EMPLOYMENT TRIBUNALS

Claimant: **Ms Haile**

Respondent: **Co-operative Group Limited**

Heard at: **London South Employment Tribunal**

On: **15 – 18 January 2024**

Before: Employment Judge Dyal, sitting with NLMs Ms Cook and Ms Oldfield

Representation:

Claimant: Mr Brown, Solicitor

Respondent: Ms Nicholls, Counsel

Upon written reasons being requested on 12 February 2024 they are provided as follows:

REASONS

1. This matter came before the tribunal for its final hearing.

The issues

2. The issue in the case were identified at a Preliminary Hearing on 16 June 2023. At the outset of the hearing there was a discussion of the issues and it was agreed that they remained as identified:

Disability status

1. Did Ms Haile have a physical or mental impairment at the material time? She relies on five conditions which she says are related, namely:

    a) premature ovarian failure
    b) fatigue
    c) asthma
    d) dyspepsia
    e) work stress

2. If so, did the impairment have a substantial adverse effect on her ability to carry
out normal day-to-day activities?

3. If so, was that effect long term?

Discrimination arising from disability

4. Was the Claimant treated unfavourably? The treatment in question is dismissal.

5. Was the Claimant's dismissal because of something arising in consequence of disability?

6. Did the Respondent know or ought it reasonably to have known that the Claimant was a disabled person?

7. Was the treatment a proportionate means of achieving a legitimate aim?

    a. The Respondent says that the aim was recruiting, retaining and engaging a balanced workforce whilst providing a service/facility to local communities. A balanced workforce in this context means having sufficient people to work nights.

Failure to make reasonable adjustments

8. Did the Respondent apply the following provision, criterion or practice (PCP):

    a. Requiring a certain number of employees to work at night in the store.

9. If so, did the PCP put the Claimant at a substantial disadvantage compared to others in that she had more difficulty doing so because of her health.

10. If so, did the Respondent fail to take such steps as it was reasonable for it to take to avoid the disadvantage? The Claimant says it did:

    a. Allowing the Claimant to work day shifts.

11. Did the Respondent know or could it reasonably have been expected to know both that:
    a. The PCP put the Claimant at a substantial disadvantage;
    b. That the Claimant was a disabled person.

Victimisation

12. Did the Claimant do a protected act:

    a. The claimant relies upon her second grievance which she raised on 27 October 2021 stating that the company had ignored medical advice.

13. If so, was the Claimant subjected to a detriment:

    a. Suspension;
    b. Dismissal.

Unfair dismissal

14. What was the reason for the Claimant's dismissal and was it a potentially fair one?

15. If the dismissal was for a potentially fair reason was it fair in all the circumstances?

The hearing

3. *Documents before the tribunal*:

    3.1. Hearing bundle running to 270 pages

3.2. Claimant's supplemental bundle admitted by consent on day 1, 50 pages
3.3. Respondent's supplemental bundle admitted by consent on day 2, 7 pages
3.4. Claimant's contract of employment admitted by consent on day 2
3.5. Claimant's statements:
  3.5.1. impact statement dated 14 September 2022
  3.5.2. impact statement of 23 June 2023
  3.5.3. impact statement dated 15 August 2023
  3.5.4. Claimant's witness statement for trial

3.6. Respondent's statements:
  3.6.1. Witness statement of Mr Umar Ullah
  3.6.2. Witness statement of Mr Ian Rowe
  3.6.3. Witness statement of Mr Mark Shadwell

4. *Witnesses the tribunal heard from*:

4.1. The Claimant;
4.2. Mr Ian Rowe, Operations Manager
4.3. Mr Mark Shadwell, Head of Operations for Multi-mission stores (South of England)
4.4. Mr Umar Ullah, Talent Acquisition Partner

Disability status

5. It is convenient to deal with disability status first in these reasons. However, to be clear at the hearing itself disability status was rolled up with the substantive issues, i.e., it was not dealt with as a preliminary issue. We therefore had the benefit of all of the evidence when determining disability status.

Law

6. S.6(1) Equality Act 2010 (EqA) provides:

A person (P) has a disability if –

(a) P has a physical or mental impairment, and
(b) the impairment has a substantial adverse long-term effect on P's ability to carry out normal day to day activities.

7. 'Substantial' is defined in s.212(1) EqA as '*more than minor or trivial'*.

8. The 'long-term' requirement is developed in para 2, Sch.1 to the EqA, which provides, so far as relevant:

(1) The effect of an impairment is long-term if –
(a) it has lasted for at least 12 months,
(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.
(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

9. '*Likely*', in this context and elsewhere in the provisions defining disability, means 'could well happen', rather than 'more likely than not to happen' (*Boyle v SCA Packaging Ltd* [2009] ICR 1056, HL).

10. Sch.1, para 5(1) EqA provides (the doctrine of deduced effects):

(3) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if:
(a) measures are being taken to correct it, and
(b) but for that, it would be likely to have that effect.
(4) 'Measures' includes, in particular, medical treatment and the use of a prosthesis or other aid.

11. The *Guidance on matters to be taken into account in determining questions relating to the definition of disability* (2011) gives non-exhaustive examples of day to day activities:

> *'[D2] In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.'*

12. Day to day activities includes work activities. In *Chacón Navas* the CJEU held that disability in the context of the Framework Directive means "a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life". The emphasis on "professional life" was reaffirmed in HK Danmark acting on behalf of Ring v Dansk Almennyttigt Boligselskab & Anor C-335/11.

13. The Tribunal's focus should be on what the employee cannot do (or what they can do only with difficulty) rather than on what they can do.

14. The EqA does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial. Unless a matter can be classified as within the heading 'trivial' or 'insubstantial', it must be treated as substantial (***Aderemi v London and South Eastern Railway Ltd*** [2013] ICR 591 EAT at [14-15]).

15. The Code of Practice on Employment 2011 includes a summary in relation to the definition of disability, at paras 2.8–2.20. Paragraph 2.20 further refers the reader

to App. 1 to the Code. Under the heading *'What is a "substantial" adverse effect?'*, paras 8–10 of the appendix provide:

> *'8. A substantial adverse effect is something which is more than a minor or trivial effect. The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people.*
>
> *9. Account should also be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation* […]'

16. The *Guidance on matters to be taken into account in determining questions relating to the definition of disability* (2011) contains the following guidance as to the interaction between the 'impairment' requirement and the issue of 'substantial adverse effects':

> *'A3. The definition requires that the effects which a person may experience must arise from a physical or mental impairment. The term mental or physical impairment should be given its ordinary meaning. It is not necessary for the cause of the impairment to be established, nor does the impairment have to be the result of an illness. In many cases, there will be no dispute whether a person has an impairment. Any disagreement is more likely to be about whether the effects of the impairment are sufficient to fall within the definition and in particular whether they are long-term. Even so, it may sometimes be necessary to decide whether a person has an impairment so as to be able to deal with the issues about its effects.'*
> *[…]*
>
> *B4. An impairment might not have a substantial adverse effect on a person's ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effects on more than one activity, when taken together, could result in an overall substantial adverse effect.*
>
> *[…]*
>
> *B7. Account should be taken of how far a person can* ***reasonably*** *be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities.*

B10. In some cases, people have coping or avoidance strategies which cease to work in certain circumstances (for example, where someone who has dyslexia is placed under stress). If it is possible that a person's ability to manage the effects of an impairment will break down so that effects will sometimes still occur, this possibility must be taken into account when assessing the effects of the impairment.

C7. It is not necessary for the effect to be the same throughout the period which is being considered in relation to determining whether the 'long-term' element of the definition is met. A person may still satisfy the long-term element of the definition even if the effect is not the same throughout the period. It may change: for example activities which are initially very difficult may become possible to a much greater extent. The effect might even disappear temporarily. Or other effects on the ability to carry out normal day-to-day activities may develop and the initial effect may disappear altogether.'

