EMPLOYMENT TRIBUNALS

Claimant: Ms M Ceriaco

Respondent: Hazelwell Care Home Ltd

Heard at: Liverpool (by CVP) **On:** 22-24 January 2024

Before: Employment Judge Eeley
Mr R Cunningham
Mr Q Colborn

REPRESENTATION:

Claimant: In person
Respondent: Mr P O'Callaghan, Counsel

JUDGMENT having been sent to the parties on 31 January 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant's claim came before the Tribunal for a hearing over three days by CVP in January 2024, to be heard before a full Tribunal. The claimant was representing herself. The respondent was represented by counsel, Mr O'Callaghan.

2. The Tribunal was referred to the contents of an agreed hearing bundle which was 173 pages in length. We received written and oral evidence from the claimant (who produced a witness statement with attachments) and the respondent's witness Amy Cunningham who is the respondent's HR Business Partner.

3. We did not hear evidence from Mr Philip Evans who was the Home Manager at the relevant time. He has apparently since left the respondent's business. Nor did we hear from Angela King, the Regional Director who was the person who made the decision to dismiss the claimant, because she too has since left the business.

4. I state at the outset that having heard the witness evidence of the two witnesses the Tribunal was satisfied that both witnesses were doing their best to assist the Tribunal and were giving honest evidence to the best of their ability and to the best of their recollection. The difficulties in this case arose more from the fact that there were gaps in the relevant documentation and because the relevant decision makers in the respondent organisation were not able to give oral evidence or a written witness statement to the Tribunal.

5. The List of Issues was agreed at the outset of the hearing. It is set out in the Case Management Order at page 74 of the agreed bundle. It contains claims of section 15 discrimination because of something arising from disability and also section 20/21 claims of breaches of the duty to make reasonable adjustments.

The facts

6. We find as a fact, and indeed it was conceded, that the claimant is a disabled person. She is disabled by reason of fibromyalgia and a herniated disc in her spine. That disability was conceded by the respondent. We also note from the evidence that we have heard that the fibromyalgia (in particular) is a condition which has both mental and physical symptoms. It fluctuates over time and involves a series of flare-ups and possible periods of remission. It is unpredictable and it has a significant component of fatigue and tiredness.

7. The Tribunal also notes that we cannot assume (as we are not medically qualified) that there is 'cause and effect' in relation to the claimant's symptoms without medical evidence to support such a conclusion. So, for example, we cannot attribute any particular 'flare-up' in the claimant's condition to a particular event connected with work without a doctor's evidence to suggest that link. We would need evidence on which to base such a conclusion.

The Respondent

8. The respondent is a company operating a series of care homes for the elderly. We heard that there are approximately 80 care homes in the respondent's portfolio across the UK. Some of them are in Scotland, 23 are in England, and there is an additional portfolio of complex care homes for those with more complex needs. The home in question in this case is Hazelwell Care Home on The Wirral. We heard that, of the homes run by the respondent, the nearest geographically to the Hazelwell was located in Sale, Greater Manchester. This gives an indication of the geographical spread of the homes within the portfolio.

9. The care home that we are concerned with has a maximum capacity of 55 residents. However, we heard that, at around the period of time under consideration, there would be around 33 people in residence in any given week.

10. As is a feature of these kinds of workplace, staffing levels and requirements will depend on the particular care needs of the portfolio of residents at any given time. They will fluctuate. The Tribunal also notes that it was indicated that at least some of the residents were suffering from dementia which, again, necessitates that certain care needs are met.

11. We also heard that the care home must be staffed at all times by at least one qualified nurse. It was indicated that, over the two or three floors of the care home, there was supposed to be one Senior Care Assistant per floor and between four and six Junior Care Assistants per floor at any given time. This refers to the staffing numbers working on a given shift, rather than the totality of the workforce. There would also be ancillary staff, which would include those employed in the kitchen. We heard evidence that there had been difficulties regarding the CQC inspection which took place in the summer of 2021. The inspection had not gone well for the respondent, particularly in relation to the assessment of its food provision for the residents. There was a requirement and a need to improve the food provision at the home.

The Chronology

12. On 11 May 2021 the claimant applied for her Senior Care Assistant role. (The application form is at page 79 of the bundle.) Within that application form there is no mention of the claimant's history of ill health or her disability. The very next day, namely 12 May 2021, the claimant went to interview with the respondent and we have some notes of that at page 84 of the bundle. The notes set out some of the questions and answers and comments that were made during the course of that interview. Those notes do not include any reference to health problems or disabilities. They *do* refer to a request to carry out a 48 hour working week.

13. On 18 May 2021 (or thereabouts) the respondent offered the claimant the job. At page 85 we can see that there is an offer, and at page 86 the offer is made subject to references, DBS checks and the like.

14. We have seen the offer letter itself at page 86. Neither of the parties was able to provide us with a copy of a written contract of employment setting out the detailed terms and conditions of employment. Nor were we referred to an employee handbook (or similar). Consequently, this offer letter is the only available document regarding the claimant's initial terms and conditions with the respondent. The letter refers to a 48 hour week and a six month probation period. It does not specify the length of the shifts, but both parties accepted during the course of the Tribunal hearing that a 12 hour shift was an industry standard, or at least frequently encountered within the sector.

15. We note there is a gap in the documentation from the inception of the contract: there is no documentation surrounding references; there is no ‘new starter form;’ and, perhaps most importantly, there is no health questionnaire. One would expect to see a health questionnaire, particularly in this sector, in order to protect the interests of both employer and employee and, of course, of the residents in the care home. One would have expected and required the respondent to have obtained completed versions of these documents and to have filed them where they could be retrieved if needed in future. Sadly, that was not the case in these proceedings.

16. We were, however, referred to two job descriptions. The Senior Care Assistant job description is at page 89 and the Junior Care Assistant (or, more properly, just ‘Care Assistant’) job description is at page 91. Both of those job descriptions

give us a flavour of the types of work that the employees would have to carry out on a daily basis. It is important to note that there is a large degree of overlap in the responsibilities of both types of Care Assistant. Both are involved in the day-to-day physical care of the residents, and there will be a degree of physical exercise/manual handling involved in that.

17. In addition to that core caring role, the Senior Care Assistant has extra responsibilities. The Senior Care Assistants are required to supervise the Care Assistants and to organise/lead the team. They also have certain responsibilities in relation to medication and infection control. The Tribunal can see that, rather than the two job descriptions being completely different, they largely overlap but there are additional tasks and responsibilities for the Senior Care Assistant.

18. The Tribunal also notes that the series of events under consideration took place during the Covid-19 pandemic. Thus, infection control was a particular matter of concern. The Tribunal has also heard reference to the need for inoculations, vaccination jabs, and the like, in the workforce.

19. Some aspects of a carer's role are physical. The physicality, the degree to which that work is strenuous, depends on the profile of the residents at any given time. Each cohort will have particular needs and they may change over time depending on who is resident and also on the availability of mechanical aids and employees to assist in caregiving.

20. The Employment Tribunal is satisfied, therefore, that a regular feature of the claimant's job was some manual 'moving and handling' of varying degrees of strenuousness.

21. The staff in the home are a mixture of employees, with contracts of employment, and agency staff, recruited to fill the gaps. We have also heard that the respondent wanted to reduce its reliance on agency staff (perhaps not surprisingly) in order to reduce costs, to improve continuity of care for residents, to improve standards of care and to improve the service across the board. However, we did not hear any specific evidence about the breakdown or composition of the workforce during the relevant period of time. Nor did we receive any information about the specific cost differentials or the availability of workers within the local job market (i.e. how easy or difficult it was to recruit and retain suitable staff.) We heard submissions and evidence 'in principle' but without any specific data to back them up. This is something which is important, to which I will return in a moment.

22. I return to the timeline. In around July 2021 the claimant was asked (or volunteered) to help out in the kitchen on one or two occasions. We do not know specifically what that work entailed. We also do not know (in terms of the claimant's qualifications and experience) whether she would meet the requirements for appointment as a substantive chef or to a substantive kitchen role in the UK. For example, we do not know whether her qualifications would meet the regulatory requirements, whether she would be able to demonstrate the requisite knowledge of nutrition etc. That is something which the Tribunal does not know. In the kitchen setting at the home, the Tribunal is aware that there were

both agency workers and employees. However, we did not have a breakdown as to who was an agency worker and who was an employee.

