EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Ms H Titterington	**Iceland Foods Ltd**

V

Heard at: Watford Employment Tribunal (CVP)	**On: 20, 21, 22 and 23 May 2024**

Before: Tribunal Member L Thompson, Tribunal Member A Moriarty and Employment Judge G D Davison

Appearances:
For the Claimant: **Mr C Coverman, FRU**
For the Respondent: **Ms J Duane, Counsel**

REASONS

1. At the conclusion of submissions, the Tribunal delivered its judgment. Mr Coverman, representing the claimant, subsequently asked for written reasons.

The issues

2. The agreed list of issues for the Tribunal to consider is at paragraph 48, page 48 of the bundle provided for the hearing and are considered below.

The evidence

3. The claimant gave evidence and was cross examined.

4. The respondent called Mr A Bashar (the claimant's line manager and store manager where the claimant works), Ms J Christie (area manager) and Mr Kelly (HR business partner) all of whom adopted their witness statements and were cross examined.

5. In addition to the oral evidence, the parties adduced a joint bundle of documents comprising of 616 pages, a schedule of loss dated 8 March 2023, an opening note form the respondent and an agreed chronology and cast list.

Submissions

6. We have taken in to account the detailed oral and written submissions provided. We do not propose to repeat the submissions herein having regard to rule 62(5) Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended. We have also taken into account the authorities we have been referred to.

The law

(1) Failure to make reasonable adjustments (s.20 Equality Act 2010)

7. To succeed in a claim under s.20 Equality Act 2010, the claimant must demonstrate:
   (a) that the respondent applied a provision, criterion or practice (PCP);
   (b) which puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled; and
   (c) that the respondent failed to take such steps as it is reasonable to take to avoid the disadvantage in question.

8. In order to be liable under s.20 Equality Act 2010, the respondent must have had knowledge (actual or constructive) of the claimant's disability *and* that the claimant is likely to be placed at a substantial disadvantage by the PCP.

9. The Tribunal should identify the nature and extent of the disadvantage to which the claimant is subjected. The claimant bears the burden of establishing a prima face case that the duty to make reasonable adjustments has arisen and that there are facts from which it could reasonably be inferred, absent an explanation, that the duty has been breached.

10. If satisfied that the duty has been potentially triggered, the Tribunal must identify the step or steps, if any, that the respondent could reasonably have taken to prevent the disadvantage in question. The test of reasonableness is objective. It is unlikely to be reasonable for the respondent to have to make an adjustment that involves little or no benefit to the claimant in terms of ameliorating the disadvantage in question.

(2) Discrimination arising from disability (s.15 Equality Act 2010)

11. In order to succeed in a claim under s.15 EqA 2010, the claimant must establish:

    (a) unfavourable treatment;
    (b) because of something arising in consequence of her disability;
    (c) which cannot be shown by the respondent to be a proportionate means of achieving a legitimate aim.

12. In order to be liable under s.15 Equality Act 2010, the respondent must have had knowledge (actual or constructive) of the claimant's disability at the time it is alleged to have treated the claimant unfavourably. The claimant need not establish knowledge (actual or constructive) of the 'something arising'.

13. In considering causation under s.15, the Tribunal must consider whether the claimant was treated unfavourably and by whom, what caused that treatment and whether that reason was 'something arising in consequence of the claimant's disability' (*Pnaiser v NHS England and anor* [2016] IRLR 170, EAT).

14. The disability must have a significant influence on, or be an effective cause of, the unfavourable treatment (*Hall v Chief Constable of West Yorkshire Police* [2015] IRLR 893, EAT). A connection less than an operative cause or influence will not be enough (*Charlesworth v Dransfields Engineering Services Ltd* EAT 0197/16).

15. It is for the Tribunal to conduct a balancing exercise based on all the facts and circumstances of the case as to whether the legitimate aim relied upon justified the unfavourable treatment. The aim relied on should be legal, not discriminatory in itself and must represent a real, objective consideration.

Findings of fact

16. The background facts to this claim are not in dispute and were helpfully summarised in an agreed chronology.

Background facts

17. On 14 July to 2003 the claimant started employment with the respondent. The claimant worked as a store assistant for Iceland Foods Limited. Her minimum contractual hours were said to be 37.5 hours which were to be worked flexibly. In practice the claimant mostly worked the 7 AM to 4 PM shift.

18. Between 2017 to 2020 the claimant had various instances of sickness absence for a variety of reasons including periods of self-isolating and shielding. In 2018 and 2020 the respondent obtained occupational health reports concerning the claimant. On 9 July 2020 the claimant attended a welfare meeting with Mr Bashar to discuss adjustments proposed in the 2020 occupational health report. On 27 August 2020 there was a further welfare meeting where the claimant's work pattern was discussed.