17. In *J v DLA Piper UK LLP* [2010] ICR 1052 EAT, Underhill P (as he was) made the following observations about deduced effects at [57]:

> '*Secondly*, there is the question of deduced effect. This was, as we have noted, the only way the case was pleaded, though it seems that the parties subsequently proceeded on the basis that "actual" adverse effects were also relied on. The Tribunal dealt with that issue by saying simply that "the Claimant did not adduce any clear or cogent evidence of this", referring to its observations about Dr Morris's evidence which we have set out at para 30 above. If, as we think, the Tribunal intended simply to discount Dr Morris's evidence because she was not a psychiatrist, that approach is wrong, for the reasons already given: we accept the contention to this effect at para 6.4 of the notice of appeal. But it may have meant only that her evidence was too brief to be "clear or cogent". If so, the point is debatable. Strictly speaking, the question that needed to be addressed was whether, on the hypothesis that the Claimant's ability to carry out normal day-to-day activities was not, as at June 2008, substantially affected, there would have been such an effect but for her treatment. Since Dr Morris did not accept that hypothesis, it is not surprising that she did not directly answer the question, saying only that without treatment the Claimant's condition would be "much worse". In view of our decision in the previous paragraph we need not decide the point, though we are inclined to think that the report can just about be read as supporting a "deduced effect" case. It is, even if so read, extremely brief, but there is nothing particularly surprising in the proposition that a person diagnosed as suffering from depression who is taking a high dose of antidepressants would suffer a serious effect on her ability to carry out normal day-to-day activities if treatment were stopped: the proposition could of course be challenged, but in the absence of such challenge—there being none in Dr Gill's report—it is

> unclear what elaboration was required. Nor do we understand the relevance of the Tribunal's observation that Dr Morris's report was written in November/December 2008: it was clearly referring back to events at the material time.'

18. If there is material before the Tribunal to suggest that measures were being taken that may have altered the effects of the impairment, then it must consider whether the impairment would have had a substantial adverse effect in the absence of those measures (*Fathers v Pets at Home* Ltd, EAT 0424/13).

19. The assessment of disability status must be made based upon the basis of evidence as to circumstances prevailing at the time of the act of discrimination: *Richmond Adult Community College v McDougall* [2008] IRLR 227.

Findings, discussion and conclusions on disability status

20. The tribunal's task was an extremely difficult one for several reasons including the following:

    20.1. The medical evidence is extremely summary and does little more than identify the names of several medical conditions the Claimant had and has.

    20.2. The Claimant's witness evidence as to the impact of these medical conditions is split between 4 different statements none of which is adequate:

        20.2.1. Impact statement of September 2022
        20.2.2. Impact statement of June 2023
        20.2.3. Impact statement of August 2023
        20.2.4. Main witness statement for trial of January 2024

    20.3. Those statements, in the round, deal with impact of the medical conditions at very high level of generality. On the whole there is a real lack of focus on normal day to day activities and any impact on them. There is also, on the whole, a real lack of focus on the relevant period in respect of which disability status must be assessed (March 2021, when the first disability discrimination complaint dates from, alleged failure to make reasonable adjustments, to December 2021, the dismissal). The statements largely (but not exclusively) focus on the position as at their respective dates of drafting. That is particularly significant as there was a sea change in the Claimant's condition after her dismissal.

    20.4. There is an almost complete absence of medical and lay evidence about deduced effects. I.e., what difference the measures the Claimant took (e.g. medication) made and what the impact on her day to day activities would have been if she not taken medication.

    20.5. Reference is made in the impact statements to osteoporosis. That is a very serious medical condition – a progressive condition to which a different test of disability status applies - that was not been pleaded in the claim form nor identified in the list of issues. An application was made to rely on it at the conclusion of the Claimant's evidence on day 2, but we refused that application for the reasons given at the time.

21. All of the above must be seen in the context of two things:

    21.1. this is a claim which has been carefully case managed with very clear directions, drafted in plain English not technical legal language, about what kind of evidence was needed to enable the tribunal to determine disability.
    21.2. the Claimant is and has been legally represented.

22. The tribunal is able to apply its collective common sense to the evidence before it and draw appropriate inferences from the evidence. However, it is the tribunal's duty to determine the case *on the evidence* and not on the basis of medical knowledge about the conditions in issue its members may happen to have from other cases, their general knowledge, own experiences and/or training.

Medical conditions relied upon

23. The Claimant relies upon the following medication conditions. It is not disputed that she had those conditions. We find she did and that they commenced on the following dates:

    a. Premature ovarian failure: 2012
    b. Fatigue: 2016
    c. Asthma: 1995
    d. Dyspepsia: 2019
    e. Work stress: 2009

Pre-mature ovarian failure

24. This was an impairment and it was and is long-term.

25. It is very hard to determine what impact the Claimant's ovarian failure had on normal day to day activities if any.

26. There is very little medical evidence indeed before us about it. The GP letters confirm the Claimant had/has it. The Occupational Health report of July 2021 says: "*Primary ovarian insufficiency — also called premature ovarian failure — occurs when the ovaries stop functioning normally before age 40. When this happens, your ovaries don't produce normal amounts of the hormone oestrogen or release eggs regularly*."

27. In her impact statement of September 2022 the Claimant does not refer to it at all.

28. In her impact statement of 23 June 2023, she did refer to it and said it had a far reaching and devastating impact on her as she always wanted children. However she did not give details of what that impact was, beyond being unable to have children, and did not relate it normal day to day activities. It would be wrong for us to guess or to speculate what if anything the impact on normal day to day activities was. (*N.b.* It has not been suggested that having biological children is

itself a normal day to day activity. No doubt it is normal but it is not a day to day activity. Having a child is a major life event not a day to day activity. Looking after a child no doubt involves many normal day to day activities but there is no suggestion that the Claimant's ability to do that kind of activity is compromised.)

29. The Claimant goes on to say in that impact statement that she has weaker bones due to the under production of oestrogen: she has osteoporosis. However, this is a serious and distinct medical condition that is not pleaded and was not identified at the Preliminary Hearing. In dealing with the application to amend we rejected the argument that there was no need to amend to rely on osteoporosis since it was a symptom of a pleaded condition. Firstly, it is a distinct and serious medical condition of its own. Secondly, there is no medical evidence in any event that the cause of osteoporosis in the Claimant's case is pre-mature ovarian failure and we could not conclude that it is. (We appreciate that the cause of an impairment is generally irrelevant for the purposes of determining disability status; it arises here simply as the Claimant submitted that she could rely on an additional un-pleaded medical condition *because* it was caused a pleaded one).

30. The Claimant says that she has pain in various part of her body, including back pain and shoulder pain. It is completely unclear if this is related to pre-mature ovarian failure or any of the other pleaded conditions. However, fundamentally, she does not say what if any impact this has on her normal day to day activities in her statement of 23 June 2023. Pain is obviously a matter of degree and it does not necessarily have any/any substantial adverse impact on normal day to day activities.

31. In her disability impact statement of 15 August 2023, the Claimant said "*I can no longer stand to work for long hours as I used to, due to my bad knee and pains on my back and shoulder. I have weakened bones due to under production of oestrogen. I have experienced and continue to experience pains on different parts of my body. I was recently diagnose on my knees with osteoporosis*." This statement post-dates her dismissal by over two and a half years. It describes the position as at the date of the statement not at the relevant times. Our points in relation osteoporosis are repeated.

32. In her main witness statement for trial dated 5 January 2024 the Claimant finally made a more concerted effort to address normal day to day activities. She said this:

    a. *Ability to walk up to 50 metres: I can walk, the pain is there all the time, sometimes my right leg feel give away, my knee swallow [swollen], sometimes feel better. Around 6 month ago I had a physio for my leg.*

    b. *Ability to cook a meal: I am no longer enjoy cooking because I am always feel tired and lost appetite and interest to cook.*

    c. *Ability to climb the stairs: I often experience breathing difficulties and due to the pain in my knees. Sometimes I find it difficult to climb stairs.*

d. Ability to go and do shopping: I find it difficult to do my normal shopping as I feel pressure on my knee in carrying heavy shopping bags. As a consequence, I buy my staff in small quantities.

e. Ability to concentrate on a task: when I am stress, I find it difficult to focus and I feel pressure and slow me down and I needed more time to complete the tasks.

f. Ability to read and write: my ability to read and write have been affected; I find it difficult to immediately take in what I am reading and my writing has slowed. I use to enjoy reading new papers and magazine. My eyes has been affected due to emotion the stress I have going through.

g. Any other aspect of daily life which you Gan think of: I find it difficult to socialise. I hardly go to friends and no longer invite friends to my flat. I no longer as tidy as I use to be and hence my flat is not well kept and clean as previously. I am living with mental lock, feel emotional very quickly, sometimes I can't control it. While I am in class all off sadden I feel emotional and I upset I am in areal in mental breakdown state. When I was doing this statement it took me days to complete because I was getting upset to read it.

33. It is not clear which of the conditions relied upon the above matters relate to. It may be that they relate to premature ovarian failure or it may not. The analysis we go through here applies whichever of the conditions these reported problems are caused by.

34. Judge Dyal went through each of the sub-paragraphs identified above with the Claimant during her oral evidence to try and understand whether she was, as appeared from the drafting, describing the position at the date of the statement rather than before/during the relevant period and if so to establish the position was as at the relevant times. The essence of the Claimant's evidence was that she was mainly describing the position at the date of her statement. There had been a sea change in her well-being after her dismissal: it had totally plummeted.