Chronology of Absences

23. As this is a case concerning sickness absence, the Tribunal turns to consider the relevant chronology of absences.

24. There is an overall record of the claimant's absences at page 102 of the bundle. We can see a period of 24 days' absence in July to August 2021; there are 11 days' absence in September (in one particular block); there is a further 42 days' absence from 27 September through to 7 November 2021; then there are 25 days' absence (starting on 19 November 2021); and a further 81 days' absence from 13 December 2021 through to the effective date of termination on 4 March 2022. That amounts to 183 days of sickness absence, which is more than 60% of the entire employment period.

25. We were also referred to fit notes provided by the claimant's GP to cover all the periods of sickness absence. They refer to fibromyalgia and, on occasion, to backache. All of those fit notes stated that the claimant was not fit for work. None of them suggested particular adjustments which would, perhaps, facilitate the claimant coming into work in a slightly different capacity to her normal work patterns or duties.

26. We further note that the probationary period of six months was extended to 11 January 2022, largely because the respondent was unable to assess the claimant's capability and suitability for the role beyond probation, given the level of her sickness absences over the relevant probationary period.

Incident September 2021

27. The Tribunal was told of an incident in September 2021 regarding annual leave. There was a dispute between the parties in relation to this. The respondent says that the claimant (at short notice) requested annual leave, and that this was refused for business reasons. The claimant subsequently went off work on sick leave and then the respondent discovered that, during her sick leave, she had spent time in Portugal. The claimant was invited to an investigation meeting to discuss this concern. During the Tribunal hearing, the claimant admitted having gone to Portugal and confirmed that she had not told the respondent about that. However, she maintained that she was still unwell and on sick leave during this period. Her position was that she acted on medical advice to use time at home with friends and family (as she is a Portuguese national) to recuperate from her illnesses.

28. The HR advice provided by the respondent at that stage was not to take any further action and to give the claimant the 'benefit of the doubt.'

29. This Tribunal has insufficient evidence to suggest that this was really a disciplinary matter. Indeed, that dovetails with the fact that the respondent took the matter no further (hence there was no disciplinary action.) In light of this, the Tribunal cannot say that this incident adversely affected the claimant's credibility as a witness before us. We note that, sometimes, it can be reasonable for a

sick employee to go abroad to recuperate, particularly if there is a mental health issue and particularly if they are travelling to their home country or country of origin.

August 2021

30. In August 2021 there was a reduction in the claimant's hours of work. The change was from a series of twelve hour shifts, amounting to 48 hours per week (four lots of twelve), to six hour shifts and 30 hours per week. This would be organised as five days of six hour shifts. This was to be implemented from 23 August 2021. It was discussed with the claimant and Mr Evans. There is no note of the conversation that took place, and we have no witness evidence from Mr Evans.

31. The respondent says that this alteration in hours was a temporary measure, whereas the claimant says that it was permanent. On balance, and having reviewed all the evidence, the Tribunal concludes that it was a permanent alteration to the claimant's hours at the point that it was agreed.

32. There are a number of features of the evidence which support us in this conclusion. Firstly, a month after the implementation of the reduction there is a written contract variation (a formal document) at page 103 in the bundle. In that document it does not make reference to it being a temporary reduction in hours. Indeed, it is questionable why the respondent would create a formal variation document for a temporary variation or something which was being done on a trial basis. The claimant (when she subsequently signed to agree to the change in her contract) would not reasonably conclude that she was just signing for a temporary change. This would not be apparent to her from the document. Indeed, there is no reference to a review point or a trial period, at which point the parties might revisit the issue and decide that six hour shifts were not practical. In short, there is nothing on page 103 to say or indicate that the change was temporary. Indeed, even on the respondent's case, there was no particular review period. How, therefore, was the matter to be revisited? Indeed, there would be good business reasons for the respondent to make it permanent in order to try and retain the employee that it had already recruited so they could cover at least half of the hours that the respondent needed, rather than throwing the matter out to the agency job market to try and cover 100% of the required hours.

33. The Tribunal also notes, when considering the impact of this change, that we had no specific evidence from the respondent as to exactly how it covered the other six hours which would have been worked by the claimant. Who covered the other six hours? How was it done? Was it all covered by the same person? Was it worked by an agency person? Did the respondent recruit someone to cover it? We are unable to see, therefore, how easy or difficult, expensive or sustainable, the 30 hours a week work pattern was, in fact, for the respondent. The Tribunal also notes that the change was from a four day pattern to a five day pattern. We have no evidence as to how this impacted on the wider rota for workers in the home. How was the workforce organised around this change from four days to five days? Did they put two half shifts together to make a whole

shift, with one employee doing both? We just do not know. We did not see the evidence to explain this.

Six or twelve hour shifts?

34. One of the other pertinent and relevant issues for the Tribunal to examine was whether the other Senior Care Assistants were doing six hour shifts or twelve hour shifts. The claimant's case is that she was not the only person in a Senior Care Assistant role who was working six hour shifts. The respondent provided one specific example where it conceded that there was one Senior Care Assistant who was working three twelve hour shifts and one six hour shift so that six hours of study leave could be accommodated. That individual was working towards a care qualification.

35. The Tribunal had to decide which version of events it preferred. We heard evidence from the claimant and Ms Cunningham. We note that Ms Cunningham had overarching responsibility for a number of care homes and was not heavily involved in the day-to-day running of this particular home. In fact, the homes were fairly autonomous, operating under local managers. Ms Cunningham had oversight over lots of homes and would have no real direct knowledge of shift patterns and recruitment in a particular home, only what she was told by particular managers who requested her advice. The manager who did know in this case (i.e. Mr Evans) is not here to give evidence. Furthermore, we have not been provided with overall documentation showing the shape of the workforce, the timesheets, the payroll, etc.

36. The claimant, on the other hand, gave evidence that she was aware of two other Senior Care Assistants who were doing six hour shifts. In one of the minutes of a meeting with the respondent she mentioned them by name – Rachel and Sarah. The claimant noted that one of them (and she recalled this in front of the Tribunal) had a young child and was working six hour shifts to accommodate this. The Tribunal were satisfied that this had the ring of truth and credibility to it. We were satisfied that this was honest evidence that the claimant gave to us based on her knowledge of her colleagues' work patterns. As I say, the respondent had already admitted that there was at least one Senior Care Assistant who did one six hour shift per week.

37. Taking the evidence in the round, we are satisfied that there was no blanket and inflexible principle that, if someone was employed as a Senior Care Assistant, they had to do twelve hour shifts. Operationally it was preferable, but we cannot say that it was mandatory and that there were no exceptions to it. The respondent admits some exceptions and the claimant points to more. Indeed the respondent was prepared to let the claimant do six hour shifts from August, so it must have been possible (at least on a time limited basis). Again, there would be some benefit to maintaining employee cover for at least half of the entire shift rather than paying agency rates for the whole twelve hours. Indeed, we heard evidence that the medication round would take place at the beginning of a given shift and so it seems to us that it could have been organised in such a way that the established employee would carry on with the regular medication duties and the agency worker might take over the latter part of the shift once the medication duties had already been completed for the twelve hour time period.

38. That is our position in relation to the six hour shifts amongst other Senior Care Assistants. We are satisfied that there was no blanket prohibition on Senior Care Assistants doing six hour shifts. These could be accommodated depending on the particular circumstances of the case and the availability of other staffing resources.

Chronology continued.

39. On 15 October 2021 there was a meeting between the claimant and Mr Evans. Ms Cunningham was present to take notes. We have some record of that at page 106 (which is a typed version of Ms Cunningham's notes) and page 107 (which is the handwritten original). We have to decide what was said at this meeting and what impact it has on our findings of fact.

40. Clearly, the claimant was keen to return to work. Psychologically it did not suit her to be at home, it would benefit her to go back into the workplace. Obviously, the respondent wanted her back at work as well. There is no indication, however, that the length of any shifts to be undertaken by the claimant was discussed at this meeting, indeed we are getting ahead of ourselves as to the evidence as to what sort of shifts the claimant could come back to work on.

41. We note that the typed notes of the meeting have a series of headings in bold with comments in normal type. There is a heading in relation to the length of the shifts which says (in the typed version), "Shifts we amended to 30 hours temporarily." In the handwritten document we have a series of what appear to be headings or agenda items on the left-hand side of the page, with smaller 'jotted' notes on the right hand side of the page, which seem to reflect the contents of the conversation that took place. In relation to the length of the shifts, the heading appears to be "Shifts – 30 hours – temp change". There is no comment in relation to that topic in the handwritten notes or the typed ones. There is just the heading/agenda item.

