EMPLOYMENT TRIBUNALS

Claimant: Mrs G Owen

Respondent: Irvings Butchers Limited

HELD AT: Manchester (in person) **ON:** 20, 21 & 22 November 2020

BEFORE: Employment Judge Johnson

MEMBERS: Mr B Rowen
Mr P Dobson

REPRESENTATION:

Claimant: Unrepresented
Respondent: Mr Walker (solicitor)

JUDGMENT

The judgment of the Tribunal is that:

(1) The complaint of disability discrimination is not well founded which means that it is unsuccessful.

(2) The complaint of age discrimination is not well founded which means that it is unsuccessful.

REASONS

Introduction

1. These proceedings arose from the claimant's employment with the respondent from 20 June 2023, until 23 August 2023 when she resigned.

2. She presented her claim to the Tribunal on 4 August 2020 (before she had resigned) and following a period of early conciliation from 3 August to 4 August 2020. She presented complaints of unfair dismissal and discrimination arising from disability (identifying chronic kidney disease or 'CKD' as it is commonly known) and also a complaint of direct discrimination in relation to age.

3. Judge Holmes considered the claim form shortly after it was presented and ordered that the complaint of unfair dismissal should be rejected as the claimant was still employed at the time when the claim was brought. The Tribunal noted that the claimant did not subsequently make an application to amend the claim following her resignation nor did she present a separate claim form identifying a complaint of unfair dismissal.

4. The respondent then presented a response which resisted the claim and challenged the claimant's disability.

5. Case management took some time to be considered, but on 13 August 2021, Judge Rice-Birchall conducted a preliminary hearing case management (PHCM). She identified the list of issues, made case management orders and listed the case for final hearing.

6. The case was also listed for a preliminary hearing in public to deal with the disputed matter of disability under section 6 EQA. This was heard by Judge Slater on 10 August 2022, and it was held that the claimant was disabled by reason of CKD. Further case management orders were also made.

7. This hearing was listed to determine liability, (in other words whether the claimant's complaints succeeded in whole or in part) and if so, the valuation of remedy in relation to losses which she can claim.

Issues

8. The parties agreed a list of issues at the PHCM before Judge Rice Birchall and these were included in the hearing bundle. They are as follows:

9. <u>Time limits (section 123 Equality Act 2010 (EQA))</u>

    a. Given the date the claim form was presented and the effect of early conciliation, the claimant's complaint of disability discrimination may not have been brought in time if it is about the act of placing her on furlough on 3 April 2020 as opposed to the state of being on furlough on 3 April 2020 as opposed to the state of being on furlough which continued until 23 August 2020.

    b. Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

        i. Was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the act to which the complaint relates?

ii. If not, was there conduct extending over a period?

iii. If so, was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the end of that period?

iv. If not, were the claims made within such further period as the Tribunal thinks is just and equitable? The Tribunal will decide:

1. Why were the complaints not made to the Tribunal in time?

2. In any event, is it just and equitable in all the circumstances to extend time?

10. Disability (section 6 EQA)

a. Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

i. Did she have a physical or mental impairment: namely chronic kidney disease? (considered a disability by reason of judgment of Judge Slater dated 10 August 2022).

ii. Did it have a substantial adverse effect on his/her ability to carry out day-to-day activities?

iii. If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

iv. If so. would the impairment have had a substantial adverse effect on his/her ability to carry out day-to-day activities without the treatment or other measures?

v. Were the effects of the impairment long-term? The Tribunal will decide:

1. did they last at least 12 months, or were they likely to last at least 12 months?

2. if not, were they likely to recur?

11. Discrimination arising from disability (section 15 EQA)

a. Did the respondent treat the claimant unfavourably by placing her on furlough without any consultation or written confirmation?

b. Was the claimant signed off sick as a consequence of the claimant's disability?

c. Was the unfavourable treatment was because of any of that sickness absence?

d. Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were to treat the claimant fairly while not able to be in work

e. The Tribunal will decide in particular:

   i. was the treatment an appropriate and reasonably necessary way to achieve those aims;

   ii. could something less discriminatory have been done instead;

   iii. how should the needs of the claimant and the respondent be balanced?

f. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

12. Failure to make reasonable adjustments. (sections 20 & 21 EQA)

a. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

b. A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

   i. Not ensuring that other staff or customers wore face masks?

c. Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that had they ensured that other staff and customers wore face masks she would have been able to continue to work?

d. Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

e. Did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage? The claimant says that the following adjustments to the PCP would have been reasonable:

   i. Ensuring customers and staff wore face masks?

f. By what date should the respondent reasonably have taken those steps?