35. It was very hard to establish what the position had been at the relevant times because the Claimant's evidence was not easy to follow. When asked to describe the position in the relevant period she tended to quickly revert to describing the position at present. Ultimately her evidence about the position as at *the relevant times* was this:

35.1. Ability to walk: in the relevant period she was able to walk. She did however have some pain, sometimes it was better sometimes it was worse.
35.2. Ability to cook a meal: in the relevant period she was able to do this. The onset of problems with cooking meals began after dismissal when she began to feel "*completely depressed*".
35.3. Ability to climb stairs: in the relevant period the Claimant was able to do this, she had some pain but she was a very active and social person. The position now is completely different.

35.4. Ability to do shopping: in the relevant period there was no particular problem. If she did a lot of shopping, like when there were big special offers she would try and get a lift home.
35.5. Concentration and reading: in the relevant period, it was not as described in the witness statement, it was nowhere near as bad. The Claimant was asked to give any specific examples she could from 2020 or 2021 of difficulty in reading or concentrating but she did not. She said it was *"not taking me that much longer way taking me longer now".*
35.6. Socialising and cleaning: the issues arose after her dismissal.

36. Standing back from all this evidence, we are not satisfied that there was a substantial adverse effect on normal day to day activities either before or during the relevant period. The evidence largely fails to engage with the impact on normal day to day activities, when it does so it focusses largely on the wrong period of time, such evidence as there is about the relevant times is vague and does not identify a substantial adverse effect on normal day to day activities.

37. Finally, dealing with deduced effects, in the impact statement of June 2023, the Claimant added that she was on hormone replacement therapy. We accept that. She said that her skin would age if she were not. That is the only evidence about deduced effects. There is no basis before us to find that absent HRT, there would be a substantial adverse effect on normal day to day activates. This is a juncture at which we remind ourselves that we need to decide the case on the actual evidence rather than on our collective background medical knowledge about menopause.

Dyspepsia

38. We accept that the Claimant had dyspepsia (indigestion) on a long-term basis and that it was an impairment.

39. The medical evidence says very little about it. Broadly, the GP's correspondence indicates that the claimant had dyspepsia at the relevant times and that her "gastro-intestinal symptoms flare up when she is on night duties". The letter of 28 April 2021 went on "*please kindly consider her medical problems when allocating duties and if possible avoid night shifts".* The OH report of July 2021, did not take matters materially further, it said "*Most people have indigestion at some point. Usually, it's not a sign of anything more serious and you can treat it yourself*…. *Stress can make indigestion worse*… *Based on the assessment today she is medically fit for work and is going back into work tomorrow and in my opinion night work is likely to increase her stress and dyspepsia."*

40. In the statement of September 2022, very brief reference was made to indigestion. No detail was given of how normal day to day activities were affected.

41. In the statement of 23 June 2023, the Claimant explained that she was "*unable to digest food at night. Whenever I eat late night, the food does not digest and I feel bloated because the food is not being broken down in my body. My food often also just remains in my throat and does not pass to my stomach. I often feel sick*

and occasionally I must vomit, break into a sweat and I often cannot sleep through the night. I have to get up around 3 times a night. I experience these symptoms the majority of times I eat and accordingly have to live with this on a daily basis." No explanation is given of the impact on normal day to day activities, if any.

42. The supplementary impact statement of August 2023 did not take matters materially further. The witness statement for trial of January 2024 said "*my gastro-intestinal symptoms flare up due to eating late at midnight as a result of the late shifts, restless, constant headache and lacking proper sleep."*

43. Based on the evidence we have heard the primary issue was that the Claimant suffered from indigestion if she ate very late at night, i.e., around midnight as she did if she worked the nightshift. This could impact on her sleep. It is unclear, however, what impact if any that in turn had on normal day to day activities in or before relevant period. We could not conclude on the evidence we have heard that it had a substantial impact.

44. Further, we must take into account the effects of behaviour and how far a person can reasonably be expected to modify his or her behaviour to avoid or reduce an adverse effect of an impairment. In this instance we think that is significant because we conclude the Claimant could reasonably have been expected to avoid the problem of eating late by simply eating earlier.

45. If she was working late she could have eaten during a break in her shift rather than when she got home. This option was in fact open to her in her employment with the Respondent and there are of course statutory rights to breaks (regulation 12 WTR) which make this coping strategy a robust one more generally.

46. We could accept that in some cases people may have particular reasons why they need to eat at home rather than at work (e.g. to eat with family, for religious reasons etc) that may affect the analysis of what is reasonable. However, the Claimant has not identified any such reasons, or any reasons at all, for not eating at work, either in her evidence to the tribunal (and she asked about this in cross-examination) or contemporaneously when the matter discussed with her by Mr Ullah in August 2021.

47. We are not satisfied based on the evidence before us that dyspepsia had a substantial adverse effect on the Claimant's normal day to day activities.

48. Deduced effects: the Claimant was on medication for dyspepsia at the relevant times. There is no evidence about what difference this medication made and what the impact of dyspepsia would have been on normal day to day activities in its absence.

Asthma

49. The Claimant had asthma as claimed, it was an impairment and was long-term.

50. The medical evidence says almost nothing about it beyond identifying that the Claimant had asthma and that because she had asthma she was vulnerable in the Covid pandemic. The medication records show she was prescribed simply the two standard, first line of treatment, inhalers.

51. No reference was made to asthma in the impact statement of September 2022.

52. In the impact statement of June 2023 the Clamant said:

> *I have been an asthma sufferer for over 20 years. I tend to experience asthma attacks during hot weather or very cold periods. When I suffer an attack, I struggle to breath. I have been prescribed inhalers which I take when experiencing an attack. When I experience an attack, I am immobile and I cannot move at all until the attack subsides.*

53. In her impact statement of August 2023 the Claimant asserted that her asthma was aggravated by working the night shift and in a cold environment. She said (of the present) "*I often experience breathing difficulties, constant headache and unable to sleep at night*". The Claimant's witness statement of January 2024 did not take matters any further.

54. Clearly there is a substantial adverse effect on normal day to day activities (like being able to walk somewhere) during asthma attacks themselves. However, there is no evidence about how frequently they occurred or how long they lasted. In terms of deduced effects, there is no evidence about what difference the Claimant's medication makes and what the position would be if she did not have this medication. For instance would the asthma attacks happen more frequently and if so how much more frequently? Would the asthma attacks, when they did happen, pass on their own without medication or what would happen? Would the Claimant's ability to do physical activities be restricted outside of asthmas attacks?

55. We are not satisfied based on the evidence before us that asthma had a substantial adverse effect on the Claimant's normal day to day activities. The evidence is too general, too vague, lacks focus on normal day to day activities and does not explain the difference if any asthma medication made to normal day to day activities.

Fatigue

56. The GP letters indeed state that the Claimant had fatigue but say nothing more about it. The OH evidence says nothing about it. So there almost no medical evidence about it before us.

57. The impact statement of September 2022 does not refer to fatigue.

58. The impact statement of June 2023, says this:

> *"I am constantly exhausted. I struggle to sleep at night. I sleep for about 1 hour and then have to get up as I feel restless. I struggle to concentrate on every task which require concentration. As an example, I enjoy reading books but find that I cannot finish reading a paragraph as I am so tired."*

59. This describes the position as at June 2023. It does not describe the position during or before the relevant period.

60. The impact statement of August 2023 does not take matters much further. It says "*I am always fatigue as my body is worn-out due to the stressful environmental condition and also the hard work I did over the past 12 years following constant night shift duties".* Again it describes the position in August 2023 not in the relevant period and in any event is extremely generalised rather than focussing on the impact on day to day activities.

61. The statement of January 2024 does not take matters much further. It says almost nothing of fatigue beyond identifying it as an impairment. It states the Claimant no longer enjoys cooking because she is always tired. However, that is a reference to the position since her dismissal. She did not have this problem during her employment.

62. The Claimant does not appear to be on any medication specifically for fatigue now or in the relevant period, and there is no evidence as to whether other medication she has taken has had any bearing on fatigue.

63. We are not satisfied based on the evidence before us that fatigue had a substantial adverse effect on the Claimant's normal day to day activities.

Stress

64. The medical evidence indicates that the Claimant had stress. However, it gives very little information:

    64.1. In April 2015, the Claimant was signed off with a fitnote that stated "constant headaches, back and knee pains, palpitations during night shifts, work anxiety." The words 'work anxiety' are circled in pen and the word 'stress' is written in pen. It is unclear by whom. The certificate applies for 2 weeks.
    64.2. The GP letter of 9 August 2021, states that Claimant had stress at work on 2 March 2020.
    64.3. In October 2020, the Claimant was signed off with "stress at work" for one month.
    64.4. On 7 of May 2021, the Claimant was signed off with mixed anxiety and depressive disorders, Stress, for a month.
    64.5. On 4 June 2021, the Claimant was signed off with mixed anxiety and depressive disorders, stress, for a month.
    64.6. The GP letter of 7 September 2022 says that the Claimant had repeatedly contacted the practice about stress at work with records dating back to

2009 and identified a list of occasions on which there had been a consultation: two in 2009, one in 2010, one in 2011, three in 2014, two in 2015, three in 2016, four in 2020, three in 2021.