42. The conclusion that the Tribunal draws from this is that, although it was on the agenda for discussion before the meeting, we accept the claimant's evidence that the temporary or permanent nature of the 30 hour week was not discussed at this meeting. The claimant was very clear on that in her evidence, and she would have good reason to remember. Whilst Ms Cunningham was convinced that there was a discussion of a temporary versus a permanent 30 hour week, she had less reason to remember specifically, given that she was not closely involved (she was there to take notes.) Indeed, this is possibly one of a series of meetings that she would have been involved in during the working day. Her recollection of events was more dependent on the notes that she took, whereas the claimant has personal cause to remember. Therefore, on balance, we prefer the claimant's evidence: the temporary nature of the reduction in hours was not mentioned at this meeting. That is consistent with the previous document on the permanent variation (see above); it is consistent with the absence of a follow-up variation document to reverse the change back from 30 hours to 48 hours; and it is consistent with the absence of any mention of it being a temporary change or a proposed increase to 48 hours in the following Occupational Health referral.

43. On 15 October 2021 both parties wanted the claimant to go back to work. There was no discussion of the shift length and there was an agreement that the claimant would go for an Occupational Health referral and consultation. The respondent's witness statement says that the claimant was specifically asked at this meeting if she would return to 48 hour weeks and that she agreed. However, there is no mention of this even in the respondent's minutes and we are not satisfied that this was said. It was more likely that this was discussed at the next meeting, with the benefit of Occupational Health advice.

44. The Occupational Health referral is at page 108. I pause to note that under the heading, "What has been done/proposed to help or support the individual to date?" the referral states, "Amendment to contract, amendment to shift patterns, welfare meeting conducted." It does not, in terms, refer to a *temporary* amendment to the contract or to a trial period. Nor does it suggest that, at the point in time that the referral was made, the respondent was looking to bring the claimant back on increased hours. Again, this is consistent with our findings on the contract variation.

45. The report itself is dated 19 October and is at page 112 of the bundle. It is relevant to read out certain sections of that report for the record. In the section under the hearing "Current," the clinician states this:

"I understand Maria is keen to return to work and has changed her hours to work six-hour shifts. In my opinion this will be beneficial for her and help her manage her condition better. She will be prone to relapses of her condition, the best way to prevent them is to keep stress to a minimum and pace oneself, so not overdoing it. Physiotherapy and counselling will also help her condition."

46. Under the heading "Capacity for Work" it stated: "Fit for work," and continued:

"I recommend she avoids any heavy lifting, pulling or pushing due to herniated disc in lower spine."

47. In response to the specific questions the report states:

"What is the likely date of return to work? Due to return."

"On return to work is there likely to be a residual disability which will prevent them from being able to carry out normal duties and for what timescale is this likely to be the case? See report."

"Is a phased return to work likely to be required? No."

"Is it likely that the Equality Act will apply? Likely to apply as long term condition and requires long term medication."

"Is the employee likely to be able to give regular and efficient service in the foreseeable future? She may have further absences due to fibromyalgia."

"Do you consider retirement on the grounds of ill-health to be an appropriate option? No as she can do her role."

So, as of October 2021, that was the medical/Occupational Health opinion.

48. The respondent sought to argue during the Tribunal hearing, that there was no recommendation from Occupational Health that the claimant should be kept on six hours. Whilst the Tribunal accepts that it is not under the heading of "recommendations," we do not accept the respondent's reading or interpretation of the document. It is important, with a document of this nature, to read it purposively, holistically and in context. The whole report is predicated on Occupational Health being told that the claimant is on six hour shifts. Occupational Health have *not* been told (or had it suggested to them) that the claimant will be asked to do twelve hour shifts or that this is a proposal. If six hour shifts are the status quo, then one would not expect it to be packaged as a recommendation. It was already in place. It is internally consistent with the rest of the report for the recommendation (and the assumption) to be that the claimant is going to do six hour shifts. Hence, there is a reference to the claimant not overdoing it and 'pacing herself.' It would be a strange recommendation indeed to recommend that someone not 'overdo it' or 'to pace themselves' and in the same report support an *increase* in the working hours. That would be contradictory, in the Tribunal's view. So, it is implicit in this report that it is based on a six hour shift and it certainly does not explicitly support or recommend a twelve hour shift.

49. There was a further meeting on 1 November 2021 between the claimant and Mr Evans. Once again, Ms Cunningham attended. However, on this occasion no notes were taken. The Tribunal wondered why this was. One would expect notes to have been taken at a meeting of this nature. We were told that the meeting was brief (it took about 12 minutes) and having heard the respective evidence of the witnesses, we have concluded that the claimant *did* want to return to work, and the respondent *did* want her to come back to work. The respondent preferred that the claimant return on twelve hour shifts. The claimant interpreted the phrases used by Mr Evans (such as, "we want you back but on original hours, or your original contract") as an ultimatum. She interpreted him as saying that she had to come back to work on twelve hours or nothing/not at all. As a matter of fact, we think that this was a misinterpretation of what the respondent was saying. The respondent preferred the claimant to come back on twelve hours but it was not saying it was twelve hours or nothing. We cannot say that twelve hours was imposed on the claimant in that sense. However, the claimant's response was to agree to try to return to work on twelve hours. She was somewhat reluctant. She did not give a guarantee because she thought that twelve hour shifts would exacerbate her condition. Her agreement was interpreted by the respondent as a *definite* return to work on twelve hour shifts, whereas the claimant was just, in fact, agreeing to *try*. The claimant may or may not have said that it was totally the wrong thing to do for her condition, but it is certainly what she thought at the time, hence she would try it out rather than guarantee its success. One might conclude that the claimant had relatively little room for negotiation and manoeuvre and may have felt that she had little choice in the matter.

50. Following this meeting on 2 November 2021, Mr Evans sent the claimant the shift pattern that she was expected to work (page 117). This was a series of twelve hour shifts. The claimant was to do 8, 9, 10 and 11 November, then a gap, and

then 16, 17, 20 and 21 November. The claimant did not respond to indicate that she disagreed or to contest this. This is consistent with her agreeing to *try* the increased hours. It does not mean that she was accepting that it would work.

51. The claimant came in (as far as we can see) to do the shifts on 8, 9, 10 and 11 November. On 15 November 2021 there was an email between the claimant and Mr Evans referring to PCR Covid tests and the claimant sent an email (page 118). It appears that she had been called in on her non-working day (namely 15 November) to a meeting, and she says this:

"I am sorry, but I won't be able to meet you today at 3.00pm as agreed this morning, I was in severe pain, so I had to take the second pain relief, that, as I've explained before makes me very light headed, I can't drive now. But I can tell on this email what was that I wanted to talk about. On our last meeting, when you asked me what I was planning on doing, I've told you that I wanted and needed to go back to work, just before you told me that, you wanted me back, but, on my initial contract hours. As I've said I would try, as I have tried, but I really can't Phil, physically I am not fit to do 12h shifts. I am sorry, I have tried as much as I could try to cope, but I really can't. So, I would like, if possible, to continue on doing the 6h shifts as I was."

52. The claimant had clearly tried the twelve hour shifts but it had not worked for her. The respondent invited the claimant to a meeting via letter dated 16 November 2021 (a meeting that was due to take place on 19 November 2021) to discuss probation, shifts, adjustments and the like. There was a warning that it could result in termination of her employment. This warning clearly upset the claimant and we have the email at page 121 to demonstrate that. She says on 16 November:

"I will obviously attend the meeting on the 19th. I do not remember though, saying in any time that I was unfit for my shca role, what I did say was, I am not fit to do the 12h shifts at the moment, so I don't understand if that is what you mean, but I don't think it is, once I am not the only shca doing "half shifts." As I've explained on my previous email, when you asked me to go back to 12h shifts, I've said that I was going to try, which I did, but I really can't cope with that at this moment. You can count on me for my shifts as they were, 8-2 or 2-8."

53. The claimant was upset, however, because there was an incident which took place on 16 November, I believe. We are not clear as to whether Mr Evans' email response at page 123 is before the incident or after it. In that email (page 123) he confirms that the respondent cannot accommodate the reduced shifts on a permanent basis and that he wants to discuss that in a probationary meeting, go through the Occupational Health report, etc., and look at reasonable adjustments.