19. On 10 September 2020 at a further welfare meeting it was agreed that the claimant's shift pattern of 7 AM to 4 PM was a reasonable adjustment. From 20 October 2020 to 31 March 2021 the claimant was absent from work due to shielding. On 22 March 2022 the claimant returned to work following a period of absence. There was a welfare meeting at which it was agreed the claimant would inform the respondent when she needed to attend any medical appointments.

20. On 25 March 2022 the claimant attended a consultation with the respondent. At this meeting the claimant was informed that her new shift pattern would be 10 AM to 7 PM, rather than the 7 AM to 4 PM shift that she had been working. She was given 3 weeks notice of this change.

21. On 29 March 2022 the claimant raised a grievance regarding a change to her working hours.

22. On 6 April 2022 the respondent invited the claimant to a grievance meeting. Between 16 April 2022 and 19 May 2022 the claimant was signed off work on the grounds of anxiety and depression.

23. On 22 April 2022 the claimant attended a grievance investigation with a Ms J Christie. Ms Christie then conducted an investigation into the grievance.

24. On 17 May 2022 the grievance outcome letter was sent to the claimant. It was accepted that the claimant should have been given more notice of the

change to her shift pattern but aside from this concession the grievance was dismissed.

25. On 20 May 2022 the claimant appealed against the outcome of the grievance. On the same day the claimant was signed off work on the grounds of anxiety and depression until 5 June 2022.

26. The claimant returned to work on 6 June 2022 and then attended the grievance appeal meeting with Mr B Kelly on 9 June 2022. Mr Kelly conducted an investigation and on 17 June 2022 concluded the grievance appeal and sends the outcome letter to the claimant. The appeal grounds were rejected in full.

27. Early conciliation commenced on 27 May 2022 and the certificate was issued on 24 June 2022.

28. The ET 1 was submitted on 11 July 2022. The ET 3 is dated 12 August 2022.

Findings on disputed facts/ issues

Time limits

29. It was agreed by the parties that any event prior to 25 March 2022 was background to the claim and so no issues of timeliness arose, although the claimant's representative did highlight that the background was relevant to assessing the context of the claims under consideration.

S.15 Discrimination arising from disability

30. The first question for the Tribunal is whether the respondent treated the claimant unfavourably by requiring her to take annual leave or authorised absence in order to attend medical appointments.

31. The Tribunal finds that the claimant was not required to take annual leave or authorised absence as claimed. These were two of the options offered to the claimant to accommodate her medical appointments. Shift swaps, unauthorised absence, the ability to work a bit earlier or later to cover any gap in hours caused by the appointment were also offered. The Colleague Handbook for employees, which the claimant accepted she was aware of, states:

"wherever possible, medical and dental appointments should be arranged outside your working hours. If there are reasons why this is not possible,

speak to your line manager to gain their agreement, and give as much notice as possible."

32. The claimant's representative stated that appointments were accommodated around shifts and so no real evidence existed to show appointments were an issue at work. The Tribunal accepts this. However, it was agreed that on one occasion an appointment had fallen within working hours and this was accommodated without issue. The claimant could provide no examples of when appointments that did clash with working hours had not been agreeably accommodated. Further, the Tribunal found the evidence of Mr Bashar credible on this point. Mr Bashar spoke of how valued an employee the claimant was. He had tried to support a 24-hour contract for the claimant with senior management. He has tried to accommodate the requests made generally and find a workable solution. The Tribunal found that both Miss Chrisite and Mr Kelly were equally claimant focused on seeking a resolution to the issues faced. The Tribunal did not accept that any member of the respondent staff had placed such restrictions on the claimant as averred. The Tribunal therefore found there to have been no unfavourable treatment.

33. If the Tribunal were wrong in the above conclusion the Tribunal would have to consider whether a need to attend frequent medical appointments arose in consequence of the claimant's disability.

34. No evidence from the drop-in centre the claimant stated she attended or from her GP regarding frequency and duration of the appointments was provided. However, the Tribunal accepted that the claimant did need to attend frequent appointments as a result of her mental health issues. The respondent did not appear to dispute this in the written submissions provided.

35. In the hypothetical situation that there was the unfavourable treatment, as a result of needing to attend appointments. The Tribunal would have found that the change in shift pattern, so the claimant's working day would end at 7pm and not 4 pm as it had done previously, was as a result of companywide changes following the response to the pandemic and efficiency of work protocols that were being rolled out across the respondent's stores. The unfavourable treatment in this hypothetical situation is not in any way linked to her disability and needing to attend appointments.