13. Harassment (section 26 EQA)

a. Did the respondent inform the claimant that she was to be placed under furlough when she was present in the shop as a customer?

b. If so, was that unwanted conduct?

c. Was it related to disability?

d. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

e. If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

14. Direct discrimination on grounds of age. (section 13 EQA)

a. The claimant's age group is over 55 and she compares herself with people in the age group under 18.

b. Did the respondent employ a person under 18 in place of the claimant?

c. If so, was that less favourable treatment? The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

d. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.

e. The claimant says she was treated worse than Rebecca Hartley who she says was employed in her place and/or a hypothetical comparator.

f. If so, was it because of age?

g. Did the respondent's treatment amount to a detriment?

h. Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

    i. Treating the claimant fairly while she was absent from work.

i. The Tribunal will decide in particular:

    i. Were the aims legitimate and of a public interest nature;

    ii. was the treatment an appropriate and reasonably necessary way to achieve those aims;

iii. could something less discriminatory have been done instead; and

iv. how should the needs of the claimant and the respondent be balanced?

15. Before the Tribunal began its reading, the parties confirmed the list and clarified certain allegations where further information was required.

Evidence used

16. The claimant gave evidence and was the only claimant witness whom she relied upon. She had previously identified a diagnosis of autism and her request was allowed whereby she be permitted to write down questions if she felt it was necessary, which would assist her in being able to answer them.

17. The respondent's sole witness was the managing director and majority shareholder, Mr John Turner. He had left school at 14 and it was agreed that the relevant sections of documents which he was cross examined upon, would be first read to him by the claimant or Judge Johnson so he could properly consider the answers that he wished to give.

18. These measures were offered in accordance with the Equal Treatment Bench Book and the overriding objective under Rule 2. As a consequence of these particular adjustments, both parties were able to effectively participate in the hearing and provide evidence in cross examination and during examination from the panel.

19. An agreed bundle was provided which included the proceedings, case management orders, judgment on disability, emails and letters and relevant medical information. The respondent also prepared a brief cast list and chronology which was agreed and was particularly helpful in reminding the panel of the events arising from Covid during the first lockdown from March to July 2020 and shortly afterwards.

Findings of fact

20. The respondent company ('Irvings'), is a butchers in Ulverston, Cumbria. It occupies a Victorian shop, with two entrances divided into cooked meats section on the left hand side and raw meat butchery products on the right hand side. This divide is understood to be for food hygiene and safety reasons. There is also a butchery area at the back of the shop. Although the Tribunal appreciates that the number of employees could fluctuate to some degree, Irvings typically employed 8 people. There were a diverse range of ages amongst the employees with teenagers being employed who were still at school to longer standing employees with more than a decade of service including a 74 year old who was a delivery driver.

21. John Turner was the majority shareholder and managing director of Irvings and had run the business for 46 years. He outsourced employment and payroll matters to his accountant and tended to follow their advice as given.

22. The claimant (Mrs Owen), was employed as a sales assistant from 4 August 2020. She had previously had a long career as a nurse and upon retirement in her mid 50s, began to work for Irvings as sales assistant from 20 June 2018. She worked from 9.30am to 2.30pm on the cooked meats section, was paid minimum wage and averaged 28 hours a week.

23. The issues in this case relate to the first period of lockdown arising from the Covid pandemic in 2020 until 23 August 2020 when Mrs Owen resigned.

24. In February 2020, Mrs Owen was diagnosed with CKD. On 19 March 2020 she was called by her GP. They told her to stay at home because of their concerns that she was particularly at risk should she be exposed to Covid. This was commonly known as 'shielding' and was a frequently adopted precaution at the beginning of the pandemic where a medical expert believed that a person might be them more vulnerable to significant harm than a typical person should they contract Covid.

25. The Tribunal reminded itself that during this period, that no Covid vaccine had yet been developed and this would not happen until the beginning of 2021. Additionally, PPE including facemasks were extremely difficult to source. Government advice was developing and changing all the time and employers, especially small businesses, would find it difficult to manage their workplaces during this period in the safest way possible while remaining open. Irvings was a retail business supplying food and was therefore considered to be an essential service. This meant that it could continue to operate during the first lockdown period which began on 23 March 2020, while many other businesses were required to close. During this first lockdown and before the wearing of face coverings became a legal requirement in England from 24 July 2020 for people visiting shops, at some stage after lock down began Irvings operated a policy of socially distanced queuing with only 2 customers being allowed to enter each side of the shop at any one time. However, we recognised that the dimensions of the actual shop and the needs of business to serve products safely and hygienically meant that it was difficult for staff to avoid close contact when working on the shop side. As soon as face masks became generally available, the Tribunal accepted that Irvings obtained masks for staff with a corporate logo printed on them. Customers were required to wear masks once they were required by the government to do so.

