the tribunal found that 'it was not on the ground of his religion that he received this treatment, but rather on the ground that he was improperly foisting it on service users'. The EAT accepted that the distinction between beliefs and the inappropriate promotion of those beliefs was a valid one, and it was correct to focus on the reason for the claimant's treatment. Citing *Ladele*, the EAT confirmed

that 'debating the correct characterisation of the comparator is less helpful than focusing on the fundamental question of the reason why the claimant was treated in the manner complained of'.

51. Constructive Unfair Dismissal

1. *Malik v Bank of Credit and Commerce International SA [1997] IRLR 462*: "The employer shall not without reasonable and proper cause conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

2. *Leeds Dental Team Ltd v Rose[2014] IRLR 8, EAT*: "The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of…"

3. *Hilton v Shiner Ltd [2001] IRLR 727, EAT: it is important to consider whether the* employer has acted as it has *without reasonable and proper cause*.

4. *British Aircraft Corpn v Austin* [1978] IRLR 332: a failure to investigate complaints promptly and reasonably may amount to a breach of this term, as long as the conduct is repudiatory in nature.

5. *Blackburn v Aldi Stores Ltd [2013] IRLR 846, EAT:* Serious breaches of the employer's internal disciplinary and grievance procedures may amount to a breach of this term.

6. *W A Goold (Pearmak) Ltd v McConnell [1995] IRLR 516* EAT: there is an implied term in the contract of employment 'that the employers would reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have'.

7. *Greenhoff v Barnsley MBC [2006] IRLR 98* EAT: a persistent failure by the employer to make a reasonable adjustment as required by the disability discrimination legislation could amount to such a breach

8. *Berriman v Delabole Slate Ltd [1985] ICR 546 CA:* s.98 ERA still applies in a case of constructive unfair dismissal - "… the only way in which the statutory requirements … can be made to fit a case of constructive dismissal is to read [s 98(1)] as requiring the employer to show the reasons for their conduct which entitled the employee to terminate the contract thereby giving rise to a deemed dismissal by the employer."

52. Time

1. *Mensah v Royal College of Midwives EAT/124/94:* The key date is the date of occurrence of the act, not the date when the complainant was aware of

it: 'An act occurs when it is done, not when you acquire knowledge of the means of proving that the act done was discriminatory. Knowledge is a factor relevant to the discretion to extend time. It is not a pre-condition of the commission of an act which is relied on as an act of discrimination'.

2. *Virdi v Commissioner of Police of the Metropolis [2007] IRLR 24, EAT*: "… while there is much to be said for time not beginning to run until an employee is made aware of the decision which confers the cause of action … that is not how the legislation has been drafted; the question is when the act is done, in the sense of completed, and that cannot be equated with the date of communication".

3. *Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640:* "…it is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike s 33 of the Limitation Act 1980, s 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in s 33(3) of the Limitation Act 1980 … the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account… That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."

4. *Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23:* "The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) "the length of, and the reasons for, the delay". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking."

5. *Pathan v South London Islamic Centre UKEAT/0312/13:* it is not the case that discretion to extend time should only be exercised in exceptional circumstances: 'it does not require exceptional circumstances: what is required is that an extension of time should be just and equitable'.

6. *Ahmed v Ministry of Justice UKEAT/0390/14:* "It is for the Claimant to satisfy the Employment Tribunal that time should be extended. There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be extended. The Employment Tribunal is required to consider all relevant circumstances including in particular the prejudice

which each party will suffer as a result of granting or refusing an extension…".

Discussion and conclusions on the evidence and the law

Direct discrimination

53. The claimant did not actively pursue an argument that the initial reduction to 17 hours a week in November 2021 was an act of discrimination: to be clear any comparator who similarly restricted themselves in their choice of location and hours would have been offered the same 17-hour contract that was offered to the claimant. There was no discrimination at this time.

54. We concluded that while a business case to increase contract hours *may* have been possible prior to June 2021, Mr. Dugroo did not consider making one, and would not have done so if asked by the claimant or anyone else. Prior to June 2021 there were no increased contract hours available. Mr. Dugroo was in charge and he was happy with the contract hours in his two-shop market. There was no difference in treatment in relation to allocation of contract hours at this point.

55. We accept that Mr. Dugroo's allocation of overtime strongly suggests that the claimant was overlooked for additional overtime hours from January 2022 onwards in comparison to other CSMs at Watling Street. While this is not a pleaded allegation of discrimination and detriment, it suggests to us that there was differential treatment of the claimant at this time.

56. While the failure to properly respond to the claimant's complaints – in particular her email to Mr. Hughes – was extremely was poor management, there was no difference in treatment between her and any comparator in the same position at this time. A comparator who was actively seeking an increase in their contractual hours would have been treated similarly.