54. In the meantime, the incident that is referred to is recorded at page 124, which is an email from Emma Roberts (who is the Home Administrator.) She sent an email to Mr Evans and Ms Cunningham on 19 November about an incident on 16 November. She alleges that she and Mr Evans were discussing some information and that the claimant walked in without warning and, in Ms Roberts' opinion, was rude and in a loud manner said to Mr Evans, *"That email you have*

just sent me, is this a joke?" Apparently, Mr Evans explained that there was a meeting in place that would be the time to discuss the matter. The claimant apparently referred to the fact that the letter indicated that her contract could be terminated, and Mr Evans replied that that was a possible decision but there were other avenues to discuss. Ms Roberts reports that, despite Mr Evans trying to advise that everything would be discussed in the meeting, the claimant continued to question why her evidence (that she had submitted) was not good enough and stormed out of the office. Shortly after, Ms Roberts encountered the claimant on a cigarette break where she said (according to Ms Roberts):

"I am sorry for what has just happened I am not happy with what is going on, I have played fair with them, and they treat me like this, so now (she said how do I say this in English) I am going to play dirty as I have played nice and it's not working."

55. Ms Roberts records that she was shocked at how a staff member could walk into the office with someone there and start speaking to them in that manner.

56. Ms Roberts did not attend as a witness at the Tribunal. This report is, therefore, hearsay. We do not know if it is accurate or that it quotes the claimant accurately. We also do not know what we should make of the quotation about 'playing dirty' in any event. It could mean something malicious. Equally, it could mean that the claimant was deciding not to be so flexible and compliant as she had been before. She may have decided that doing as requested was not assisting her and that she would 'stick to her guns,' 'stand her ground' and stick to what she wanted. Either way, we do not take it as evidence of untruthfulness or manipulation and we do not consider that the credibility of the claimant is damaged or diminished by this report at page 124. Indeed, the claimant was understandably upset in the circumstances where she had been told by the respondent, in correspondence, that they could dismiss her when she went to the meeting. This was in circumstances where she had just come back to work from sickness absence and had attempted to go back to a twelve hour shift, against her better judgment.

57. On 19 November 2021 there is correspondence (at page 126) inviting the claimant to the meeting and indicating that the incident on 16 November had been considered as inappropriate and unnecessarily aggressive behaviour by the claimant and that it would be added to the agenda for discussion at the meeting. This was a somewhat thin skinned response by the respondent. The claimant apologised in an email (page 127). She did not intend to come across as unnecessarily aggressive. In any event, that meeting did not take place.

58. The claimant emailed the respondent on 4 December and stated:

"I am sorry to say, but what you are stating is not correct. On our last meeting, before my return to work, you have told me that you wanted me to return on my initial contract hours, you did not asked or offered, you've imposed. To which I have said I would try because I really needed to go back to work, as I did. After my first week of work, I have emailed you, and explained that I could not physically keep on doing 48 hours a week. My contract hours were changed by mutual agreement due to my medical condition, which had now declined after my

physical effort trying to fulfil your imposition, and all the stress that your inflexibility have been putting me through. You are forcing me to work 18 overtime hours weekly, knowing that I am not capable of doing so at the moment. Sadly I can only state that you are discriminating me due to my condition, and I really don't think that is fair, Phil."

59. This is the first time, on 4 December, that the claimant describes the twelve hour shifts as "imposed" on her, and this is her impression, arrived at after the event. We have already made our findings in relation to how the agreement was actually reached – this is how the claimant views matters after the event.

60. At page 130 we have various pieces of correspondence including an email from 19 November where Mr Evans sets out details of the other senior that works a 42 hour week (which is made of three twelve hour shifts and one six hour shift for training purposes.) It concludes that Mr Evans really needs the senior to be able to work the 48 hour contract due to the requirements of the home for a full-time senior, not a part-time one. He concludes by stating that this was the offer that was made to the claimant based on her working full-time.

61. There is a further alleged incident on 17 November 2021 (page 133). This is the incident reported by Helen Barrington (who we understand is another Senior Care Assistant.) We have a handwritten document addressed to Mr Evans which states:

"On Wednesday 17th November in a discussion with Maria she stated that she will not be doing any more 12 hrs shifts and that she will leave at 2pm on Thursday 18th. She showed me emails that she has sent to Phil and what has been replied. I explained that if Maria left on Thursday at 2pm she would be sacked. I also said that "Maria, you are running the shift, so you will not be able to leave." Maria said, 'ok so tomorrow will be my last 12hr shift'."

62. The claimant did, in fact, go off on sickness absence and did not come to the meeting on 22 November 2021. We understand from the documentation that the respondent would have discussed her conduct, in addition to the sickness absence issues, and dismissal might have been a possibility.

63. The claimant was invited to a welfare meeting on 7 December 2021 (page 136). That was then rearranged to 14 December 2021. This meeting apparently went ahead with Angela King. There are no notes of this meeting, and we heard little to no evidence about it. There was nothing in the oral evidence of any great detail. The claimant seems to have said that, at that point in time, she was not fit to return to work but there was no updated Occupational Health report at this point. The follow-up email (page 139) seems to confirm that the claimant had accepted that she was not fit to come back at that point, but we cannot go further than that – there is insufficient evidence. We are not prepared to say, for example, that the claimant said there were no further adjustments required at that point in time. There is no evidence to support that.

64. At page 141 we had further correspondence inviting the claimant to a capability meeting which was subsequently rearranged. Both of those letters do not warn

the claimant that she is at risk of dismissal. This is perhaps surprising given that the meetings might turn out to be 'crunch' meetings.

65. We were then referred to the 27 January meeting, the notes of which are at page 144 in the bundle. There was a general update in the meeting on the claimant's medical condition. She was asked about her prognosis. She referred to using the pain clinic. There was reference to going back to Occupational Health. She confirmed that she could not cope with twelve hours. There is reference (page 145) to the contract amendment, in particular the reference by Ms King that the contract was amended to six hour shifts five days per week. In the course of the meeting the claimant maintains that that was permanent rather than temporary. The claimant also asserted that she felt she had no choice, either to come back on 48 hours, or not at all. In that meeting the claimant also referred to the evidence about Rachel and Sarah working six hour shifts and queried why their hours could not be increased to cover her absence, given that one of them actually wanted to increase her hours. She in fact refers to four Senior Care Assistants doing half shifts. The claimant again refused to accept that it was a temporary variation to the contract. There is reference to an Occupational Health report, and that is where we go next.

66. We have an Occupational Health report on 10 February 2022 (page 148 in the bundle). It summarises the claimant's condition; it points out that she has had an MRI (for which she is awaiting the results); it refers to her going to physiotherapy every six weeks (with exercises); antidepressants being increased; walking the dog etc. It notes that fibromyalgia can go into remission following rest, normally. Unfortunately it is unpredictable and can cause further absences. Under the heading "Capacity for Work" it states that the claimant is unfit for work, and "I am unable to predict a return-to-work date currently." There are then a series of specific questions. When asked "what is the likely date of a return to work?" the clinician states "Unknown, as she has ongoing symptoms." The clinician recommends a phased return to work. The clinician indicates that the Equality Act applies, and when asked whether the claimant is likely to give regular and efficient service in the foreseeable future, the answer is "She may have further absences due to fibromyalgia." So, he does not say 'no,' he does not say 'yes,' he just says there may be further absences. When asked about temporary redeployment etc, the clinician states that part-time hours would be required on a return to work. In relation to ill health retirement, the clinician states "this may need to be considered if the condition fails to improve in the next few months." The claimant is said to be fit to attend management meetings.

67. There was an invitation to a meeting on 23 February 2022. The claimant was told that there was a risk of dismissal. The notes of that meeting were at page 153. Importantly, in that meeting Ms King indicated that the claimant (in the report) was not fit for work now or in the future, which is an interpretation of the contents of the report. "How do you feel about your employment?" she asks, and the claimant responds:

"I don't know…. Am I coping, will I come back? I want to feel able to come back but I do not know if I can, I am sorry but the truth is I feel very angry with Phil, he was responsible for this."

68. There was then an exchange where the claimant asserted that Phil Evans' actions had exacerbated her symptoms. The claimant indicated that when she spoke to Phil Evans initially, she did in fact disclose her condition and signed a disclosure form. When asked by Ms King "You have your own thoughts about your flare-ups and it doesn't look like you can complete your probationary period, is there anything else you want to add?" the response from the claimant was, "Honestly no."

69. The claimant did not say that there was anything particular that the respondent could do at this point in time, and we accept that, on balance, she was referring to the general position and not just to what they could do on that particular day. We understand that the claimant was affected by brain fog but we also accept that the respondent was entitled to take the claimant's response as a reference to there being nothing generally that the respondent could do at this point in time, and indeed the claimant does not come back after this meeting with further suggestions (and she does not appeal.)