26. On 19 March 2020, Mrs Owen claimed she sent a handwritten letter to Mr Turner, (photocopy on p58). Mr Turner said that he had not received this letter during lockdown, and he only became aware of its existence during disclosure as part of the Tribunal proceedings. The disputed letter notes that Mrs Owen said that she had been told by her GP to *'socially distance myself as I have chronic kidney disease'.* She suggested that she could continue to work doing deliveries and, in any event, asked that he job be kept open and reminded Mr Turner that she was entitled to SSP. Mr Turner said that because he had not seen this letter at the time, he did not know about Mrs

Owen's suggestion and did not consider it as an option himself, independently.

27. While there was a dispute about the date when this letter was created and sent, there was no dispute that Mrs Owen had met with Mr Turner at this time and discussed the matters raised in this letter verbally. She was also given a fit note by her GP (p69) dated 26 March 2020 describing her as being unfit to work at all by reason of her CKD stage 3 and that the note was effective for 3 months from that date, which we understood meant it expired on 25 June 2020. This was sent to Irvings and they were accordingly on notice that Mrs Owen needed to shield. The Tribunal does not accept that when Mrs Owen informed Mr Turner that she needed to take time away from work, she actually suggested that she could actually work if staff and customers were made to wear PPE. Indeed, during her evidence, Mrs Owen confirmed that the first time she raised this possible solution was during the hearing of her evidence in these proceedings and it had not been raised previously, either during her employment or when she presented her claim.

28. Mr Turner discussed Mrs Owen's absence with his accountant, and it was recommended that she be placed on furlough (receiving 80% of pay), rather than claim SSP as this would result in her loss of income being lessened. At no point did Mrs Owen challenge this decision and she continued to receive furlough payments until the date of her resignation in August 2020, subject to what was effectively a renewal when she sought to return to work following the expiry of the fit note.

29. Although there was a dispute between the parties regarding the way in which this decision was communicated to her, there was no dispute that she was informed at Irvings' premises and that it was communicated verbally. However, Mrs Owen said it took place in the shop, Mr Turner said it took place upstairs in private. In the absence of any supporting evidence for either side, we are unable to find conclusively either way, but we noted that Mrs Owen was unable to describe who was present (either in terms of staff or customers) in the shop if told there despite her knowing most people in Ulverston who visited the shop and of course the staff. We concluded that wherever the conversation took place it was made as a private comment in such a way which was directed to Mrs Owen alone and not carried out in such a way that it could be heard by others or to cause embarrassment to her. It was noted in her letter dated 17 June 2020 (see p59 and below), she referred to the *'furlough agreement that you kindly set up for',* which on balance suggested to the Tribunal that she was not troubled by the manner which was communicated to her and was more than happy with the decision to furlough her.

30. She suggested that Mr Turner had used the term *'here's skiving Gill!*' when she attended the shop as a customer during her absence. Despite saying that she was accompanied with her husband, and he witnessed this comment, he did not attend to give evidence, nor did her provide a witness statement to support this allegation. Moreover, she said she attended Irvings as part of her shopping during the first lockdown period despite shielding because nobody was available to assist with shopping. This is surprising given that her

husband accompanied her at the alleged time and there was no suggestion that he could not have carried out this activity alone on her behalf. Mr Turner denied making the statement as alleged and on balance we were unable to accept that it happened, or at least happened during the material time to which this case relates.

31. Shortly before the 3 month fit note expired, Mrs Owen sent a typed letter to Irvings on 17 June 2020 which informed Mr Turner that the:

'…sick certificate terminates on 29th June 2020 and that also as I am ready, available and fit for work it is my intention to return to work on that date (Monday 29th June 2020).'

The letter was not accompanied by any medical evidence or anything else which might explain how despite having been previously told by her GP to shield by reason of Covid, she could now return to work without any precautions being put in place. However, it was noted that the fit note was edited by her GP in such a way that they did not need to assess her fitness to work at the end of this period. Nonetheless, Mrs Owen still had CKD and Covid was a still a significant issue in the UK with many people suffering from the condition and it seems unlikely that with Covid continuing to be a problem which had not diminished, a GP if consulted would not have recommended the shielding to continue for a further extended period.

32. Mrs Owen then spoke with Mr Turner on 25 June 2020 and referred to this conversation in her letter of 26 June 2020, (p61). It was entitled *'redundancy'* and suggested that her position was about to be made redundant. She reminded him that she wanted clarity concerning her employment, that he was unavailable to have a chat on Saturday 27 June 2020 and that she wanted to have a representative present during any meeting. She concluded the letter by asking for a meeting and that it must be arranged within 7 days.

33. The Tribunal understood that Mrs Owen emailed Irvings' accountants on 29 June 2020 (a document that was not available in bundle) and which was the day she was originally proposing to return to work.