64.7. The OH report of July 2021, gave very general information about stress and ways of avoiding it. It said "*Based on the assessment today she is medically fit for work and is going back into work tomorrow and in my opinion night work is likely to increase her stress and dyspepsia."*

65. Oddly, none of the notes of the consultations with the GP about stress are in evidence.

66. In her impact statement of September 2022, the Claimant complained that the night shift was stressful. In terms of identifying what in particular was stressful the main matter referred to was shoplifters. The Claimant was afraid of walking home after the end of her shift when she was threatened by shoplifters saying they would wait for her after her shift. She also referred to the nightshift being busy and hectic. However, she said little else about the impact of stress on her normal day to day activities. It is hard to interpret but she may be suggesting that stress causes her indigestion, poor sleep, restlessness, headache and body ache. She said she was frightened and anxious about walking home by herself after night shifts and would ask friends, colleagues, customers and others to walk her or give her a lift home.

67. In her impact statement of June 2023 the Claimant said

> *I began to experience stress around 2009 while working for the respondent. As a result of work stress, I would often feel anxious and depressed. I experience heart palpitations when I feel stressed. I would experience these symptoms about once or twice a week when I used to work for the respondent. I would experience headache constantly. Co-op was aware of my stress on many occasions but neglected me. I have stress sick notes back from 2014 to 2021 GP recommended avoid night shift. Due to all this stress since recently my eye sight affected badly and sometime my blood pressure goes high. In general, I am feeling awful.*

68. The issues with eye-sight and blood pressure post-date the relevant period.

69. In her impact statement of August 2023 the Claimant said little about stress. The height of it was that the *"Stressful working condition experienced all these years has immensely affected my lack of concentration, increased anxiety, heart palpitation, mood swing as a result of all these, I am prone to depression".*

70. The Claimant had a meeting with Mr Ullah in August 2021, to discuss what was stressful on the nightshift and the primary matter identified then was dealing with shoplifters. That was also the one tangible thing that she emphasised in her oral evidence in respect of stress.

71. Drawing the threads together there are essentially three things that require analysis:

71.1. Worry about walking home alone after the nightshift;
71.2. Stress of dealing with shoplifters;
71.3. Hectic/busy nature of the nightshift.

72. In our view, working a night shift as such is a normal day to day activity. There was ultimately no dispute about that. For the reasons we now go on to give we do not accept that there was a substantial adverse effect on the Claimant's ability to carry out nightshifts (nor other normal day to day activities).

73. Firstly, the worry the Claimant described about walking home after the nightshift on her own was entirely within the ordinary normal range. It was perfectly rational to be concerned about walking home at around midnight on her own in the dark in London. This concern, at this level (where the Claimant kept it in proportion and took simple steps like walking with others or getting lift where possible), is simply a normal reaction to the dangers of urban life. It has not been suggested that having some sort of stress condition made this worry worse or more difficult to manage. In any event our analysis is that what the Claimant had was simply an ordinary, rational concern about the potential for being a victim of crime when walking alone at night in London.

74. Secondly, and now turning to the primary thing the Claimant identified in her evidence that was stressful about the night shift, shoplifters. The Claimant found confronting shoplifters very stressful.

75. Importantly, we do not think that confronting shoplifters is itself a normal day to day activity. It is a form of crime fighting. It is something that takes a lot of courage, is bound to involve heated confrontations at least some of the time and has a significant danger element to it (whether during the confrontation itself or afterwards e.g. on the walk home).

76. While we accept that there were shoplifters on the night shift, and more of them than on the day shift, we do not accept that confronting shoplifters was part of the Claimant's assigned work duties. She confronted shoplifters because she took her job so seriously (as she said in her grievance appeal meeting *"I take ownership of the position in everything - Shoplifters both internal and external").* However, the Respondent's policy was in fact that she should not do so: the policy was to not confront shoplifters at all and the Claimant was aware of this. (She was required to tell her manager if she saw a shoplifter but that is another matter.)

77. Thus even if confronting shoplifters is a normal day to day activity it is necessary to take into account the effects of behaviour. The Respondent's policy was that employees should not challenge shoplifters. There was no requirement to do so and indeed a policy not to. In our view it was reasonable to expect the Claimant to avoid doing so both for that reason and because she found it very stressful.

78. We find that most of the stress of the night shift would have been removed had she simply not challenged shoplifters.

79. The other stressor the Claimant identified on the nightshift was it being busy and hectic. However, we do not accept that this was something that generated the stress reaction the Claimant describes in her impact evidence. It is plain to us that she was someone that had a strong work ethic an appetite for work. We do accept that there were issues about the additional work involved on nights compared to day but we do not accept that they were health issues. Rather, the issues were these (these factors will be better understood by the reader if read in conjunction with our chronological findings of fact):

    79.1. Being required to work nights offended the Claimant's sense of justice: she felt that she had done her time on nights and had earned the right to do days. As set out in the findings of fact in the main chronology of events below, she was on nights for a long time against her preference and nights were harder work than days. She thought it was unjust for other employees who did not have her length of service, both generally and on the night shift in particular, to avoid nights. She thought that it was her 'turn' to work days. It became a very deeply held reason for not working nights but it was not in our view a health related reason.
    79.2. From the summer of 2021, she had obtained a second job working 2 – 5pm Monday to Friday. This was incompatible with working the nightshift.

80. All in all, while we accept the Claimant had a stress condition we do not accept that it had a substantial adverse effect on her normal day to day activities. There is very little evidence about the impact it had on normal day to day activities and such evidence as there is we have analysed as above.

Cumulative effect of the 5 impairments

81. We turned our mind to whether or not in combination the impairments had a substantial adverse effect on normal day to day activities. We concluded that they did not. Even in combination the evidence of adverse effect on normal day to day activities was scant and largely vague despite the very many opportunities the Claimant has had to set out her case. The relatively low threshold of proving a substantial adverse effect has not been met.

Reasonable adjustments and s.15 EqA complaints

82. Since the Claimant was not a disabled person at the relevant times these complaints must fail.

Chronological findings of fact

83. The Claimant's employment with the Respondent commenced in January 2008. She was based at its Hither Green store. Initially she was employed as a Customer Team Member but was promoted to team leader in 2010. She was contracted to 35 hours per week. The Claimant remained a Team Leader at Hither Green until her summary dismissal on 29 December 2021.

84. The Claimant, then, was a long-serving employee. She was also a committed and loyal one. She took her job very seriously and in her own words treated the Respondent's business with the care she would have treated her own. She was well known and popular with the Respondent's customers in the local community. As discussed further below, for most of her employment the Claimant worked the night-shift which was contrary to her preference.

85. The store traded for 110 hours per week. Its opening hours were 7 am to 11 pm though we infer they must have been slightly shorter hours on Sundays.

86. Until February 2021, the store had one Store Manager, one Deputy Manager and 4 Team Leaders. The shifts at the store were primarily divided between earlies (6am – 3pm) and nights 3pm or 4pm to about 11pm. However, employees did not necessarily work a whole early/night shift and as business needs required they might work a shift that spanned the early/night division.

87. Shifts were assigned to employees by a rota. Each employee gave their availability at the outset of their employment and were then assigned hours within their availability. The Respondent tried to get double the amount of availability for each employee than the amount of hours they actually worked so as to give it flexibility in the hours assigned each week.

88. At the Hither Green store, although there was a rota there was little variation to it from week to week. Generally employees worked pretty fixed hours from one week to the next and generally they worked on the morning shift, or the evening shift, and not both. However, as business needs required, arising through sickness, holiday or as the case may be, there were variations to this.

89. At the outset of her employment the Claimant was assigned the nightshift in accordance with her then availability. She remained on nights for many years. The Claimant became unhappy working the nightshift within about a year and wanted to move to earlies. She made it known that she wanted to transfer to the day shift.

90. In September 2020, the then deputy manager, Mr Khan, agreed to swap shifts with the claimant. This meant she was working the dayshift and he the nightshift. She found this much preferable.

91. In February 2021 there was a restructure. The existing store manager (who himself had not been in post for very long) and Mr Khan, deputy manger, left and a new store manager Mr Jayabalasingam was put in place as was a new deputy store manager, identified in the evidence simply as Lee. Mr Jayabalasingam brought in an additional team leader. She was a student and she was assigned night shifts. This made five team leaders. In around July 2021, the deputy store manager role was deleted from the Respondent's stores in most cases including in Hither Green, and Lee became a team leader.