36. In considering the reasonable adjustment claim (Sections 20 & 21 of the Equality Act 2010) the respondent conceded that the claimant has a disability, mental health issues (anxiety and depression) and the respondent had knowledge of the same. It was not accepted or advanced that the

claimant's other health conditions referred to in the occupational health reports, chilblains and asthma, amounted to a disability.

37. On 25 March 2022 the Tribunal finds there were two interactions/ meetings between claimant and Mr Bashar. At the first of which a Ms Patel was present who took a note. The second was a conversation between the claimant and Mr Bashar. At the first of these meetings the proposal of working 10AM – 7PM Monday to Friday was put forward to meet the business needs of the respondent and, the Tribunal finds, in Mr Bashar's eyes to provide the stability of working hours required by the claimant and maintain her 37.5 pw contracted hours. The Tribunal finds alternatives were discussed at this meeting. The note of this meeting refers to an 8AM to 5PM shift 'and such on odd occasion.' At the second meeting the alternatives to the proposed working structure were again discussed e.g. the 8AM to 5PM shift and/or weekend shift work. The claimant declined these options. The Tribunal finds there was no PCP in place as at 25 March 2022 for claimant to work 10AM to 7PM Monday to Friday. The Tribunal finds the respondent wished to change the claimant's hours due to changes in the business more widely and believed this pattern would suit the claimant.

38. The claimant did not agree to the proposed changes in her working pattern. The form at page 603 in the bundle regarding the meeting the Tribunal found to be of assistance in assessing the purpose of the meeting. The form is headed 'informal consultation form' and refers to consultation and finding reasonable alternative roles and expressed a hope that agreement could be reached. If this could not be achieved the form noted the process would move to a formal consultation. The PCP alleged is a 'requirement to work until 7pm Monday to Friday.' The Tribunal finds that the evidence does not disclose such a requirement, simply a proposal. This finding is supported by a contemporaneous Nexus note (page 156) made by Mr Bashar on 25 March 2022.

'Hayley (the Claimant) has asked for some earlier shifts in which I proposed the weekend shifts where any shift can be catered to, and also can provide a 8-5 shift on Friday. Hayley has shared her concern regarding her appointments and as a reasonable request we are happy to cater to the day of the appointment either via shift change to an early (if wages allow) a day off (which Hayley will work a different day) within this change Hayley contractual hours, working days and role stays the same.'

39. The Tribunal notes that the claimant does not accept the above note was an accurate record of the conversation, but finds alternatives were proposed and the PCP as pleaded was not in place.

40. If the Tribunal were wrong in the above conclusion and there were such a PCP the question of substantial disadvantage would need to be considered.

41. The Tribunal finds there would not have been such a disadvantage. Two issues have pleaded:

    i) it would be more difficult to attend medical appointments.

42. The evidence is the claimant's appointments were usually organised around her shifts. Nothing has been provided from a medical specialist that this would not continue to be the case (the claimant's proposed start time for work was 10 am as opposed to 7 am as had been previously). No evidence was advanced as to why the claimant could not attend her medical appointments in the morning before work,

    ii) the PCP would exacerbated the claimant's mental health problems

43. The Tribunal did not accept this proposition, as above the claimant could still attend appointments. There was no evidence that working until 7pm would exacerbate her mental health conditions. Further, no evidence was provided that any services that the claimant may wish/ need to attend were not available at other times of the day.

44. No disadvantage has been found, but again in the alternative if Tribunal wrong in that conclusion, and given the claimant's accepted mental health issues, the respondent could reasonably have expected that requiring her to work until 7PM Monday to Friday would place her at a disadvantage. The steps that could be taken would then need to be assessed. If this stage had been reached in the assessment the Tribunal would have found the respondent took reasonable steps to avoid any disadvantages as pleaded. The respondent has provided cogent business reasons why the claimant's former shift pattern could not continue. The respondent had to meet business and customer needs and the profiling of the business had changed from mainly instore to online. It was not feasible for the claimant to remain on a 7AM to 4PM shift. The respondent had suggested different shifts, different roles, a different place of work (within reasonable proximity to the current place of work). The respondent had therefore offered reasonable alternatives. These were reasonable steps for the respondent to undertake as the respondent was trying to maintain the claimant's 37.5 contract in a stable pattern. Reasonable alternatives were pursued given the changing nature of the business.

Conclusions

45. As a result of the above factual findings and application to the legal principles on the final day of the hearing the claim of discrimination arising

from disability (s.15 of the Equality Act 2010) was found to be not well-founded and was dismissed as was the claim of a failure to make reasonable adjustments (s.20 & 21 of the Equality Act 2010).

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Employment Judge G D Davison
28 June 2024

Sent to the parties on
3 July 2024

For the Tribunal