34. Mr Turner wrote to her shortly afterwards in an undated letter, (p60 and which appeared to have been written on Irvings' behalf by accountants), explaining that:

'…I do not feel it appropriate to bring your period of furlough to an end at this stage, at least without having some clarity about your medical condition…'

'…you had gone off work on medical advice because of your kidney condition…'

'Although business is picking up again in the shop the same issues, that led to you being advised by your GP to stay away from work in the first place, still apply. Customers are still coming into the shop and although we are following the government guidelines as best we can, there is inevitably going to be a risk if you return at the current time'.

'As such, before I can consider whether or not it would be appropriate for you to return to work, it would assist if you could let me have a letter from your GP confirming the prognosis for your kidney condition and what steps we might reasonably take to minimise any possibility of you contracting Covid 19 should return to work.'

'Once you can let me have this medical evidence, I will then be happy to review the position, If it is possible to bring you back to work, we can then make arrangements for it to happen. If it is not, then the furlough will need to continue until such time as it is safe to bring you back.'

35. The Tribunal was not entirely sure when this letter was drafted (it has no date printed on it after all), but it appears to respond to Mrs Owen's letter sent on 17 June 2020 rather than in response to her letter dated 26 June 2020.

36. In effect, Mr Turner was stating that Mrs Owen had been signed off because of risks relating to her health by reason of CKD and her increased vulnerability should she contract Covid. He was making clear that Covid was still a problem and that in order that he could be assured that it was safe for her to return to work, he needed some medical evidence to support this. This was a reasonable approach for an employer to take given the context of this situation.

37. Although initially, Mrs Owens was unhappy that Mr Turner did not simply accept her assertion that she was fit to return to work, during her evidence she conceded that it was *'not unreasonable for [Irvings] to seek further information',* but that her GP would not speak with Mr Turner and that they required her to pay £80 for a letter confirming the present position concerning her health, which she could not afford.

38. The Tribunal noted that Mr Turner was simply suggesting that if it assisted, he would be happy to speak directly with the GP but was not making it a requirement that they speak with him before Mrs Owen could return to work. She did not provide any authority to contact the GP or obtain medical records, nor did she communicate the financial difficulties that she had with paying for a letter from her GP confirming her fitness for work. She did not ask that Irvings pay for the letter so that the information requested could be obtained from the GP. Although Mrs Owens did refer to a letter from her GP in the bundle which in a single sentence confirmed that she had CKD, it was dated 24 August 2021 and the Tribunal finds that it was not provided until after her employment terminated.

39. Mrs Owen continued to remain on furlough. Mrs Owen sent a letter dated 26 June 2020 referring to a conversation with Mr Turner on the previous day and which recalled that he was concerned that Irvings might need to consider making redundancies. Mr Turner did recall discussing with Mrs Owen on or around 25 June 2020. She did not cross examine him about this particular matter during his evidence. Accordingly, we therefore accept that he did query whether she wished to take redundancy if she was unable to return to work, that no agreement was reached, and no unilateral redundancy decision

was taken by Mr Turner. Indeed, we accepted his evidence that once home deliveries became well established, the need for staff increased rather than diminished. We do not find that Mrs Owen was likely to be made redundant during the summer of 2020. There may have been a conversation about this as an option, but that was all.

40. On 14 August 2020, Mrs Owen sent an email at 10:48 explaining that *'It is with regret that I am forced to tender my resignation from Irvings Butchers effective from 23rd August 2020'.* It was a short email and provided no reason behind the decision to resign and simply explained what money she believed was owing to her up to and including her date of resignation, (p63).

41. Mrs Owen suggested that during her absence a younger member of staff Rebecca Hartley was employed to carry out her duties and was effectively being trained up to take over her roll. There was no dispute that she was working for Irvings before Mrs Owen began to shield, that she of school age and therefore a teenager. Due to the challenges arising from Covid, she was asked to coordinate the door to door deliveries which increased as the pandemic extended and we accept that she may have carried out other duties as Irvings adapted to the new situation resulting from the pandemic. Staff would inevitably need to be flexible during this period and cover Mrs Owen's job when required, but that was not the same as replacing her permanently.

Law

Time Limits under the Equality Act 2010

42. Section 123(1) of the Equality Act 2010 provides that a complaint may not be brought after the end of (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the Tribunal thinks just and equitable. Under section 123(3) conduct extending over a period is to be treated as done at the end of the period; and failure to do something is to be treated as occurring when the person in question decided on it. Under section 123(4) in the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something (a) when P does an act inconsistent with doing it; or (b) If P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

43. In Robertson v Bexley Community Centre [2003] IRLR 434 the Court of Appeal stated that when Employment Tribunals consider exercising the discretion under section 123(1)(b) there is no presumption that they should do so unless they consider it just and equitable in the circumstances to do so. A Tribunal cannot hear a complaint unless the Claimant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule. In accordance with British Coal Corporation v Keeble [1997] IRLR 336 a Tribunal may have regard to the following factors: the overall circumstances of the case; the prejudice that each party would suffer as a result of the decision reached; the particular length of and the reasons for the delay, the extent to which the cogency of evidence is likely to be affected by the delay; the extent to which the Respondent has cooperated with any requests for information; the promptness with which the Claimant acted once he knew of

facts giving rise to the cause of action; the steps taken by the Claimant to obtain appropriate advice once he knew of the possibility of taking action. The relevance of each factor depends on the facts of the individual case and Tribunals do not need to consider all the factors in each and every case; see Department of Constitutional Affairs v Jones [2008] IRLR 128.