57. It was Mr. Virdi's involvement which prompted the business case to increase the contract hours, including hours required at Watling Street and his business case was accepted in June 2022. While we saw no direct evidence on it, we accept that the aim of the business case was to have a regular increase in contract hours at Chancery Lane and Watling Street. While work was available at other locations Mr. Virdi managed, the business case did not relate to this overtime, which was available at these other shops in any event. The business case was for an increase in contract hours at Watling Street and Chancery Lane.

58. The respondent's forceful submission was that Tejas is not an appropriate comparator as he became an employee after many of the events in question. They say the correct comparator would be an employee who was on a 17 hour a week contract who was not flexible in the hours they could work and who could not work in many of the stores. Tejas is not the correct comparator as he was flexible and could meet the business requirements.

59. The Tribunal concluded that the requirements of flexibility for the business case to increase hours at Watling St and Chancery Lane was not defined by the respondent. That was because there was no need for flexibility in these additional hours at these stores. It was clear on the evidence that after his hours were increased, Tejas worked regular afternoon and evening shifts at Watling Street, in particular Tuesdays and Fridays. The claimant was seeking the same location and similar hours. We accept that there were hours at other stores the respondent also needed filling at short notice, and the claimant was limited in the hours she could work. But this was not the requirement at Watling Street.

60. Considering the circumstances relevant to the issue in the case, we concluded that the appropriate comparator is an employee who was working in the same two-store market as the claimant, on a part-time contract, who was seeking an increase in their contract hours in a situation where increased contract hours were available. This applied to the claimant and to Tejas, who we concluded was an appropriate comparator.

61. The claimant was not offered additional contract hours at Watling Street, which she had been pressing for. Tejas was given these hours. This was a difference in treatment and was less favourable treatment.

62. The respondent's explanation is that Mr. Virdi wanted Tejas in the role as he was flexible. But this does not explain Mr. Ul-Haque's failure to intervene during the discussions on the business case and suggest the claimant could work at least some of these hours, that recently she had actively sought an increase in hours and complained when they were not given. Tejas started working on a consistent pattern of either Tuesday or Friday working at Watling Street on the evening shift – this did not require flexibility.

63. The respondent's explanation also does not explain why the general practice of offering increased contract hours to all staff was not followed. No witness could explain this, apart from saying Mr. Virdi was seeking flexibility.

64. Mr. Ul-Haque knew the claimant was disabled and restricted in her hours and place of work. We did not accept that the claimant's apparent inflexibility was a factor which should have stopped her from being asked. The respondent operates shifts, and its evidence was that many staff have preferred rota patterns. We reiterate that many of the 11 shifts worked by Tejas at Watling St in June-July were hours suitable for the claimant, that Watling Street did not require a significant degree of flexibility in the additional contract hours.

65. The recent Occupational Health report had referred to the claimant's ongoing health issues. We concluded that this fed the perception of the Mr. Ul-Haque that the claimant was lacking in flexibility, and for this reason was not suitable for any of the additional contract hours on offer. We concluded that a significant reason for not considering the claimant for additional contract hours was because she is disabled. The respondent's use of flexibility was, we found, a proxy for the view that the claimant was inflexible because she is disabled. This was the reason why she was not considered for any of the additional contract hours, in particular the increased contract hours available at Watling Street.

66. To put it another way, we concluded that had the claimant been an employee who was not disabled but who was actively seeking additional hours at Watling Street only, it is highly likely she would have been informed of the prospect of hours being available at Watling Street. The need for flexibility at other shops was not relevant to the fact there was an agreed increase in regular contract hours at Watling Street which the claimant was willing and able to work.

67. We did not consider a non-disabled employee's lack of flexibility would have stopped them being offered increased hours at Watling Street. Tejas wish for increased hours could have been accommodated by increased hours at Chancery Lane plus additional hours he could work flexibly elsewhere. We concluded that alternatives were not considered because the respondent had a closed mind, the claimant was disabled and was lacking in flexibility and therefore she was not going to be considered for increased hours. In this we followed Essop that the claimant's lack of flexibility was effectively a proxy for the claimant's disability, as she was unable to work flexibly because she is disabled.

68. The Tribunal had significant concerns about the respondent's transparency when considering when and how to offer increased hours and overtime to employees. It struck us that managerial discretion appeared to play a significant part in the process. A lack of clear guidelines can give rise to unintended outcomes, including issues of discrimination. We concluded that this is what occurred here. No one intended to discriminate against the claimant – but we concluded that the outcome of the respondent's decision making, and the thought process around it, was discriminatory, in that its mindset was not to consider informing the claimant about the increased contract hours at Watling Street because of a perception she was inflexible as she was disabled; when in fact the respondent knew it did not require flexibility in the allocation of increased contract hours at Watling Street.