70. The dismissal letter is at page 155. For the purposes of brevity I am not going to read that into the record just now, but there is a series of bullet points summarising what was discussed and coming to the conclusion that the claimant is unfit for return to work, there is no potential date for a return, and considering that, as well as the claimant's own comments (including her reference to limited movement in arms and muscles and limitations on everyday tasks), Ms King came to the conclusion, considering the impact of the absence on the service, that there was no option but to terminate the employment on grounds of ill health capability. The claimant was notified of the right of appeal. She did not exercise that. The deadline for the right of appeal was extended and there were emails to that effect on page 157 and 158.

The Law

Knowledge of disability

71. The issue of knowledge of disability arises in both reasonable adjustment claims and section 15 discrimination arising from disability claims.

72. Paragraph 20(1) of Schedule 8 to the Equality Act 2010 indicates that the employer will only come under the duty to make reasonable adjustments if it knows, not just that the relevant person is disabled, but also that the relevant person's disability is likely to put him or her at a substantial disadvantage in comparison with non-disabled persons. Knowledge is not limited to actual knowledge but extends to constructive knowledge (i.e. what the employer ought reasonably to have known). The EAT has held that a tribunal should approach this aspect of a reasonable adjustments claim by considering two questions:

    (1) Did the employer know both that the employee was disabled and that the disability was liable to disadvantage the employee substantially?
    (2) If not, ought the employer to have known both that the employee was disabled and that the disability was liable to disadvantage the

employee substantially? (Secretary of State for Work and Pensions v Alam [2010] ICR 665, EAT)

It is only if the answer to the second question is 'no' that the employer avoids the duty to make reasonable adjustments.

73. In Wilcox v Birmingham CAB Services Ltd EAT 0293/10, Mr Justice Underhill, took the view that the effect of the knowledge defence in the predecessor Disability Discrimination Act was that an employer will not be liable for a failure to make reasonable adjustments unless it had actual or constructive knowledge both (i) that the employee was disabled, and (ii) that he or she was disadvantaged by the disability in the way set out in section 4A(1) (i.e. by a PCP or physical feature of the workplace). The second element of this test will not come into play if the employer does not know the first element.

74. An employer cannot claim that it did not know about a person's disability if the employer's agent or employee (for example, an occupational health adviser, HR officer or line manager) knows in that capacity of the disability. The EHRC Employment Code makes it clear that such knowledge is imputed to the employer (see paragraph 6.21). The duty to make reasonable adjustments would still apply even if the disabled person asked the agent or employee to keep the information confidential. This means that employers must have a suitable confidential means of collating information about employees to ensure that they adhere to their duty to make reasonable adjustments. However, the Code confirms that information will not be imputed to the employer if it is gained by a person providing services to employees independently of the employer, even if the employer arranged for those services to be provided (see paragraph 6.22). The case law also shows that, depending on the particular circumstances of a given case and the way in which the adviser was instructed, there may be circumstances where the information/knowledge passed to the adviser will not be imputed to the respondent (e.g. In *Hammersmith and Fulham London Borough Council v Farnsworth [2000] IRLR 691, EAT* and in the EAT in *Q v L EAT 0209/18*)

75. When considering whether an employer is to be regarded as having constructive knowledge of a worker's disability so as to trigger the duty to make reasonable adjustments, it is irrelevant that a formal diagnosis has yet to be made, so long as there are other circumstances from which a long term and substantial adverse effect of a mental or physical impairment can reasonably be deduced. While knowledge of the disability places a burden on employers to make reasonable enquiries based on the information given to them, it does not require them to make every possible enquiry, particularly where there is little or no basis for doing so (*Ridout v TC Group 1998 IRLR 628, EAT,*)

76. A failure by an employee or job applicant to cooperate with an employer's reasonable attempts to find out whether he or she has a disability could lead to a finding that the employer did not know, and could not be expected to know, that the employee or job applicant was disabled.

77. Even where an employer knows that an employee has a disability, it will not be liable for a failure to make adjustments if it 'does not know, and could not reasonably be expected to know' that a PCP, physical feature of the workplace or failure to provide an auxiliary aid would be likely to place that employee at a substantial disadvantage (paragraph 20(1)(b), Schedule 8 Equality Act)

78. In the context of a claim of discrimination because of something arising from disability, section 15(2) means that an employer will not be liable for section 15 discrimination if it did not know and could not reasonably have been expected to know of the employee's disability. The EHRC Employment Code states that an employer must do all it can reasonably be expected to do to find out whether a person has a disability (paragraph 5.15). What is reasonable will depend on the circumstances. This is an objective assessment. It suggests that 'Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a "disabled person"' (paragraph 5.14)

79. Failure to enquire into a possible disability is not by itself sufficient to invest an employer with constructive knowledge. It is also necessary to establish what the employer might reasonably have been expected to know if it had made such an enquiry. A Ltd v Z [2020] ICR 199 shows that determining whether an employer had constructive knowledge involves a consideration of whether the employer could, applying a test of reasonableness, have been expected to know, not necessarily the employee's actual diagnosis, but of the facts that would demonstrate that he had a disability, namely that he was suffering a physical or mental impairment that had a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. In *A Ltd v Z* the tribunal had failed to apply the correct test, asking itself only what more might have been required of the employer in terms of process without asking what it might then reasonably have been expected to know. Given the tribunal's finding that Z would have concealed her disability, if the employer had taken the additional steps that the tribunal considered would have been reasonable, it could not reasonably have known of the employee's disability. The employer's appeal succeeded. The burden is on the respondent to make reasonable enquiries based on the information given to it. It does not require them to make every possible enquiry even where there is no basis for doing so. The failure by an employee to co-operate with the employer's reasonable attempts to find out

whether the employee is disabled could lead to a finding that the employer did not know and 'could not reasonably be expected' to know.

80. The employer must have the requisite knowledge of disability at the time it treats the employee unfavourably. If the treatment complained of is made up of a series of distinct acts occurring over a period, it is necessary to consider not only whether the employer had the requisite knowledge at the outset but also, if it did not, whether it gained that knowledge at any subsequent stage when the treatment was ongoing.

81. While lack of knowledge of the disability itself is a potential defence to a section 15 claim, lack of knowledge that a known disability caused the 'something' in response to which the employer subjected the employee to unfavourable treatment is not (*City of York Council v Grosset [2018] ICR 1492, CA).*

Section 15: Discrimination arising from disability.

82. Section 15 Equality Act 2010 states:

(1) A person (A) discriminates against a disabled person (B) if-

(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

83. Four elements must be made out in order for the claimant to succeed in a section 15 claim:

(i) There must be unfavourable treatment. No comparison is required.
(ii) There must be something that arises 'in consequence of the claimant's disability.' The consequences of a disability are infinitely varied depending on the particular facts and circumstances of an individual's case and the disability in question. They may include anything that is the result, effect or outcome of a disabled person's disability. Some consequences may be obvious and others less so. It is question of fact for the tribunal to determine whether something does in fact arise in consequence of a claimant's disability.
(iii) The unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability. This involves a consideration of the thought processes of the putative discriminator in order to determine whether the something arising in consequence of the disability operated on the mind of the alleged discriminator, whether consciously or subconsciously, at least to a significant extent.

(iv) The alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

See Secretary of State for Justice and another v Dunn EAT 0234/16.

84. Treatment cannot be 'unfavourable' merely because it is thought that it could have been more advantageous or is insufficiently advantageous (The Trustees of Swansea University Pension & Assurances Scheme and anor v Williams [2015] IRLR 885; [2017] IRLR 882 and [2019] IRLR 306.)

85. The consequences of a disability 'include anything which is the result, effect or outcome of a disabled person's disability.' Some may be obvious, others may not be obvious (paragraph 5.9 EHRC Employment Code 2011).

86. Following the guidance given in Pnaiser v NHS England [2016] IRLR 170 at paragraph 31 the correct approach to a section 15 claim is:

(a) A tribunal must first identify whether there was unfavourable treatment and by whom. No question of comparison arises.
(b) The tribunal must determine what caused that unfavourable treatment. What was the reason for it? An examination of the conscious or unconscious thought processes of A is likely to be required. There may be more than one reason or cause for impugned treatment. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.
(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is irrelevant.
(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability.' That expression 'arising in consequence of' could describe a range of causal links. The causal link between the something that causes unfavourable treatment and the disability may include more than one link. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.
(e) The knowledge that is required is knowledge of the disability only. There is no requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. (See also City of York Council v Grosset [2018] ICR 1492).
(f) It does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of 'something arising in consequence of the claimant's disability.' Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

87. The first limb of the analysis at section 15(1)(a) is to determine whether the respondent treated the claimant unfavourably "because of something arising in consequence of the claimant's disability". This analysis requires the tribunal to focus on two separate stages: firstly, the "something" and, secondly, the fact that the "something" must be "something arising in consequence of B's disability," which constitutes a second causative (consequential) link. It does not matter in

which order the tribunal takes the relevant steps (Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305 at paras 26-27) also City of York Council v Grosset [2018] IRLR 746 paragraph 36).