Discrimination in the workplace

44. Section 39(2) of the Equality Act 2010 provides, amongst other things, that an employer must not discriminate against an employee by dismissing him or subjecting him to any other detriment.

Disability discrimination

Section 15 Equality Act 2010

45. Section 15 of the Equality Act 2010 provides that a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. However, this kind of discrimination will not be established if A shows that he did not know, and could not reasonably have been expected to know, that B had the disability.

46. Unfavourable treatment involves an assessment in which a broad view is to be taken and which is to be judged by broad experience of life. It has the meaning of placing a hurdle in front of or creating a particular difficulty for, or disadvantaging a person because of something which arises in consequence of their disability.

Sections 20 & 21 Equality Act 2010

47. Sections 20, 21 and 39(5) read with Schedule 8 of the Equality Act 2010 provide, amongst other things, that when an employer applies a provision, criterion or practice ("PCP") which puts a disabled employee at a substantial disadvantage in relation to a relevant matter in comparison to persons who are not disabled, the employer is under a duty to take such steps as it is reasonable to have to take to avoid the disadvantage. Paragraph 20 of Schedule 8 provides that an employer is not expected to make reasonable adjustments if he does not know, and could not reasonably be expected to know that the employee has a disability and is likely to be placed at the disadvantage.

Section 26 Equality Act 2010

48. Section 40 of the Equality Act 2010 provides that an employer must not, in relation to employment by him, harass an employee. The definition of harassment is set out in section 26(1) of the Equality Act 2010. A person (A) harasses another (B) if:

    a. A engages in unwanted conduct related to a protected characteristic (disability in this case); and

    b. the conduct has the purpose of effect of : -

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

49. Section 26(4) provides that 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.

Thus, the test contains both subjective and objective elements. Conduct is not to be treated as having the effect set out in section 26(1)(b) just because the complainant thinks it does. The Tribunal is required to take into account the Claimant's perception, the other circumstances of the case, and whether it is conduct which could reasonably be considered as having that effect.

50. A Tribunal should address three elements in a claim of harassment: first, was there unwanted conduct? Second, did it have the purpose or effect of either violating dignity or creating an adverse environment: Third, was that conduct related to the Claimant's protected characteristic?

Direct discrimination

51. Section 39 of the Equality Act 2010 provides that an employer must not discriminate against an employee of his by, amongst other things, subjecting him to a detriment.

52. Section 13 of the Equality Act 2010 sets out the legal test for direct discrimination. A person (A) discriminates against another (B) if, because of a protected characteristic (race in this case), A treats B less favourably than A treats or would treat others.

53. In the case of age discrimination, A does not discriminate against B if it can show their treatment was a proportionate means of achieving a legitimate aim, (Section 13(2) ERA).

Comparators

54. For the purposes of direct discrimination, section 23 of the Equality Act 2010 provides that on a comparison of cases there must be no material difference between the circumstances relating to each case. In other words, the relevant circumstances of the complainant and the comparator must be either the same or not materially different. Comparison may be made with an actual individual or a hypothetical individual. The circumstances relating to a case include a person's abilities if on a comparison for the purposes of section 13, the protected characteristic is disability.

The burden of proof

55. Section 136 of the Equality Act 2010 sets out the burden of proof that applies in discrimination cases. Subsection (2) provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that person (A) has contravened the provisions concerned, the Tribunal must hold that the contravention occurred. However, subsection (2) does not apply if A shows that A did not contravene the provision.

Discussion

Disability discrimination

56. It was agreed by Irvings that Mrs Owen was disabled within the meaning of section 6 EQA at the relevant time by reason of CKD. This was diagnosed in February 2020 and communicated to Mr Turner by Mrs Owen in March 2020 when she informed Mr Turner of the condition prior to beginning her absence and which then developed into furlough.

57. Accordingly, we accept that not only was Mrs Owen disabled by reason of CKD for the relevant period, but also that Irvings had knowledge of this condition and the relevant impairment, namely her increased vulnerability to Covid from March 2020.

Section 15 EQA.