92. Although there were now more team leaders than before the restructure in terms of head count, the FTE remained the same.

93. While the Claimant was on annual leave in March 2021, Mr Jayabalasingam rota'ed her to do a mixture of early and late shifts. He said that the early shifts she was doing were holiday cover. On 4 April 2021, while still on annual leave the Claimant spoke to Mr Jayabalasingam on the telephone and they had a disagreement about her shifts. The matter was unresolved but he told her to complete an availability sheet when she returned.

94. On 8 April 2021, the Claimant returned and she had an argument with Mr Jayabalasingam and Lee about her shifts. The Claimant put down on the availability form that her current shifts were early shifts. Mr Jayabalasingam disagreed and said that her shifts were evening shifts. The Claimant's position was that her shifts had changed following the swap with Mr Khan. There was a negotiation over her shifts where she offered to do one night shift per week and the rest earlies. The managers said it needed to be 2 nights per week and three earlies.

95. In the course of the conversation the Claimant was also told that she would not be given hours above her contractual hours. This would mean on the morning shift working 6 am – 1pm rather than what she had been doing 6 – 3pm. This was as a result of a wider efficiency drive, where stores where having their hours cut, rather than a punishment for the disagreement. The Claimant told the managers that she would look for a part time job from 3pm to 6pm to replace the lost hours.

96. The Claimant commenced a period of sick leave on 9 April 2021.

97. On 7 May 2021 the Claimant went to the store to discuss her shifts with Mr Jayabalasingam. He told her that only night shifts were available.

98. On 10 May 2021, the Claimant made a written complaint (it is dated 7 May 2021). The gist of the complaint was that while historically she had worked the night shift, that had ceased because of her health, but most recently she had been required to work some nightshifts. On 3 April 2021, Mr Jayabalasingam had allocated her night shifts. When she complained to him he told her that should would not be paid if she did not turn up. He had given the day shift to the new team leader. This led to a dispute and the Claimant commenced a period of sick leave. On the Claimant's return from sick leave on 7 May 2021, she was told that she had to work the 'evening shift'. The Clamant also said she normally worked 45 hours a week, 6am – 3pm but had been told she could only work 35 hours, as contracted. She said in which case she wanted to work 6m – 1pm so she could take a part-time job 3pm – 6pm.

99. She appended a letter from her GP of 28 April 2021, which said that the Clamant suffered from:

    - *Pre-mature ovarian failure*
    - *Fatigue*
    - *Asthma*
    - *Dyspepsia*
    - *Work stress*

It also said:

> *"Her gastrointestinal symptoms flare up when she is on night duties. Please kindly consider her medical problems when allocating duties and if possible avoid night shifts".*

100. On 7 May 2021, the Clamant was signed of with a Fitnote that said she had "mixed anxiety and depressive disorder, stress" until 7 June 2021.

101. On 3 June 2021, the Claimant had a meeting with the area manager, Matthew Young. He told her that if she wanted to do morning shifts only she would need to step down as team leader. She texted him afterwards and said she did not want to do that.

102. The Claimant was signed off again for the same reason for a further month on 8 June 2021.

103. The Claimant's complaint of 10 May 2021 was treated as both a grievance and a flexible working request.

104. On 1 July 2021, the Claimant attended an investigation meeting with Mr Umar Ullah, area manager. After an initial discussion of the grievance, Mr Ullah decided the Claimant should be referred to Occupational Health and that in the meantime she should work the morning shifts as a team leader.

105. The Claimant was referred to Occupational Health (OH). OH reported on 12 July 2021. The report included the following points:

105.1. The Claimant had primary ovarian insufficiency, also called premature ovarian failure. The report did not suggest this had any bearing on or relevance to any workplace issue.
105.2. Indigestion. This was said to be something most people suffer from at some point and usually not a sign of something more serious.
105.3. Stress, which could make indigestion worse. The report gave general information about stress.
105.4. It offered the following opinion: *"Based on the assessment today she is medically fit for work and is going back into work tomorrow and in my opinion night work is likely to increase her stress and dyspepsia. I would advise that a workplace stress risk assessment is completed to support her at work and identify any causes. Psychologically her levels of distress pertaining to perceived workplace issues are a real risk well-being… Given the nature of Nebyat's medical condition it is possible that she falls within the criteria of the Equality Act, and this should be borne in mind with any considerations for adjustments. Although this would be a legal decision and not a medical one."*

106. On 11 August 2021, the Claimant met had a follow up meeting with Mr Ullah 102.

106.1. One of the primary themes of the meeting was Mr Ullah exploring with the Claimant what she found stressful about night shifts. The Claimant gave little in the way of specifics and was hard to pin down, what it was:
  106.1.1. The Claimant's main focus was on shoplifters being stressful. Mr Ullah checked whether the claimant was aware of the process. She said she was. We accept his evidence that the process was not to challenge shoplifters nor to try and stop them. He offered the Claimant training with regard to dealing with shoplifting.
  106.1.2. The Claimant also said she was "gastric and asthmatic".
  106.1.3. Her union rep said working evenings caused stress and less sleep.
  106.1.4. Mr Ullah asked what was stressful, the Claimant said it was tiring and exhausting.

106.2. There was also a more general discussion about the hours the Claimant could/could not work:
  106.2.1. Mr Ullah asked the Claimant if she could finish at 9pm. She does not recall this but we find he did. The notes record it, they are contemporaneous and were signed by the Claimant at the time.
  106.2.2. The Claimant said that eating after a night shift was too late and meant she could not sleep due to indigestion. Mr Ullah said that they could arrange a meal break during her shift, at say 6 or 7pm. The Claimant said she did not want to eat at those times but did not give any reason as to why not.
  106.2.3. Mr Ullah said that the Claimant could transfer to another store if she found one that would accommodate her on mornings.
  106.2.4. There was a discussion about whether the Claimant could work mornings if she stepped down to CTM. Mr Ullah said he would need to check with the store manager. He adjourned and spoke to the store manager, and returned and reported that if the Claimant stepped down she would need to speak to the store manager.
  106.2.5. The claimant was asked what the latest she could finish was and she said 2pm. She later said she could not work later than 3pm. Her union rep said that the Claimant's morning availability was limited because she was looking for a second job.
  106.2.6. The Claimant asked if she could do one late night and she was told if so she would have to cut down her hours.

107. Mr Ullah ultimately gave the Claimant numerous options:

107.1. finding another store that could accommodate her request to work early shifts only;
107.2. having days off together as she was saying that lates would mean she slept less so this would allow her to recover;
107.3. a mixture of lates and early shifts;
107.4. to keep her late shifts together;
107.5. to step down as CTM to accommodate her timetable;
107.6. to start work earlier and finish at 9pm;

107.7. to have meal breaks to allow the Claimant to eat earlier.

108. At the conclusion of the meeting the Claimant agreed to do 2 late shifts and remain as team leader.

109. After the meeting Mr Ullah texted the Claimant and said that "*I have spoken to the store manger and he has agreed that if you do the 2 late nights and 3 early, he would accommodate you stepping down to ctm on 35 hours. This would make it easer when you have your second job for you and you would be a lot less stressed. Just another option for you. Let me know by 30 August what you would like to do".* The Claimant was intensely upset by this.

110. On 13 August 2021, the Claimant changed her mind and sent Mr Ullah some text messages. She said her decision at the meeting had been made under duress. She said she would only work 6am – 1pm. She wanted Mr Ullah's agreement in writing and failing that she would take the matter further.

111. Mr Ullah wanted a further meeting with the Claimant to talk more. The Claimant declined this so Mr Ullah gave an outcome to her complaint/flexible working request on 15 September 2021. He said:

> *"The quality of your or your team's work would be likely to suffer - there would not be enough cover in the evening meaning that the workload would be too much for the evening team, therefore affecting delivery completion and gap scan in the morning.*
>
> *It would be difficult to recruit an additional team member - we would not have enough hours available to recruit to replace your void in the evenings.*
>
> *It would have a negative impact on the service we provide to our customers - we would have less people in the evening to be able to serve our customers on the checkouts as well as completing all the delivery and tasks.*
>
> *There wouldn't be enough work to do at the times you want to work - we have adequate cover in the mornings and we would struggle to find enough work for you and the team to complete as there would be too many people there reducing productivity."*
>
> *I have also thought about and discussed with you whether there are any other potential alternative options, specifically finding another store that could accommodate your availability, stepping down to CTM on days 3 days a week (20 hours) as we would need to recruit a Team Leader for the 2 late nights or you agree to work 2 late nights a week as well as 3 earlies as the Team Leader. Unfortunately, on this occasion, I'm unable to accommodate this change.*

112. On 20 September 2021, the Clamant appealed. The appeal was passed to Mr Shadwell to deal with. He delegated the investigation of the appeal to Mr Kevin Yeoman, ER investigations specialist. Mr Yeoman interviewed:

112.1. The Claimant
112.2. Mr Jayabalasingam
112.3. Mr Ullah

113. On 27 September 2021, the Claimant spoke to someone (unidentified) in HR. Her understanding of the call was that her case would be escalated to the Head of HR if no resolution was reached in the grievance appeal. We accept that was her understanding of the call.