69. We have concluded that the claimant was discriminated against, and she resigned as a consequence. We conclude that the claimant's dismissal amounted to an act of discrimination.

Time

70. The respondent's position is that time started to run on 1 March 2022, this shortly after Mr. Ul-Haque spoke to the claimant following her email to Mr. Hughes. The issue of the contract to Tejas does not start the clock again, as the claimant was informed there was no increase in contract hours in March 2022. The issue in July is an allegation of an employee's appointment, this is not an issue in the claim within the tribunal's Order paragraph 4.

71. We disagreed – the Order explicitly states at paragraph 4 that her hours were not increased and Tejas is named as a comparator. It says she discovered the difference in treatment at end July 2022.

72. We have already concluded that there was no act of less favourable treatment – direct discrimination – prior to Tejas's appointment. If we are wrong on that we

would have said that time ran continuously from January 2022 to the date of Tejas's appointment. The claimant made continuing requests for an increase in contract hours during this period, and we found that when a decision was made to appoint Tejas the claimant's requests for more contractual hours were known about but were disregarded in this decision-making process. There were decisions being taken before and during this appointment process not to allocate the claimant more hours. We found that this act of the respondent concluded on 12 June 2022, the date of Tejas's appointment to a 30-hours contract based at Watling St. We accept that the claimant only became aware of this act at end-July 2022.

73. ACAS were contacted 9 August 2022, the ACAS Certificate issued 20 September 2022, a 42-day conciliation process. The claim issued 20 October 2022. The last act must therefore have been on or after 9 June 2022 for the claim to be brought within the extended statutory limitation period. As the last act was 12 June 2022, we found that this claim was therefore issued in time.

74. If we are wrong on time, we would have concluded that it would have been just and equitable to extend time: the claim would be only days out of time. The 2nd ET claim, dismissal, is in time, and the Tribunal would be considering many of the events in the 1st claim in support of her allegation that the dismissal was an act of discrimination. There was therefore no prejudice to the respondent in allowing an extension of time.

75. In addition, the increase in hours for Tejas did not follow the usual pattern of publicising the increase in hours and inviting staff to apply, the claimant was not aware of the hours Tejas was working until she cross-referenced the rotas. This failure of the respondent to follow its normal practice meant that the claimant was not aware of the discrimination that had occurred until late July, and she took action to contact ACAS thereafter. At this time, she remained in employment. We noted that the claimant would have no other recourse for acts of discrimination were we to strike-out the claim as being out of time. For these reasons we would have regarded it as just and equitable to extend time, were the claim out of time.

<u>Unfair dismissal</u>

76. We concluded that the reason why the claimant was resigned was because of the failure of the respondent on several occasions to increase her contractual hours. This for the claimant came to a head when she discovered Tejas's contractual hours at Watling Street. As she put it no one had listed to the issues she was trying to resolve. We accept that the failure to allocate her more hours and her view that this was discrimination and there was no attempt to resolve this was the principal reason for her resignation.

77. As we have found, the failure to increase the claimant's hours amounted to an act of direct discrimination. Noting that not all discriminatory acts necessarily amount to a repudiatory breach of contract *(per Amnesty International v Ahmed)* we concluded that in this case it did. The respondent's only justification for not considering the claimant for more hours was that she was inflexible, when in fact

the hours at Watling Street did not need flexibility. The reason for resignation was that she had tried to raise and resolve issues at work for some time, but *"no=one listened".* We accepted that the fact the claimant's concerns were ignored, her request for an investigation into discrimination was ignored, her request for more hours was rejected, when hours became available shortly after she was passed over for, all created a hostile working environment for her. We also accepted that the acts of failing to consider her for increased hours was the issue she refers to in her resignation email as that she was trying to solve: all of this were issues she had been unable to solve, and which led directly to her resignation.

78. We concluded that the reason why the claimant resigned is because she reasonably considered she had been treated unfairly, she had complained, no-one had addressed her complaint, she was then discriminated against in the allocation additional contract hours at Watling Steet, which she found out about in end July 2022, the last act which caused her resignation. The failure to address her complaint – listen to her – and the appointment of Tejas and failure to consider her were repudiatory breaches of contract, the respondent was acting without reasonable or proper cause, and the claimant resigned as a consequence.

Employment Judge Emery
20 October 2023

Judgment sent to the parties on:

20/10/2023

For the Tribunal:

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