58. The Tribunal accepted that Irvings placed Mrs Owen on furlough shortly after her absence began in late March 2020 following the fit note being provided by her GP. The decision was proposed by Irvings' accountant and communicated verbally to Mrs Owen at Irving's premises shortly after the decision was made. There was no consultation or written confirmation with her and the Tribunal noted that Irvings did not dispute this allegation. However, the Tribunal also accepted that this event took place in March 2020 which was before the HM Treasury direction of 15 April 2020 was effective, which required that any placement of an employee on furlough should be explicitly agreed by the employee in writing.

59. The Tribunal takes notice of the fact that SSP would be paid at a lower weekly rate than furlough payments, which would be paid at 80% of Mrs Owen's salary. While this government backed scheme under the Coronavirus Job Retention Scheme Regulations 2020 may well have also benefitted Irvings in terms of its outlay paid in supporting an absent employee, it produced a favourable outcome for Mrs Owen compared with the alternative of her relying upon SSP. Even though she argued during cross examination that this benefit only amounted to a few pounds, it nonetheless provided better pay. The available evidence did not suggest that at the time, Mrs Owen was unhappy with the decision to place her on furlough, and she appeared to speak positively of it in her letter dated 17 June 2020.

60. On balance, we accepted that although the decision was made by Irvings, it involved a better outcome for Mrs Owens than the alternative where she would receive less pay by claiming SSP. At this stage she was willing to accept this proposal given the outcome, although it was noted that she did not

provide her written consent. Nonetheless, at no stage following this decision did she seek to challenge her placement on furlough during the period of the fit note. The outcome ultimately, was more favourable that what she initially intended.

61. Under these circumstances, the Tribunal is unable to see how this treatment was unfavourable as required by section 15 EQA. The Tribunal heard that furlough commenced in early April 2020 and Mrs Owen self certified for the first week of her absence. Furlough was introduced to provide Mrs Owen with more money and Mr Turner gave clear evidence because of that both in his statement and when giving evidence during the hearing. On balance the Tribunal accepts that the decision was therefore not because of something arising from a disability, namely the decision by GP to shield her, but because the SSP that she was receiving was lower than the furlough payments that she could receive if placed on furlough.

62. An added consideration however, relating to this allegation was the second decision by Irvings to impose furlough (or continue with it), following Mrs Owen's letter dated 17 June 2020 asking to come back to work on 29 June 2020 following the expiry of the fit note. By this stage, she believed that she was fit for work and could return to her job on a full paid basis (or alternatively part time with some furlough payments paid at 80% of the balance not worked). This would of course have involved higher pay for her than remaining on furlough. This was refused by Irvings for the remaining period (which we calculate at 7 weeks), of her employment while they awaited the provision of medical evidence supporting her fitness to return to work.

63. To some extent this could be construed as unfavourable treatment related to her disability. This is because she said she was now fit to return to work and resume her job with full pay. The reason Mr Turner refusing to allow this and to decide to continue with her being furloughed was because of something connected with her disability of CKD, namely a greater vulnerability should she contract Covid and a previous decision of her GP to shield her.

64. However, we noted that while the medical evidence was unavailable (and Mrs Owen failed to provide anything before she resigned), had Irvings refused to place her on furlough (or renew it), her circumstances would have placed her in a situation where she would have been required to claim SSP by obtaining a further sick note from her GP (which in all likelihood would have been granted given their previous decision that she should shield), which was of course less valuable than furlough as described above. Accordingly, we remain of the view that this second decision was not unfavourable treatment either, (albeit related to something arising in consequence of her disability). Indeed, at this time Mrs Owen was still not objecting to furlough per se as payment for absence instead of SSP but because she believed she was fit to return to work.

65. Even if the alleged 'treatment' was unfavourable, it was nonetheless carried out by Irvings as a proportionate means of achieving a legitimate aim, namely Mr Turner wanted to treat Mrs Owen fairly as an employee who was unable to work through no fault of her own.

66. It may have felt to Mrs Owen that she was being treated unfairly, but a reasonable employer would not want to have her return to work until satisfied she was fit enough to do so and not more vulnerable than her colleagues. The treatment complained of would have only been imposed as long as the medical evidence was not available. Once available, had it supported Mrs Owen's return with or without adjustments, we accepted Irving's evidence that this would have been supported. As it happened, the continued decision to remain on furlough was in the hands of the claimant and her unwillingness to obtain evidence from her GP at this time.

Reasonable adjustments ss20 & 21 EQA

67. In terms of the single PCP asserted by Mrs Owens, namely that Irvings did not ensure other staff or customers wore face masks, the Tribunal was acutely aware that the employer needed to take into account the actual circumstances that existed at that time of the first lockdown in 2020 and not allow matters to become tarnished with hindsight or a conflation of later events which arose during the pandemic.