88. When considering an employer's defence pursuant to section 15(1)(b) the 'legitimate aim' must be identified. The aim pursued should be legal, should not be discriminatory in itself and must represent a real, objective consideration. The objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. (Bilka-Kaufhaus GmBH v Weber von Hartz [1986] IRLR 317.)

89. The question as to whether an aim is "legitimate" is a question of fact for the tribunal. The categories are not closed, although cost saving on its own cannot amount to a legitimate aim (Woodcock v Cumbria Primary Care Trust 2012 ICR 1126.)

90. Once the legitimate aim has been identified and established it is for the respondent to show that the means used to achieve it were proportionate. Treatment is proportionate if it is an 'appropriate and necessary' means of achieving a legitimate aim. A three- stage test is applicable to determine whether criteria are proportionate to the aim to be achieved. First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective? (R(Elias) v Secretary of State for Defence [2006] IRLR 934).

91. Determining proportionality involves a balancing exercise. An employment tribunal may wish to conduct a proper evaluation of the discriminatory effect of the treatment as against the employer's reasons for acting in this way, taking account of all relevant factors (EHRC Code paragraph 4.30). The measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective (see EHRC Code (para 4.31). It will be relevant for the tribunal to consider whether or not any lesser measure might have served the aim.

92. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business but it has to make its own judgment, based upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary (Hardy & Hansons Plc v Lax [2005] IRLR 726 and Hensman v Ministry of Defence UKEAT/0067/14/DM). It is not the same test as the 'band of reasonable responses' test in an unfair dismissal claim. However, in Birtenshaw v Oldfield [2019] IRLR 946 (para 38) the EAT highlighted that in considering the objective question of the employer's justification, the employment tribunal should give a substantial degree of respect to the judgment of the decision maker as to what is reasonably necessary to achieve the legitimate aim provided it has acted

rationally and responsibly. However, it does not follow that the tribunal has to be satisfied that any suggested lesser measure would or might have been acceptable to the decision-maker or would otherwise have caused him to take a different course. That approach would be at odds with the objective question which the tribunal has to determine; and would give primacy to the evidence and position of the respondent's decision-maker.

93. It is necessary to weigh the need against the seriousness of the detriment to the disadvantaged person. It is not sufficient that the respondent could reasonably consider the means chosen as suitable for achieving the aim. To be proportionate a measure has to be *both* an appropriate means of achieving the legitimate aim *and* (reasonably) necessary in order to do so (Homer v Chief constable of West Yorkshire Police Authority [2012] IRLR 601.)

Section 20/21: reasonable adjustments.

94. Section 20 (so far as relevant) states:

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
(2) The duty comprises the following three requirements.
(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

…

95. Section 21 states:

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
(3) …

96. The correct approach to a claim of unlawful discrimination by way of a failure to make reasonable adjustments remains as set out in Environment Agency v Rowan 2008 ICR 218 and is as follows:

    (a) Identify the PCP applied by or on behalf of the employer,
    (b) Identify comparators (if necessary),
    (c) Identify the nature and extent of the substantial disadvantage suffered by the claimant.

97. The identification of the applicable PCP is the first step that the claimant is required to take. If the PCP relates to a procedure, it must apply to others than the claimant. Otherwise, there can be no comparative disadvantage.

98. In Ishola v Transport for London [2020] EWCA Civ 112 it was noted that the phrase PCP should be construed widely but remarks were made about the legislator's choice of language (as opposed to the words "act" or "decision".) Simler LJ stated, *"I find it difficult to see what the word "practice" adds to the words if all one off decisions and acts necessarily qualify as PCPs…. If something is simply done once without more, it is difficult to see on what basis it can be said to be "done in practice." It is just done; and the words "in practice" add nothing….The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee…To test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply…. In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. …In context and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that "practice" here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP of "practice" to have been applied to anyone else in fact. Something may be a practice or done "in practice" if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one. …in the case of a one-off decision in an individual case where there is nothing to indicate that the decision would apply in future, it seems to me the position is different. It is in that sense that Langstaff J referred to "practice" as having something of an element of repetition about it."*

99. A 'substantial disadvantage' is one which is 'more than minor or trivial.'

100. Only once the employment tribunal has gone through the steps in Rowan will it be in a position to assess whether any adjustment is reasonable in the circumstances of the case, applying the criteria in the EHRC Code of Practice. The test of reasonableness is an objective one. The effectiveness of the proposed adjustments is of crucial importance. Reasonable adjustments are limited to those that prevent the PCP from placing a disabled person at a substantial disadvantage in comparison with persons who are not disabled. Thus, if the adjustment does not alleviate the disabled person's substantial disadvantage, it is not a reasonable adjustment. (Salford NHS Primary Care Trust v Smith [2011] EqLR 1119) However, the threshold that is required is that the adjustment has 'a prospect' of alleviating the substantial disadvantage. There is no higher requirement. The adjustment does not have to be a complete solution to the disadvantage. There does not have to be a certainty or even a 'good' or 'real' prospect of an adjustment removing a disadvantage in order for that adjustment to be regarded as a reasonable one. Rather it is sufficient that a tribunal concludes on the evidence that there would have been a prospect of the disadvantage being alleviated. (Leeds Teaching Hospital NHS Trust v Foster [2011] EqLR 1075.

101. An employer has a defence to a claim for breach of the duty to make reasonable adjustments if it does not know and could not be reasonably be expected to know that the disabled person is disabled and is likely to be placed at a substantial disadvantage by the PCP etc. The question is what objectively the employer could reasonably have known following reasonable enquiry.

102. An employer can satisfy the duty to make reasonable adjustments even if the adjustments adopted are not the adjustments preferred by the employee (Garrett v Lidl Ltd UKEAT/0541/0).

Burden of Proof

103. Section 136 of the Equality Act 2010 provides that, once there are facts from which an employment tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof "shifts" to the respondent to prove any non-discriminatory explanation. The two-stage shifting burden of proof applies to all forms of discrimination under the Equality Act including discrimination arising from disability under section 15 and the failure to make reasonable adjustments under section 20. Although similar principles apply, what needs to be proved depends, to a certain extent, on the nature of the legal test set out in the respective statutory sections.

104. The wording of section 136 of the act should remain the touchstone.

105. The relevant principles to be considered have been established in the key cases: Igen Ltd v Wong 2005 ICR 931; Laing v Manchester City Council and another ICR 1519; Madarassy v Nomura International Plc 2007 ICR 867; and Hewage v Grampian Health Board 2012 ICR 1054.

106. The correct approach requires a two-stage analysis. At the first stage the claimant must prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out on the balance of probabilities is the second stage engaged, whereby the burden then "shifts" to the respondent to prove (on the balance of probabilities) that the treatment in question was "in no sense whatsoever" on the protected ground.

107. The approved guidance in Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205 (as adjusted) can be summarised as:

    a) It is for the claimant to prove, on the balance of probabilities, facts from which the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. If the claimant does not prove such facts, the claim will fail.
    b) In deciding whether there are such facts it is important to bear in mind that it is unusual to find direct evidence of discrimination. In many cases the discrimination will not be intentional.
    c) The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal. The tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was discrimination, it merely has to decide what inferences could be drawn.
    d) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts. These inferences could include any that it is just and equitable to draw from an evasive or equivocal reply to a request for information. Inferences may also be drawn from any failure to comply with the relevant Code of Practice.
    e) When there are facts from which inferences could be drawn that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent. It is then for the respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed that act. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever on the protected ground.
    f) Not only must the respondent provide an explanation for the facts proved by the claimant, from which the inferences could be drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment. Since the respondent would generally be in possession of the facts necessary to provide an explanation, the tribunal would normally expect cogent evidence to discharge that burden.

108. The shifting burden of proof rule only applies to the discriminatory element of any claim. The burden remains on the claimant to prove that the alleged discriminatory treatment actually happened and that the respondent was responsible. The statutory burden of proof provisions only play a role where there is room for doubt as to the facts necessary to establish discrimination. In a case where the tribunal is in a position to make positive findings on the evidence one way or another as to whether the claimant was discriminated against on the alleged protected ground, they have no relevance (Hewage). If a tribunal cannot make a positive finding of fact as to whether or not discrimination has taken place it must apply the shifting burden of proof.