114. On 2 October 2021, the Claimant was signed off for a month with 'stress'.

115. The claimant was sent the notes of the appeal investigation hearing. She made some corrections but said she wanted her appeal to be based on her 'written submissions' a reference to the letter of appeal.

116. Mr Shadwell rejected the appeal on 21 October 2021. Mr Shadwell told the Claimant that her availability to work night shifts would recommence from Monday 1 November 2021. He also said:

> *Late-Night working can be restricted to two late nights per week, which to support you can be consecutive or separated.*
>
> *We are prepared to make a reasonable adjustment to allow you to take a break to eat at an agreed time.*
>
> *If you need support in the meantime, remember we have an Employee Assistance Programme (EAP) who can provide colleagues with support. You can contact the EAP on 0800 069 8854. It's independent and totally confidential. And there's no charge for Co-op colleagues.*

117. The Claimant telephoned HR after receiving Mr Shadwell's letter on 27 October 2021. She also raised a further grievance in writing. The gist of it was that she was being forced to work evening shifts against medical advice (that of her GP and OH). Essentially, it repeated the same points on this matter as had been explored in the preceding grievance/appeal process. She suggested that this, and the conduct of previous manager trying to get her to work the late shift, was bullying and harassment.

118. On 10 November 2021, Mr Young wrote to the Claimant stating that following the outcome from Mr Shadwell she should be returning to her "*original availability which will include up to two late night shifts per week*". She was told that this would commence from 6 December 2021. So the date of commencement pushed back to give her time to adjust.

119. The Claimant wrote to Mr Young on 18 November 2021, and told him she had not received a formal response to her grievance appeal from HR. Mr Young wrote back on 23 November 2021, saying that there was no outstanding grievance so her new working rota would be as per his letter of 10 November. The Claimant

further responded that "al*l management team has been informed from very long time including yourself I am no longer available after 1pm*". On 24 November 2021, the Claimant wrote a further lengthy complaint.

120. The Claimant was schedule to work 4pm – 11pm on 7 December 2021 and 11am to 7pm on 8 December 2021. On the 7 December and 8 December 2021 the Claimant attended the work place at 6 am to carry out a 6am to 1pm shift despite her assigned shift times. This disobedience generated a disciplinary process.

121. Mr Jeyabalasingham gave a witness statement with an account of 7 and 8 December that we accept to be accurate:

121.1. On 7 December 2021, a team leader (Ms Esplugas-Mateu) had contacted him and reported that the Claimant had turned up to work the morning shift though she was scheduled for the night shift. He advised her to tell the Claimant to stop, to return later for the nightshift and tell her that she would not be paid if she continued to work the morning shift. Mr Jeyabalasingham telephoned the store a little later and the Claimant had continued to work. He repeated the instructions to her on the telephone but she persisted.

121.2. On 8 December 2021, Mr Jeyabalasingham attended the workplace and the Claimant did the same thing again. He asked the Claimant to leave and return for her scheduled shift. She refused and said she was only available 6 am to 1pm. Mr Jeyabalasingham told the Claimant that the shifts issues had been dealt with in the grievance process and she had been given three week's notice of new rota. Mr Jeyabalasingham told the Claimant to stop working because she would not be paid. She disagreed. She then walked towards the shopfloor to continue working whilst ignoring his request to come back to the office. He asked her to go to the canteen while he took advice from people services. She refused and continued working. He took advice and then suspended the Claimant and gave her a letter of suspension. The Claimant left.

122. Ms Esplugas-Mateu was gave a written account of 7 - 8 December 2021, in similar terms.

123. On 8 December 2021, the Claimant wrote to the head of HR again. She cited the medical evidence and highlighted the words 'Equality Act'.

124. On 14 December 2021, the Claimant was invited to an investigation meeting to discuss "*failure to follow reasonable management request due to refusing to leave the store when not scheduled to work but your weren't able to attend*."

125. On 16 December 2021, the Claimant wrote to the Respondent and said that she was giving the reasons for not leaving at the time requested on 8 December 2021:

> *"You, and all the management team are aware that I am no longer available to work after 1pm.*
>
> *Consequently, I went to work that day at 6am with the intention of working until 1pm and thus to completing my daily hours. I have been on this early morning shift since July 2021 from 6am to 1pm.*
>
> *I would like to stress that I did not fail to follow reasonable management request to leave the store.*
>
> *All I did when I was asked to leave was to request a letter from you to that effect and I immediately left on receipt of the letter.*
>
> *This letter gives you my position relating to this matter. This letter is in lieu any meeting"*

126. On 17 December 2021, the Claimant attended the investigation meeting chaired by Mr Kantasamay. He attempted to discuss the matter with the Claimant. She declined and said that her position was in the letter.

127. By letter of 17 December 2021, The Claimant was invited to a disciplinary hearing to take place on 21 December 2021. The allegation was:

> *"insubordination on 7 and 8 December 2021 in that you failed to follow a reasonable management request to leave the store premises, when you attended the workplace when you were not scheduled to work and "Alleged insubordination on 7th and 8th December 2021 in that you have intentionally refused to work your scheduled shifts from 4pm to 11pm on the 7 December 2021 and on the 8 December 2021".*

128. The Claimant was warned that the allegation was considered to be gross misconduct and could lead to summary dismissal.

129. The Claimant asked to reschedule the disciplinary hearing. The meeting was rescheduled to 28 December 2021. The Claimant asked for the hearing to be further postponed so that she could take legal advice. However, it was not and it went ahead on 28 December 2021. The Claimant did not attend the meeting.

130. The hearing manager was Mr Bhatt. He decided to dismiss the Claimant summarily finding the complaints well founded. His letter of dismissal is brief in terms of explaining the decision to dismiss. Beyond setting out the allegations, materially, he said simply *"looking at the evidence, which is the witness statements, I have no alternative but to uphold the allegations as more than one manager confirmed the allegations to be true".*

131. The Claimant had not been sent the witness statements. The letter of dismissal gave no indication whether sanctions short of dismissal had been considered, whether thought had been given to whether there was any mitigation nor whether length and quality of service had been taken into account.

132. The Claimant appealed. She referred to the background to the matter, including health-based reasons for not wanting to work the night shift and set out her grounds of appeal:

- *No witness statements provided*
- *Did not move disciplinary hearing so she could take legal advice*
- *Had been no issue about working on 7 December 2021*
- *On 8 December 2021, the gist of what happened was that her manager wanted her to leave the premises and said she would be unpaid. She asked for a written note*
- *Failure to consider her needs for flexible work*
- *Failure to consider her length and quality of service*
- *Failed to consider options short of dismissal*
- *Conduct was out of character*

133. The Claimant had an appeal hearing with Mr Rowe on 27 January 2022. In the course of the hearing the Claimant told Mr Rowe that her position remained that she would not work nights.

134. Mr Bhatt was interviewed by Mr Rowe on 7 February 2022. The interview was extremely brief and Mr Bhatt was not asked about whether or not he had taken into account length and quality of service, mitigation, nor whether he had considered options short of dismissal.

135. The appeal outcome was given on 11 February 2022 dismissing all grounds. No basis was given for rejecting the Claimant's grounds that there had been a failure to consider length/quality of service or sanctions short of dismissal. In his oral evidence Mr Rowe could not say what the basis was. The Claimant's ground in relation to not being sent the witness statements was rejected on the basis that the statements were in her HR file which had been at the investigation hearing. The reasoning was that had the Claimant engaged at the investigation hearing or attended the disciplinary hearing the documents would have been shared with her.

Law

136. By s.94 Employment Rights Act 1996 there is a right not to be unfairly dismissed.

137. There is a limited range of potentially fair reasons for dismissal (s.98 Employment Rights Act 1996). Conduct is one.

138. If there is a potentially fair reason for a dismissal, the fairness of the dismissal is assessed by applying the test at s.98 (4) ERA. The burden of proof is neutral. Section 98 (4) says:

> *(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 case.*

139. In ***BHS v Burchell*** [1980] ICR 303, the EAT gave well known guidance as to the principal considerations when assessing the fairness of a dismissal purportedly by reason of conduct. There must be a genuine belief that the employee did the alleged misconduct, that must be the reason or principal reason for the dismissal, the belief must be a reasonable one, and one based upon a reasonable investigation.