68. We accept that until several months following the introduction of lockdown measures, it was extremely difficult for employers to obtain PPE such as face masks, especially those not involved with the care or emergency services. Moreover, it was not actually compulsory to require employees and customers to wear face coverings in England until 24 July 2020. This was shortly before Mrs Owen resigned and more than a month after she asked to return to work.

69. Mrs Owen claimed she spoke with Mr Turner about making the wearing of masks a requirement of the business on an earlier date during lockdown and provided a couple of samples to show him. However, she failed to assert a precise or approximate date when this took place and Mr Turner was unable to recall the incident in question. On balance, we do not accept that this incident took place as alleged. We did note that this allegation was not supported in any of the documents relied upon by Mrs Owens in the bundle. We also accept that Mr Turner complied with the requirements imposed upon him by the government and also sourced bespoke masks during the summer of 2020 and arranged for socially distanced service for customers in the shop.

70. For there to be negative PCP as alleged by Mrs Owen we would need to be satisfied that there was an actual practice on the part of Mr Turner which actively resisted the wearing of masks in the shop and there was simply no evidence before us to support this argument.

71. This was not a scenario where Mrs Owen was seeking to argue that she could return to work if she was allowed to wear a face mask and instead she was asking that everyone else should wear one instead. Even if the PCP had been in place (which we do not accept), it would only have placed Mrs Owen at a substantial disadvantage had she been prevented herself from wearing a mask.

72. As a consequence, it could not have been a reasonable adjustment to require everyone to wear face masks before 24 July 2020 as an appropriate adjustment would have been for Mrs Owen to be permitted to wear a face mask so she could return to work.

73. However, based upon the evidence before the Tribunal, there nothing which persuaded us that the wearing of face coverings was a declared issue or requirement being advanced by either the Mrs Owen or her GP so as to facilitate a return to work when she requested the same on 17 June 2020. Had the medical evidence requested been provided and it supported such a contention, it may well have been an adjustment that could have been considered, but it related to an allegation where the PCP simply did not exist as alleged.

Harassment section 26 EQA

74. We accepted that Mrs Owen was informed by Irvings (Mr Turner) on the business premises that her absence during the lockdown would be treated as furlough and she would be paid on this basis and would not be treated as off sick so as to avoid her claiming SSP which involved less money being paid to her. As discussed above, while she did not confirm her agreement in writing, we accepted that she was happy to accept the decision given that it provided her with more money than her initial intention to claim SSP and as she confirmed in her letter of 17 June 2020

75. We accepted that this conversation took place in March shortly after Mrs Owen's absence began and took place when she visited Irving's premises as a customer. She was informed that she would be placed on furlough and she argues this took place in the actual shop, whereas Mr Turner recalls it taking place in a private room upstairs in the building.

76. We were unable to find which of these accounts accurately reflected the location of the conversation based upon the dispute between the two witnesses and the absence of supporting evidence. However, we did accept that it was a legitimate and important conversation to have given its implications. Even if it did take place within the shop, we accepted that it was directed at Mrs Owen personally, intended as a private conversation and Mrs Owen was unable to provide any information concerning the identity of those who might have overheard the conversation and did not provide witness evidence to support this allegation that it was carried out in a public way.

77. The Tribunal could not accept that this conversation amounted to unwanted conduct. Mrs Owen needed to know of her position, Irvings needed to communicate this with her and did so as soon as they saw her. It did however, relate to her disability namely being a way of paying her during her absence which arose from circumstances connected with her disability. There might have been better ways to communicate this information, but we were unable to find that the conduct had the purpose of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. Ultimately, it was a very unusual situation, Irvings as a small employer with limited administrative resources and Mr Turner appeared

to the Tribunal to be a reasonable employer trying to protect his employees as far as her was reasonably able to.

78. Mrs Owen says that she felt that the way in which the conversation took place (namely within the shop), had the effect of violating her dignity etc. The problem that we had with this argument was that there was an absence of evidence which suggested she was left hurt or unhappy by what had happened. Instead, she appeared to quietly remain absent on furlough and when she sought to return to work, she did not say anything negative about the furlough decision. No grievance or document purporting to be a grievance was sent to Irvings by her concerning this matter.

79. However, even if she did feel unhappy with the way in which the decision was communicated, there was simply insufficient evidence available to confirm that it was communicated in a public and demeaning way which could reasonably be considered a violation of her dignity.

Age discrimination section 13 EQA

80. Mrs Owen was aged over 55 at the relevant time and she compared herself with Rebecca Hartley who was aged under 18 at that time. This was the younger person identified by her as the comparator in the list of issues. There was another girl called Evie who worked for Irvings at the material time and who was under 20, but she was engaged to work in the butchering section (Mrs Owen worked in cooked meats) and she was not named as a comparator. In any event, she did not carry out Mrs Owen's work.