109. Where it is alleged that the treatment is inherently discriminatory, an employment tribunal is simply required to identify the factual criterion applied by the respondent and there is no need to inquire into the employer's mental processes. If the reason is clear or the tribunal is able to identify the criteria or reason on the evidence before it, there will be no question of inferring discrimination and thus no need to apply the burden of proof rule. Where the act complained of is not in itself discriminatory and the reason for the less favourable treatment is not immediately apparent, it is necessary to explore the employer's mental processes (conscious or unconscious) to discover the ground or reason behind the act. In this type of case, the tribunal may well need to have recourse to the shifting burden of proof rules to establish an employer's motivation.

110. The claimant bears the initial burden of proving a prima facie case of discrimination on the balance of probabilities. The requirement on the claimant is to prove on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an unlawful act of discrimination. The employer's explanation (if any) for the alleged discriminatory treatment should be left out of the equation at the first stage. The tribunal must assume that there is no adequate explanation. The tribunal is required to make an assumption at the first stage which may in fact be contrary to reality. In certain circumstances evidence that is material to the question whether or not a prima facie case has been established may also be relevant to the question whether or not the employer has rebutted that prima facie case.

111. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, with more, sufficient material from which tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination (see Madarassy).

112. If the claimant establishes a prima facie case of discrimination the second stage of the burden of proof is reached and the burden of proof shifts onto the respondent. The respondent must at this stage prove, on balance of probabilities that its treatment of the claimant was in no sense whatsoever based on the protected characteristic.

113. In some instances, it may be appropriate to dispense with the first stage altogether and proceed straight to the second stage (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337.) The employment tribunal should examine whether or not the issue of less favourable treatment is

inextricably linked with the reason why such treatment has been meted out to the claimant. If such a link is apparent, the tribunal might first consider whether or not it can make a positive finding as to the reason, in which case it will not need to apply the shifting burden of proof rule. If the tribunal is unable to make a positive finding and finds itself in the situation of being unable to decide the issue of less favourable treatment without examining the reason, it must examine the reason (i.e. conduct the two stage inquiry) and it should be for the employer to prove that the reason is not discriminatory, failing which the claimant must succeed in the claim.

114. In the context of a section 15 claim in order to establish a prima facie case of discrimination the claimant must prove that he or she has the disability and has been treated unfavourably by the employer. It is also for the claimant to show that "something" arose as a consequence of his or her disability and that there are facts from which it could be inferred that this "something" was the reason for the unfavourable treatment. Where the prima facie case has been established, the employer will have three possible means of showing that it did not commit the act of discrimination. First, it can rely on section 15(2) and prove that it did not know that the claimant was disabled. Secondly, the employer can prove that the reason for the unfavourable treatment was not the "something" alleged by the claimant. Lastly, it can show that the treatment was a proportionate means of achieving legitimate aim.

115. Where it is alleged that an employer has failed to make reasonable adjustments, the burden of proof only shifts once the claimant has established not only that the duty to make reasonable adjustments had arisen but also that there are facts from which it could reasonably be inferred (absent an explanation) that the duty been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it can be properly inferred that there is a breach of that duty. Rather, there must be evidence of some apparently reasonable adjustment that could have been made. Therefore, the burden is reversed only once a potentially reasonable amendment adjustment has been identified Project Management Institute v Latif [2007] IRLR 579.

Conclusions

116. We return to the List of Issues at pages 74 and 75 of the bundle. Our conclusions are as follows.

117. We did not address the time limit point as an initial issue because that might or might not be relevant depending on our other conclusions in the case. The fact that the claimant was disabled has been conceded so we need not concern ourselves further with that issue.

Section 15 claim

118. The first question we have to resolve is that set out at paragraph 3 on page 75 (the section 15 claim): did the respondent treat the claimant unfavourably in the ways that are set out at paragraph 3.1?

119. The first item of alleged unfavourable treatment is the alleged requirement for the claimant to work 48 hours per week causing damage to her health (paragraph 3.1.1.) In light of the facts set out above, we concluded that there *was* a requirement to work 48 hours per week, but we were not satisfied that there was proof that this *caused* damage to the claimant's health given the pre-existing nature of her disability. However, we do appreciate that the claimant struggled to work and to manage 48 hour weeks. To that extent, paragraph 3.1.1 is proven as unfavourable treatment.

120. The second item of alleged unfavourable treatment (paragraph 3.1.2) is "requiring the claimant to undertake physical work beyond her physical capabilities causing damage to her health." Again, we accept that the claimant was required to do physical work which was beyond her physical capabilities. We cannot say that this caused damage to her health because there is no medical evidence to support that causal link. In any event, unfavourable treatment is proven notwithstanding the lack of proof of damage to health.

121. Paragraph 3.1.3 asks: did the respondent dismiss the claimant? Clearly, even on the respondent's own case, it did dismiss the claimant, on or around 4 March 2022.

122. Having considered the allegations of unfavourable treatment we move on to consider the so-called 'matters arising in consequence of the disability' for the purposes of the section 15 claim (paragraph 3.2.)

123. At 3.2.1 the List of Issues indicates that the matter arising is that the claimant was: "incapable of undertaking strenuous physical activity and of undertaking long hours of work due to impact on fibromyalgia and herniated disc which resulted in the claimant having periods of absence from the workplace." We have concluded, based on the evidence that we have heard, that as a result of the claimant's disability her capacity to do the work, to do strenuous physical activity and to complete long hours of work, was adversely impacted. This did have an impact on her ability to attend work. It was linked to the fibromyalgia. The claimant's incapability in relation to undertaking strenuous physical activity and undertaking long hours of work did cause her absence from the workplace. Consequently, this aspect of the case is proven.

124. The second matter 'arising in consequence of disability was set out at paragraph 3.2.2, namely, the claimant's absences from 12 November onwards. Again, the evidence suggests that this absence arose in consequence of the claimant's disability. Thus, both the elements of paragraph 3.2 are proven.

125. The Tribunal then had to carry out an assessment of the relationship between the 'unfavourable treatment' and the 'matters arising from disability.' Paragraph 3.3 asks: "Was the unfavourable treatment because of any of those things?" Clearly, the dismissal was because of the difficulties in carrying out the various

elements of the claimant's work, the claimant's difficulties in working the desired length of shift and the claimant's sickness absence record. The Tribunal is satisfied that the link is established there.

126. We were not satisfied, however, that the unfavourable treatment at 3.1.1 and 3.1.2 was caused by the pleaded 'matters arising from disability.' The requirement to work 48 hours, and the requirement to do physical work beyond her capabilities were not imposed on the claimant *because* she was incapable (as alleged at 3.2.1) or because of her absences from 12 November 2021 (3.2.2). Rather, it was the other way around. The claimant had a job which required 48 hours of work and had physical elements to it from the outset. Those elements were pre-existing and were always part of the job role. They were not caused by the claimant having difficulties which were linked to her disability. The relevant causation test in section 15 is not satisfied in relation to these two elements of unfavourable treatment.

127. As a result of the above, there is one element of unfavourable treatment (the dismissal) to which the respondent's section 15(1)(b) defence should be applied. The respondent says that the dismissal was a 'proportionate means of achieving a legitimate aim.' At the beginning of the hearing the respondent confirmed that the legitimate aim was 'to maintain a reasonable level of service to residents.' The respondent effectively sought to rely on 'operational requirements.' We are satisfied that that is a legitimate aim. We are not convinced, however, that the dismissal helped to achieve that aim because it would very much depend on whether, by dismissing the claimant, the respondent was able to replace her with a regular member of staff who could work the 48 hour week and maintain appropriate levels of service to residents. The difficulty the Tribunal has is that it heard no evidence about what actually happened next. Who did replace the claimant? How quickly were they put in place? Were they a direct employee or an agency worker? Was it better than having the claimant there, on the books, with at least the potential for the claimant to come back to work?