140. However, the ***Burchell*** guidance is not comprehensive, and there are wider considerations to have regard to in many cases. For instance, wider considerations of procedural fairness and of course the severity of the sanction in light of factors such as the offence, the employee's record and mitigation.

141. In ***Iceland Frozen Foods v Jones*** [1982] IRLR 439, the EAT held that the tribunal must not simply consider whether it personally thinks that a dismissal was fair and must not substitute its decision as to the right course to adopt for that of the employer. The tribunal's proper function is to consider whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.

142. The range of reasonable responses test applies to all aspects of dismissal. In ***Sainsbury's v Hitt*** [2003] IRLR 23, the Court of Appeal emphasised the importance of that test and that it applies to all aspects of dismissal, including the procedure adopted.

143. The fairness of a disciplinary process and a dismissal should be judged at its conclusion. It is possible for unfairness at an earlier part of the process to be corrected at a later stage of the process, for instance, at the appeal stage. In any event not every aspect of unfairness will make a dismissal unfair overall. See ***Taylor v OCS Group Ltd*** [2006] IRLR 613.

144. By s.207 TULR(C)A the tribunal is required to have regard to *Acas Code of Practice on disciplinary and grievance procedures* in a case of this kind since many of its provisions are relevant. It sets out some well known basic principles of fairness in disciplinary and grievance processes. Para 9 of code says this:

If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.

Polkey

145. In ***Polkey v A E Dayton Services Ltd*** [1987] IRLR 503, Lord Bridge said this:

'If it is held that taking the appropriate steps which the employer failed to take before dismissing the employer would not have affected the outcome, this will often lead to the result that the employee, though unfairly dismissed, will recover no compensation or, in the case of redundancy, no compensation in excess of his redundancy payment. Thus, in Earl v Slater & Wheeler (Airlyne) Ltd *[1973] 1 WLR 51 the employee was held to have been unfairly dismissed, but nevertheless lost his appeal to the Industrial Relations Court because his misconduct disentitled him to any award of compensation, which was at that time the only effective remedy. But in spite of this the application of the so-called* British Labour Pump *principle [*British Labour Pump Co Ltd v Byrne *[1979] IRLR 94, [1979] ICR 347] tends to distort the operation of the employment protection legislation in two important ways. First, as was pointed out by Browne-Wilkinson J in* Sillifant's *case, if the [employment] tribunal, in considering whether the employer who has omitted to take the appropriate procedural steps acted reasonably or unreasonably in treating his reason as a sufficient reason for dismissal, poses for itself the hypothetical question whether the result would have been any different if the appropriate procedural steps had been taken, it can only answer that question on a balance of probabilities. Accordingly, applying the* British Labour Pump *principle, if the answer is that it probably would have made no difference, the employee's unfair dismissal claim fails. But if the likely effect of taking the appropriate procedural steps is only considered, as it should be, at the stage of assessing compensation, the position is quite different. In that situation, as Browne-Wilkinson J puts it in* Sillifant's *case, at 96:*

"There is no need for an 'all or nothing' decision. If the [employment] tribunal thinks there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment."

An example is provided by the case of Hough and APEX v Leyland DAF Ltd *[1991] IRLR 194 where the EAT upheld an [employment] tribunal decision that the compensatory award should be reduced by 50% in circumstances where there was a failure to consult over redundancies but the tribunal concluded that such consultation might have made no difference'.*

146. The ***Polkey*** principle is not confined to cases of procedural unfairness but has a broader application. The tribunal's task is to apply ERA 1996 s 123(1) and award 'such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer'). See e.g. ***Lancaster & Duke Ltd v Wileman*** [2019] IRLR 112.

147. In ***Hill v Governing Body of Great Tey Primary School*** [2013] IRLR 274, the EAT said this:

> *A '*Polkey *deduction' has these particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer* would *have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done. Although Ms Darwin at one point in her submissions submitted the question was what a hypothetical fair employer would have done, she accepted on reflection this was not the test: the tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand…*

148. Guidance as to the *Polkey* exercise was given in *Software 2000 -v- Andrews* [2007] IRLR 568 which must be read subject to the repeal of Section 98A, but which otherwise speaks for itself. Similarly, in *Scope -v- Thornett [2007] IRLR 155,* Pill LJ said as follows at paragraph 34:

> "*... The employment tribunal's task, when deciding what compensation is just and equitable for future loss of earnings will almost inevitably involve consideration of uncertainties. There may be cases in which evidence to the contrary is so sparse that a tribunal should approach the question on the basis that loss of earnings in the employment would have continued indefinitely but, where there is evidence that it may not have been so, that evidence must be taken into account ...*"

Contribution

149. The basic and compensatory award can each be reduced on account of a claimant's conduct according to the different statutory tests at Section 122(2), Section 123(6) ERA.

150. The impugned conduct need not be unlawful so as to justify a reduction but it must be blameworthy. Blameworthy conduct includes conduct that could be described as 'bloody-minded', or foolish, or perverse. See further ***Nelson -v- British Broadcasting Corporation (No. 2)*** [1980] ICR 110. In the case of

Section 123(6), the blameworthy conduct must also cause, or partly cause, the dismissal.

Double counting

151. Although it is true that in some cases it is appropriate to make both a *Polkey* reduction and a reduction for contributory conduct, care must be taken to avoid double-counting the same facts and thus penalising the employee twice for essentially the same thing as explained in ***Lenlyn UK Limited v Kular***, UKEAT/0108/16/DM.

Victimisation

152. Section 27 EQA 2010 provides as follows:

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

153. In ***Chief Constable of the West Yorkshire Police v Khan*** [2001] IRLR 830 Lord Nicholls said *"The primary object of the victimisation provisions is to ensure that persons are not penalised or prejudiced because they have taken steps to exercise their statutory rights or are intending to do so."*

154. In ***Aziz v Trinity Street Taxis Ltd*** [1988] IRLR 204, at 29, dealing with the Race Relations Act equivalent to section 27(2)(c) EQA 2010:

> *"An act can, in our judgment, properly be said to be done 'by reference to the Act' [the Race Relations Act] if it is done by reference to the race relations legislation in the broad sense, even though the doer does not focus his mind specifically on any provision of the Act."*

155. The putative discriminator has to have knowledge of the protected act. See, for example, ***South London Healthcare NHS Trust v Al-Rubeyi*** at UKEAT/0269/09/SM.

156. An unjustified sense of grievance cannot amount to a detriment: ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] IRLR 285).

The burden of proof

157. The burden of proof provisions are contained in s.136(1)-(3) EqA:

> (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.

158. The effect of these provisions was summarised by Underhill LJ in ***Base Childrenswear Ltd v Otshudi*** [2019] EWCA Civ 1648 at [18]:

> 'It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in *Madarassy*.[1] He explained the two stages of the process required by the statute as follows:
> (1) At the first stage the Claimant must prove "a *prima facie* case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):
>
> > "56. … The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.
> > 57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. …"
>
> (2) If the Claimant proves a *prima facie* case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:
> "He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim."
> He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.'

159. In ***Deman v Commission for Equality and Human Rights*** [2010] EWCA Civ 1279, Sedley LJ observed at [19]: *'the "more" which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by a non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred.'*

[1] *Madarassy v Nomura International plc* [2007] ICR 867, CA

160. The Court of Appeal in ***Anya v University of Oxford*** [2001] ICR 847 at [2, 9 and 11] held that, in a discrimination case, the employee is often faced with the difficulty of discharging the burden of proof in the absence of direct evidence on the issue of the causative link between the protected characteristics on which he relies and the discriminatory acts of which he complains. The Tribunal must avoid adopting a 'fragmentary approach' and must consider the direct oral and documentary evidence available and what inferences may be drawn from all the primary facts.

161. In ***Hewage v Grampian Health Board*** [2012] ICR 1054 at [32], the Supreme Court held that the burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

Discussion and conclusions

Unfair dismissal

162. Reason for dismissal was the Claimant's conduct on 7 and 8 December 2021. There is overwhelming evidence of this and we reject the Claimant's case to the contrary. The Claimant's conduct of 7 and 8 December 2021 was egregious and in large part not disputed. There was in any event cogent evidence of it and it was the type of conduct that it is unsurprising lead to dismissal.

