



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs Shlomit Williams

**Respondent:** Asda Stores Ltd

**Heard at:** Watford

**On:** 17-19 October 2023  
& 12 January 2024

**Before:** EJ Bansal & Members – Mr D Wharton & Mr W Dykes

## Representation

**Claimant:** Ms H Sheves (FRU Representative)

**Respondent:** Mr S Liberadzki (Counsel)

**JUDGMENT** having been given orally at the hearing and a judgment been sent to the parties, these written reasons have been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013. Therefore the following reasons are provided.

## WRITTEN REASONS

### Background

1. This is a complaint of unfair dismissal, discrimination arising from disability, and failure to make reasonable adjustments.
2. By a Claim Form presented on 1 December 2021, following a period of early conciliation from 4 November 2021 to 22 November 2021, the claimant brought complaints for ordinary unfair dismissal, unlawful discrimination arising from disability, and failure to make reasonable adjustments.
3. The respondent defend the complaints asserting the claimant was fairly dismissed on grounds of redundancy, and deny the discrimination complaints.

### The Legal Issues

4. At a Preliminary Hearing held on 6 September 2022, Employment Judge Tuck KC agreed with the parties representatives the legal issues to be determined. At this hearing both representatives confirmed their agreement to the List of

Issues, which are set out below. (p39-40), although Ms Sheves representing the claimant, in her Skeleton Argument claimed that the unfair dismissal claim was not only on the grounds of procedural unfairness but also for “substantive unfairness” due to the claimant’s failure to consider the claimant’s impairment when offering alternative roles. The Employment Judge questioned this pointing out that this had not been pleaded; had not been included in the List of Issues determined at the Preliminary Hearing, and the respondent had prepared its case based on the agreed List of Issues. Following further discussion, Mr Liberadski agreed to this amendment.

Unfair dismissal

- (i) What was the reason for dismissal? *It is accepted that the reason for dismissal was redundancy -s139 ERA 1996.*
- (ii) If so, did the respondent follow a fair procedure? *The claimant asserts the the dismissal was unfair because;*
  - (a) *the “markdown” position was not brought to the claimant’s attention and it was assumed she would have rejected it, and*
  - (b) *she was treated inconsistently compared with another colleague, Tracey Brown, who selected an alternative role as a “home shopper” but did not have to carry out that role but continued to work in the back office.*
- (iii) If so, in all the circumstances did the respondent act fairly in accordance with s98(4) ERA 1996, and in particular, did the dismissal fall within the range of reasonable responses? *The claimant asserts the dismissal is outside the range of reasonable responses.*
- (iv) Does the respondent prove that if it adopted a fair procedure the claimant would have been fairly dismissed in any event? and/or to what extent and when?

Disability Discrimination:

- (v) The claimant confirms her disability is chronic back pain and that the respondent was aware of this at all material times.

Failure to make reasonable adjustments

- (vi) a. The PCP applied to the claimant was a requirement that any back office roles were for a minimum of 16 hours per week, spread over 3 days.
- b. The claimant says this put her at a substantial disadvantage as compared to non-disabled employees because her back condition precluded her from working that number of hours.
- c. The claimant said a reasonable adjustment would have been to only work 12 hours per week over 2 days.

Discrimination because of something arising from disability:

- (vii) a. The claimant says that arising from her disability is an inability to work 16 hours per week.

- b. The unfavourable treatment which arose from this was not being afforded alternative employment in the back office.
- c. The Respondent says it had a legitimate aim of setting shift patterns to meet its business needs, and that its actions were proportionate

### **Hearing**

- 5. The Tribunal was provided with an agreed bundle of documents of 172 pages. During the course of the hearing, further relevant documents were added by the respondent namely, evidence of the claimant's working hours, and a Manager Guide for Conducting Individual Consultation. The parties were informed that only documents referred to in the witness statements and those referred to in evidence will be read as part of the Tribunal's preliminary reading and during evidence.
- 6. The Tribunal heard oral evidence from the claimant and for the respondent from Mrs Sarah Khan (Customer Trading Manager) and Mrs Jacqui Burman (Manager). The claimant presented witness statements of two work colleagues, Kelly Flecknell and Tracey Moloney. Both of them did not attend to give evidence. Accordingly, no weight was attached to their statements.
- 7. At the conclusion of the parties evidence, both representatives submitted written submissions, with reference to case law, which they expanded on orally.