128. There are really two issues. First: did dismissal actually further the legitimate aim? For the reasons already stated, it is questionable whether the legitimate aim is in fact furthered or achieved by dismissing an employee without knowing that the employer already has an appropriate replacement. Even if it does, the second issue is proportionality. The Tribunal has to consider whether the dismissal is appropriate and reasonably necessary to achieve the aim. Could something less discriminatory have been done instead? How should the needs of the claimant and the respondent be balanced? What the Tribunal concludes is this: the Occupational Health report at the date of dismissal said that it could not predict when the claimant would be able to come back to work. It did make reference to a phased return to work. It did make reference to a potential return to work (albeit with further absences). It did make reference to recommended part-time hours. Thus, it did not close the door entirely to the claimant coming back to work. Rather it indicated that they could not predict when that might happen. The question which the Tribunal wrestled with was: why does the respondent have to dismiss the claimant at this point without exploring lesser sanctions or waiting a little bit longer? Why is it important to dismiss straight

away? Isn't it necessary, appropriate and proportionate to explore alternative measures? Where is the evidence that the respondent cannot afford the agency cover for a little while longer or otherwise keep the claimant 'on the books' until she is able to come back? The Tribunal finds that the respondent was too ready to accept that the claimant was saying that there was nothing further they could do. Looking at this case in its entirety, looking at the history of the evidence, surely the respondent could and should have worked through options that would be more proportionate? The respondent could have looked to reassure the claimant that the door was not closed to a six hour shift. The respondent could have said to the claimant, "if you are fit to come back, we will be able to consider a phased return to work." Even if that were temporary, it might well have improved the claimant's position sufficiently for her to attempt a return to work. Instead, telling the claimant that it had to be twelve hour shifts and that that was not flexible further entrenched her difficulties so that she was not able to predict her own return to work. If a package had been put together and put to the claimant with appropriate time to consider it, it could have been tested. The claimant may have come back, she may have been able to work satisfactorily. On the other hand she may not have done or, alternatively, she may not have been able to come back to work at all, but at least by that point the respondent would have exhausted the more proportionate options and could reasonably take the view (at that later stage) that it was necessary to dismiss her. Further, we were not convinced that dismissing the claimant helped the service achieve its legitimate sims in any event.

129. In looking at the viability of keeping the claimant 'on the books,' we note that we have had no costings. We have had no evidence about how her six hour shifts were covered when she did do a six hour shift (i.e. how was the other half of the standard twelve hour shift covered when the claimant only did six hour shifts?) We do not know what difficulties there were (if any) in covering the other six hours in practice when the claimant was only doing six hours. We do not know why that could not continue. We do not know what was going on whilst the claimant was absent from work, how her work was being covered, and why any existing arrangements had to come to an end at the point that they did. If the respondent is saying that it was too expensive or difficult then there should be evidence to demonstrate that. Likewise, where is the evidence about the reorganisation of rotas or which explains any difficulties that the respondent had in accommodating six hour shifts? We do not have it, it has not been presented to the Tribunal by the respondent. It is of course possible that the respondent *could* have proved that this was a proportionate means of achieving its legitimate aim. However, on the basis of the evidence actually presented in this case the respondent has failed to discharge that burden. The respondent has failed to produce sufficient evidence to satisfy the Tribunal. The respondent has not shown that it could not have reassured the claimant of a phased return to work to see where that would have taken matters. It may well have been that it would only have delayed dismissal, we do not know, but the dismissal, when it took place, was premature. There were other, more proportionate, options. The respondent has failed to establish its defence to show that the dismissal was a proportionate means of achieving a legitimate aim. Consequently, the dismissal element of the section 15 claim is well founded and succeeds.

Reasonable adjustments

130. We turn now to the reasonable adjustments claim. We are asked to consider whether the respondent knew or could reasonably have been expected to know that the claimant had a disability, and, if so, from what date? At the very latest the respondent knew about the disability from the October 2021 Occupational Health report. There is a possibility that they had constructive knowledge before that, given that they had implemented a return to work on reduced hours in August 2021 (see above.) Realistically, given that we have found that it was a permanent variation to the contract, that perhaps indicates that the respondent knew (or ought reasonably) to have known that the claimant had a disability (or it would not have made the permanent variation.) However, as it turns out, that may not be of central importance to the outcome of the case.

131. Paragraph 4.2 on the List of Issues sets out the PCPs (the provision, criterion or practice). Did the respondent have the PCPs in question? Paragraph 4.2.1 refers to "a practice of having Senior Care Assistants undertaking the physical care of clients normally reserved for more junior Care Assistants." The Tribunal concludes that both Senior *and* Junior Care Assistants did undertake physical care of clients. It is not true to say that this aspect of the job was *reserved* for Junior Care Assistants – both levels of employee did it. It was just that Senior Care Assistants had additional tasks, over an above the requirements of the more junior role, and which were in line with their level of seniority. Although we take issue with the way this part of the PCP is described in the list of issues, we are satisfied that the respondent did have the PCP of having the Senior Care Assistants undertaking physical care of clients (which more junior care assistants would also often do.)

132. The PCPs at 4.2.2 and 4.2.3 were accepted and admitted by the respondent. They were: the "practice of Senior Care Assistants working 48 hours per week" and "the practice of requiring employees to attend work and not having long periods of sickness absence."

133. The Tribunal then considered whether those PCPs put the claimant at a substantial disadvantage compared with someone without her disability, and we concluded that they did. The claimant struggled with the physical impact of the role and also struggled to maintain the 48 hour week and therefore she was at a disadvantage compared to those without her disability. Likewise, we accept that the claimant was at a greater risk of dismissal because her absence record was higher and that was linked to her disability and her inability to comply with the PCPs in question.

134. Did the respondent know, or could it reasonably have been expected to know, that the claimant was likely to be placed at those disadvantages? We answer that question in the affirmative. In applying one's mind to it, it is apparent that someone with the claimant's disability, who struggles to do the hours and struggles with the physical nature of the role is going to be at a disadvantage as a result of the PCPs at 4.2.

135. So the crux of the matter is: what steps could have been taken to avoid the disadvantage? What reasonable adjustments should have been made? The claimant suggested that from 7 November 2021 her reduced hours of 30 hours per week should have been maintained. This is the crucial point. We have found that it was a permanent variation. We have found that it should at least have been attempted as part of a return to work from absence. It made no sense to have the claimant return back to work from sickness absence on 48 hours per week in circumstances where, previously, she had been working 30 hours and where the Occupational Health evidence did not suggest or recommend that an increase in hours was helpful or appropriate. Instead of getting the claimant to return to work on her previously reduced hours, the respondent actually doubles the length of the shift and makes it a 48 hour working week. This is counterintuitive and counterproductive. The respondent could (and should) have tried a 30 hour week at this point, even if that had to be revisited at a later date if it became unsustainable in the longer term. There is a real possibility that, had the claimant been told that she could come back in that way, the claimant's reintroduction into the workplace would have been smoother and more effective. This would have been beneficial to all. That was a reasonable adjustment that the respondent could and should have taken, at least for a period of time.

136. The claimant argued that she should have been transferred to a less physically demanding role in the kitchen. We were not convinced of that. There was no evidence that the claimant was a chef previously or that she had relevant and sufficient qualifications and accreditations for such a role. There was not enough evidence to say that it would be reasonable to give the claimant that job or that she would be able to meet the requirements properly. Also, we note that, although it is argued to be a less physically demanding role, we would not accept that Kitchen work is not physically demanding. An employee working in the kitchen is on their feet continuously and is typically bending, stretching, and turning. There are 'time critical' elements to meal preparation, which are important in this context, and so even though there may have been people there to assist the claimant, we are not content to say that it was less physically demanding. So, for those two reasons (the claimant's lack of qualification and accreditation and the physically demanding nature of the job) this was not a reasonable adjustment in this case.

137. The reasonable adjustment contended for at paragraph 4.5.3 is reduced hours. This is a different way of maintaining the reduced hours of 30 hours per week but without reference to a specific maximum number of hours per week. For the same reasons we would say that reduced hours should have been looked at from 7 November 2021 and should have been tried for a period. If there was a difficulty with 30 hours, some other reduction in hours could be trialled to see if it did the trick. Unfortunately, the Tribunal has not been presented with evidence that this was looked at or considered.

138. Paragraph 4.5.4 refers to less strenuous tasks, such as the kitchen. As previously stated, we do not consider that to be less strenuous. There is also no real prospect of changing the Senior Care Assistant role to take out the strenuous aspect of the role. It would not leave a full job role. The non-care elements of

the job were ‘add-ons’ to a substantive caring role, so that is not a realistic proposition.

139. Finally, paragraph 4.5.5 refers to more generous absence trigger points. This was not an ‘absence trigger point’ case. Triggers were not relevant or applicable in this case and so it is not relevant to adjust them as part of any reasonable adjustments for the claimant.

140. For the avoidance of doubt, we find that the respondent did fail to make the reasonable adjustments vis-a-vis the 30 hours/reduced working hours and that they should have implemented that from the return to work in November 2021.

141. In light of the two elements of the claims which have succeeded, the Tribunal will make arrangements for a remedy hearing at which the outstanding issues of compensation can be addressed.

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Employment Judge Eeley

Date:17 April 2024

REASONS SENT TO THE PARTIES ON
25 April 2024

FOR THE TRIBUNAL OFFICE