81. Ms Hartley was already employed by Irvings before Mrs Owen began her period of leave/furlough and for the reasons given in the findings of fact we were unable to see how she was employed by Irvings to replace Mrs Owen. Ms Hartley covered a number of roles, but primarily focused upon the expansion of the home delivery service, but even so, would have helped in the shop where necessary to cover for Mrs Owen who was absent at the time. This is not however, the same as being used to replace her, as an employer quite reasonably has to find ways to ensure that there is sufficient staffing cover while an employee is absent through ill health. The facts on balance of probabilities do not support Mrs Owen's contention in relation to this allegation.

82. In terms of proving direct discrimination under section 13 EQA, Mrs Owen must persuade the Tribunal that Irvings as her employer, treated her less favourably than a comparable employee who in this case was named as Ms Hartley. As a comparator in an age discrimination complaint, Ms Hartley clearly fell into a much different age group than that occupied by Mrs Owen and to that extent she is an appropriate comparator.

83. However, Mrs Owen is not using Ms Hartley as a comparator to say that she was also shielding but was not subject to what could be called 'a replacement exercise' but was instead the subject involved with the alleged unfavourable treatment. Mrs Owen did not refer to a hypothetical comparator, but even if she did (and the list of issues allows for this), she would not persuade the

Tribunal that the unfavourable treatment to which she complains actually took place.

84. Under these circumstances we were unable to accept that Ms Hartley was engaged as a replacement for Mrs Owen during her absence. As a consequence, the complaint of direct age discrimination must fail.

Time limits section 123 EQA

85. The claim was presented on 4 August 2020, but ACAS was notified of a potential claim on 3 August 2020 and in accordance with section 123 EQA, all alleged acts of discrimination which took place before 4 May 2020 were presented out of time.

86. In terms of the claim, this potentially affects the allegations relating to Mrs Owen being placed on furlough under sections 15 and 26 EQA as on balance we found that she was notified of the proposal to place her on furlough in March 2020, (furlough began at the very of April 2020 after all). The allegations relate to the actual decision to place her on furlough or the way in which it was communicated to her and therefore we are unable to accept that it formed part of a series of continuing acts in respect of every subsequent date that furlough took place (described as the 'state of furlough in the list of issues'). The decision was communicated and made in March 2020 and Mrs Owen either agreed, accepted to acquiesced to the decision

87. Accordingly, the initial section 15 and section 26 harassment allegations relating to the conversation in March 2020 was out of time in accordance with section 123 EQA.

88. However, in relation to the section 15 EQA allegation, furlough was initially offered to cover the period of the fit note, which ran from 26 March to 25 June 2020. After this date, (or following the letter requesting return to work, dated 17 June 2020), Irvings were put in a place where they were being asked to remove furlough so she could return to work. They decided to continue with furlough until it was satisfied medical evidence supported a return to work. This was a fresh allegation (and effectively a second allegation under section15) and clearly within time.

89. The Tribunal did consider the question of whether it was just and equitable to extend time in relation to the allegation of harassment under section 26 EQA and the first part of the allegation of unfavourable treatment under section 15 EQA. We took account of the evidence which Mrs Owen gave concerning the date when she decided to present her claim and we took into account that she was unrepresented and not legally qualified. We also noted that the case involved a relatively short period of time with allegations beginning in March 2020 and ending in August 2020 when Mrs Owen resigned. However, we heard no evidence to suggest that Mrs Owen was ignorant of the right to pursue employment claims in the Tribunal and that even if she was unaware of the mechanism of bringing such a claim, she did not provide any evidence that she could not have made enquiries into how she might pursue such a claim until she notified ACAS in August 2020. The original decision concerning furlough

did not appear to be an issue for her when it was communicated to her and only became relevant in June 2020, when she was prevented by Irvings from returning to work until they were satisfied she had medical evidence confirming she was fit to do so.

90. In considering the question of just and equitable extensions under section 123 EQA, the Tribunal took into account the principles expressed in Robertson v Bexley Community Centre (see above). This case reminded Tribunals that there is no presumption that time should be extended unless they considered it just and equitable in the circumstances to do so. On balance, we were simply not persuaded that it was just and equitable to extend time and the relevant allegations/complaints are therefore out of time.

91. However, whatever our decision was in relation to section 123 EQA, it would not have made a material impact upon our overall decision in relation to the substance of the complaints of discrimination brought in these proceedings.

Conclusion

92. Accordingly, for the reasons given above, the Tribunal must conclude:

a) The complaint of disability discrimination is not well founded which means it is unsuccessful.
b) The complaint of age discrimination is not well founded which means it is unsuccessful.

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Employment Judge Johnson

Date: 23 November 2023

JUDGMENT SENT TO THE PARTIES ON

27 November 2023

FOR THE TRIBUNAL OFFICE