### **Findings of Fact**

- 8. Having considered all of the evidence, on the balance of probabilities the Tribunal made the findings of fact as set out below, relevant to the issues to be determined. The Tribunal has taken into account its assessment of the credibility of the witnesses and the consistency of their evidence with the surrounding facts. Any reference to a page number is to the relevant page number in the bundle.
- 9. The respondent is a national food and clothes retail store, which has some 600 stores in the UK, and has around 180,000 employees.
- 10. The claimant was employed full time by the respondent from 29 May 2002 at its Watford Store in the role of Check Out Operator, 4 days a week. Following this she took on the role of Divisional Communications Co-Ordinator working Monday, Tuesday, Wednesday & Thursday from 9am to 3pm, until she left on maternity leave in 2005.
- 11. The claimant returned after maternity leave in 2006, and took on the role of assisting a colleague dealing with trading standards. Within a few months her colleague left and the claimant took on this role. The Tribunal was not provided with evidence of the claimant's working hours, although it appears from the documentary evidence that she was contractually employed to work 15 hours per week, over 3 days. The Tribunal accepts that there may have been variation to these working hours.

12. In 2014, the claimant reduced her working hours from 4 days to 2 days. The claimant said this was because of her back pain condition and that she needed to look after herself. (p180-181) In evidence, the claimant said, she could not handle the hours physically and mentally – physically the burden on her back became too much. The claimant in her statement at Para 11 says “she reduced these hours to make it easier to cope physically with everything, particularly as my back issues started restricting me”.
13. On 24 June 2019, the claimant’s terms and conditions of employment were changed. Her role was that of “Back Office Colleague”, which entailed investigating accidents and handling claims. The start date was 3 November 2019; she was based at the Watford Store, working 11.5 hours per week. (p66) This role developed as the workload increased. It was a stand-alone role.

Claimant’s back pain

14. The claimant suffered from chronic back pain. In evidence, the claimant asserted it had been present since 2007 but that it became significant from 2010. The Tribunal is of the view that the claimant back pain started from 2010. This is confirmed by the RNO Hospital medical report, which confirms the back pain started in 2010. (p77)
15. In their Response, the respondent has accepted the claimant’s back condition amounts to a disability within the meaning of s6 Equality Act 2010.
16. In terms of knowledge of the claimant’s condition, the Tribunal finds that the first Sarah Khan was made aware of this condition was at the second consultation meeting. It does not appear that Sarah Khan knew the extent of this condition, and neither did she explore this further with the claimant. Further, there is no evidence the claimant, in the consultation process, gave any further information to Sarah Khan about her condition and why this impacted her in consideration of the alternative vacancies except for the HomeShopper role. We accept Mrs Burman knew of the claimant’s condition as confirmed in her witness statement.

Redundancy process.

17. In 2019, the respondent considered implementing a redundancy process. Due to the pandemic, this was delayed.
18. In February 2021, all employees at the Watford Store were briefed on the proposed changes to the business. The proposal for the Back Office/Admin Dept, which comprised of 9 employees, was to combine the roles of Admin, People Compliance, Cash Office and Training Co-ordinator into a multi skilled Back Office role. This proposal was to reduce the headcount to 4 employees who would work in a Combined Back Office role. This change meant that there would be changes to rotas and hours of work. This proposal was subject to a period of collective consultation with the Union representatives National Colleague Voice Representatives, GMB and USDAW between February 2021 and April 2021.