163. The Claimant believes there was a longstanding conspiracy to get her out of the business and that the whole thing was a set up. We do accept that she clashed with Mr Jayabalasingam very early on and that there was tension between them. However, we do not accept that there was a conspiracy or that the way the night shift issue was managed was a set up to remove her from the business. The evidence simply does not support it. For instance, there was a lengthy period between July 2021 and December 2021 when the Claimant was excused from doing nightshifts at all, pending the outcome of her grievance. That was a very benevolent approach. That was a voluntary period of grace on the Respondent's part that is inconsistent with a setup. Likewise when this arrangement came to an end the Claimant was given about three week's notice that she would start being allocated night shifts. Again this was accommodating and evidenced a will to make things work. Further although the Respondent did not go as far as giving the Claimant what she wanted in removing all night shifts it made many suggestions to mitigate the concerns the Claimant raised about doing nightwork.

Fairness

164. The Respondent had a reasonable believe that the Claimant was guilty of serious misconduct on 7 and 8 December. That was a reasonable belief because there was clear witness evidence supporting it and the Claimant did not really dispute much of the core facts.

165. However, details matter, and there was not a reasonable investigation. The Claimant was not sent the primary materials on which the decision making was based - that is the two witness statements of Mr Jayabalasingam and Ms Esplugas-Mateu. In our view that was a breach of the ACAS code and it was more generally outside the band or reasonable responses. It is not an answer to say that the statements were in the Claimant's file and would have been shared with her had she engaged more deeply. They just needed to be sent to her but were not.

166. It was also unfair in our view, meaning outside the band, to refuse the Claimant's request for a further postponement of the disciplinary hearing so that she could get legal advice. The time of year is highly relevant. The disciplinary hearing fell over the Christmas period when it would obviously be much more difficult to get assistance. Further this was a case in which the Claimant's job was at risk and although the misconduct itself was straightforward enough there was a considerable background to it that meant there was obvious merit in getting advice. Most importantly, this was a case in which there was no particular urgency. No factor has been identified that meant there was any business need to deal with the matter prior to the new year. Any reasonable employer would simply have given the Claimant a couple weeks to get legal advice, given the time of year, and thus schedule disciplinary around 3 weeks after it was in fact scheduled.

167. Having read the written evidence and heard Mr Rowe's evidence, we are satisfied that no account was taken of the Claimant's length and quality of service in determining what the appropriate sanction should be. And we are further satisfied that the Claimant's specific ground of appeal in relation to this, was dismissed without there being any basis for dismissing it. Both these matters, the failing to give thought to relevant factors and failing to deal properly with a ground of appeal about that, were outside the band.

168. We are also satisfied that there was a failure to properly think about and consider whether the Claimant had any mitigation for her conduct. She plainly did some. This was not gratuitous misconduct. It was misconduct but it arose out of a deep sense of grievance and a belief that working nightshifts was bad for the Claimant's health and a belief that there was an ongoing grievance process by some kind of further right of recourse to HR.

169. We are also satisfied that at the dismissal stage Mr Bhatt did not consider whether it would be sufficient to impose a sanction short of dismissal. There was a real issue here given that this was a long serving employee without a track record of misconduct. That was outside the band. We are also satisfied that the Claimant's specific ground of appeal in respect of this matter was dismissed without any basis. That was also outside the band.

170. At the appeal stage, on balance we are satisfied that Mr Rowe did consider whether or not he should reinstate the Claimant with a sanction short of dismissal. He decided not to, in part because she told him that her position remained she would not work nights. However, this does not cure the unfairness

of Mr Bhatt failing to consider the matter since *his* judgment was also important and if anything more important as the dismissing officer.

171. Overall, while we accept that there was a reasonable believe that the Claimant had done serious misconduct on both 7 and 8 December 2021, for the reasons given, looking at matters in the round the dismissal was unfair.

Polkey

172. In our view this is a case in which if the Respondent had acted fairly there is a strong probability but not a certainty that it would have dismissed the Claimant and the dismissal would have been fair.

173. Certainly we take the view that the conduct was serious enough that, even as a first offence, a fair dismissal was possible in the event of a fair procedure (to include a fair thought process by the decision makers) being followed.

174. If a fair procedure had been followed we take the view that there is a strong likelihood that the outcome would indeed have been dismissal. That is because:

174.1. the Claimant's own position was not very different to that set out in the witness statements that the Claimant was not sent;
174.2. the misconduct was very serious and repeated on 2 days;
174.3. the mitigation the Claimant had was moderated by the fact that the issues had been considered at length already in a grievance and appeal process;
174.4. the Claimant said at the appeal stage that she would not work nights.

175. However, we take the view that though dismissal was by no means certain:

175.1. Given the Claimant's length and quality of service and the fact this conduct was out of character, it was certainly open to the decision makers not to dismiss her – it would have been perfectly rational to give her another chance; there was more than one rational response.
175.2. The claimant's own position may well have softened had the disciplinary process been conducted more fairly. For instance if the sanction had been reduced her willingness to work nights might have softened.
175.3. Even if the Claimant had continued to refuse to work nights at Hither Green there were other arrangements which she, though she had previously rejected, might have been willing to accept (having had the scare of the disciplinary process and, say, a final warning). For instance mornings only but on reduced hours and perhaps a lower graded role. Or perhaps the Claimant may have been willing to move to another store that would accept her on days.

176. We find that a fair process would have deferred the date of dismissal by around 3 weeks.

177. All in all we take the view that a *Polkey* reduction of 75% should apply to the Claimant's losses from 19 January 2022. This reflects what we think is the approximately 75% chance that the Respondent could and would have dismissed the Claimant had it acted fairly.

Contributory conduct

178. In our view the claimant's conduct on 7 and 8 December was very clearly blameworthy conduct. Of particular note, she was not scheduled to work the early shifts but insisted on doing so nonetheless. She was told on both occasions to stop doing so but insisted on doing so nonetheless. She was in flagrant breach of what were reasonable management instructions. This all followed an internal grievance process and appeal, and a significant period of notice at the end of it that she would be required to work some evenings.

179. We accept that the Claimant believed she had a further right of appeal to HR in respect of her grievance. However, even taking her evidence at its reasonable highest she was never told that she could continue working days only pending this further stage. However strong her feelings were, this remained serious misconduct that easily passes the threshold of blameworthiness.

180. If the Claimant's remedy is compensation, then we think it is just and equitable to reduce her compensatory award by 75%:

    180.1. The Claimant's nature and character of the misconduct was very serious and in short, she is primarily to blame for the dismissal.
    180.2. The misconduct was repeated on a second day.
    180.3. The conduct was the reason for the dismissal.

181. However, in light of the *Polkey* reduction which arises essentially out of the same conduct, it is important to avoid double counting. Therefore the reduction to the compensatory award applies only from the date of dismissal 29 December 2021 to the date the *Polkey* reduction kicks in, i.e.,. it applies until 18 January 2022.

182. In our view it is just and equitable to reduce the basic award by 50%. In our view this strikes the just and equitable balance between the Claimant's misconduct and the extent of the unfair aspect so the disciplinary process that led to the Claimant's dismissal.

<u>Victimisation</u>

183. The Respondent accepts and we find that the Claimant did a protected act by her grievance letter of 27 October 2021.

184. Suspension and dismissal are both detriments, so the issue is whether either or both were because, or partly because of, the protected act.

185. The Claimant accepts that there is no direct evidence that the protected act had any causative impact on the decisions to suspend and dismiss her. However she says that this inference should be drawn because the Respondent simply dismissed the health issues she raised in her original grievance from May 2021 without properly considering them and that it can be inferred it was irritated when she raised the matter again on 27 October 2021.

186. We do not accept that analysis. The Claimant's health concerns were considered during the grievance process and with some care. This included an OH referral, and then a meeting to discuss the OH report and the stress issue identified (with Mr Ullah in August). A significant number of adjustments were suggested to try and accommodate the health issues, albeit not the one the Claimant wanted. It is not right that the health issues were simply dismissed. They were also considered again at the appeal stage by Mr Shadwell and his outcome letter makes that plain.

187. It is true that at the disciplinary stage little thought was given to the Claimant's health. In our view that is because the Respondent (both HR and management) took the view that those matters had already been dealt with and that the Claimant was simply trying to reopen the matter.

188. The disciplinary process was dealt with in a way that was unfair in some respects:

188.1. Not adjourning to for a sufficient period to allow the Claimant to take legal advice.
188.2. Not providing the Claimant with the witness statements.
188.3. Not taking into account mitigation, nor length/quality of service.
188.4. Not considering sanctions short of dismissal.

189. However, ultimately in our view none of these matters have any connection with the protected acts. In our view the Respondent was indifferent to the grievance of 27 October 2021 - it simply thought that the matter was closed having already been dealt with.

190. Moreover there was a clear, obvious and logical reason for suspension and dismissal: the conduct on 7 and 8 December 2021. There is overwhelming evidence that that was, and was the only reason, for the dismissal and we so find.

_____

Employment Judge Dyal

_____

Date 15.02.24