19. After the consultation period ended with the Unions sometime in April 2021, the respondent began the consultation process with individual employees.
20. The Combined Back Office vacancies were each advertised mainly on a 16 hour per week basis (see list of vacancies p132-133) which enabled 4 employees to be appointed on a part time basis rather than 2 full time employees. In addition there was 1 Optical role, 1 Pharmacy role, 4 Home Shopping roles and 2 Counter roles. The hours of work for these roles were mainly 16 hours per week, except for the Pharmacy role, and the back office Cash roles had a fixed start time of 7am.
21. In readiness for the consultation process each affected employee was required to complete a Flexibility & Preference Questionnaire, which was used as part of their consultation discussion. This Questionnaire confirmed the employees current hours; their preferred working hours and roles. The claimant's completed Questionnaire confirmed her first choice as "Existing role", with Service Retail 2<sup>nd</sup>, and 3<sup>rd</sup> preference as Section Leader. (p88)
22. The Form made it clear that the employee should confirm if there are any ways of working which they would not be able to manage. The claimant did not on this form give any further information about any limitations she had, including about her medical condition, that would affect her future employment. She completed the Form to indicate her preferred roles, to work Days (6am-10pm), and her availability from 9am to 3pm. In the Form was a box allowing for an additional information. The claimant left this blank.
23. By letter dated 24 April 2021, the claimant was invited to a consultation meeting scheduled for 29 April 2021 at 9.30am, with Sarah Khan. The consultation meeting was to discuss the proposed changes, the redundancy proposals; the selection process and discuss alternative roles.(p84)
24. The claimant attended the meeting with Sarah Khan on her own. At this meeting the claimant was informed that her role was at risk of redundancy; was given details of her redundancy package if she was made redundant; was given a list of the available vacancies, and details of the assistance available to her in the consultation process. The claimant chose Vacancy 6 (Pharmacy) and Vacancy 3 for Back Office (p85-87). Following this meeting, Sarah Khan wrote to the claimant confirming their discussion and that if no suitable alternative vacancy is found then a formal notice of redundancy will be issued with a termination date.(p90)
25. On 6 May 2021, the claimant attended a second consultation meeting with Sarah Khan. (p91-92) At this meeting the claimant confirmed she was not interested in either of the Vacancies 3 & 6, and that the only role she was interested in was her current role (Accident Investigator), which she was passionate about, even though this was no longer to be available, and that she would be flexible to help out in other departments as she has been doing over the years, eg personnel, checkouts, price change and training with home shopping. Further the claimant also expressed her view that the vacancies should be in line with the hours she currently worked. She also changed her mind about her working hours and working days. She was prepared to reduce her working hours to 10 hours, and working days to Weds & Thurs

from 9am to 2pm. She was not prepared to work weekends because her husband worked and did not want to leave her daughter home alone. The meetings notes also record the claimant saying, "*I am in stage in my life that I don't need to compromise.*" (p91-92) There was no mention of her back condition being the reason for her change of mind and for the desired role and working hours/days.

26. Following this meeting the claimant was invited by Sarah Khan to another meeting scheduled for 20 May 2021 at 12 noon. (p93) The purpose of this meeting as stated in the letter was to talk about the next steps which may include speaking about new working arrangements and that if no alternative role was available then to discuss the possibility of being made redundant. (p93)
27. At the meeting held on 20 May 2021, Sarah Khan was accompanied by Jamie Purse, Services Section Leader, who took notes of the meeting. This time the claimant was accompanied by Tracey Maloney (work colleague) The signed minutes of the meeting confirm as follows;
  - (a) The claimant was only interested in staying in her current role – working Mon to Weds or Weds and Thursday between 9.00am to 2pm;
  - (b) She rejected any of the alternative roles;
  - (c) Was not prepared to work weekends due to family/childcare reasons;
  - (d) Not able to work in home shopping due to back pain;
  - (e) Was willing to work one in four weekend shifts but did not indicate which vacancy she would be willing to take;
  - (f) Would be interested in doing admin for home shopping;
28. Sarah Khan said the claimant raised her back pain issue for the first time. This was not mentioned in their previous meetings, and neither was it mentioned in the Questionnaire Form completed by the claimant on 29 April 2021.
29. Also at this meeting Sarah Khan pointed out the available roles, which the claimant considered were not suitable due to her family life. Further, she told the claimant that because there was no suitable vacancy for her she would be told first and have first choice about any available vacancy until her employment ended. At the end of this meeting the claimant was given 12 weeks' notice of redundancy. (p94-96)
30. Following this meeting, by letter dated 20 May 2021, Sarah Khan confirmed their discussions and gave written notice of redundancy with a termination date of 12 August 2021, and set out the redundancy package. Further the claimant was given the right of appeal. (p97)

### Appeal & Grievance

31. By letter dated 14 June 2021, the claimant appealed the redundancy decision, and also raised a grievance. (p98) In respect of the decision to make her redundant, she felt the consultation process was not meaningful; the offers of alternative roles were disingenuous as the respondent knew she would not be able to perform those roles because of her health limitation and

child care responsibilities; and that despite the guarantee to first choice on roles, that has not happened as she discovered positions have been advertised without first being offered to her. Further, she has been ostracised in the office and been disrespected by not being acknowledged or greeted whenever at work. She felt stressed and lost all trust and confidence, and requested that she be paid in lieu of notice. (p98).

Grievance Meeting – 16 June 2021

32. The claimant's grievance was conducted by Mrs Burman, (Online Trading Manager) based at the Luton store. She had not been involved in the redundancy process involving the claimant.
33. Mrs Burman joined the respondent in 2011, and has held various roles with the respondent. In the past she worked alongside the claimant for approx. 8 years; and was aware that the claimant had a back problem but was not aware that it was a problem or issue during her employment.
34. At the meeting held on 16 June 2021, the claimant was accompanied by Tracey Maloney (work colleague). The notes of the meeting record the discussions held and that the meeting lasted 50mins (p100-107) In summary the claimant raised the following issues;
  - (i) The consultation was not meaningful;
  - (ii) Offers of alternative employment were disingenuous as she was unable to perform alternative roles due to health limitations and/or childcare responsibilities;
  - (iii) Roles were advertised without her being offered "first choice" which she had been told;
  - (iv) Following the consultation process she felt ostracised and disrespected by other colleagues.
35. Mrs Burman discussed the issues with the claimant. In their discussions Mrs Burman ascertained that;
  - (i) She felt ostracised as she had not been greeted by Chris Good (General Store Manager) or Syed Aziz, (Deputy Store Manager) who she felt, pretended that she did not exist nor had either manager told her that they were sorry that it didn't work out.
  - (ii) She found out that a Markdown role did become available after her consultations, and that she was not offered this despite the assurance given by Sarah Khan that she would have first choice if any roles became available. In their discussion the claimant did not confirm if she would have taken the role, if offered, and considered this question was irrelevant.
  - (iii) That Syed Aziz had approached her openly and offered her a Counters Job which she had been offered in discussions with Sarah Khan. Her dissatisfaction was with the manner this was offered by Syed;
  - (iv) She did not want to leave her daughter on her own (who was at secondary school) and therefore could not accept a vacancy with start times of 7am or a vacancy which included evening shifts;

- (v) That she would be prepared to work less than 16 hours a week;
  - (vii) She wanted to know why her role was no longer required as stand alone role when she was performing well in her role and had saved the store a lot of money.
  - (viii) That she was of the view that management should have taken the lead;
  - (ix) She would no longer accept any vacancy offered even if it was suitable for her personal circumstances;
  - (x) The hours advertised for the alternative vacancies were no realistic and had hoped there would be other alternatives for her;
36. Following this meeting, Mrs Burman held investigations meetings with Syed Aziz and Chris Good.
37. To confirm and discuss the outcome of the grievance, Mrs Burman met with the claimant on 17 June 2021. At this meeting the claimant was accompanied by Tracey Maloney. (p120-124)
38. Mrs Burman did not uphold the grievance but made a recommendation. In summary, the outcome confirmed as follows;
- (i) Mrs Burman understood her childcare responsibilities, and that the available vacancies may not have been conducive to them, however the process is that of offering the vacancies which are available at that time – which may not be suitable; the jobs which are available are subject to the needs of the business;
  - (ii) Syed did not intend to offend her when informing her of the counter job the way he did. He thought he was being helpful, in making her aware of the available role. He understood he should have been professional.
  - (iii) Mr Good did not want to discuss matters during the consultation process and had stayed away with a view to approach colleagues when they were closer to their notice period.
  - (iv) Regarding the vacancies the recommendation was that all future vacancies be collated regularly and those employees under consultation be informed of the vacancies first before they are advertised.
  - (v) The claimant was given the right of appeal.
39. The Tribunal noted that although Mrs Burman, in her outcome, did not directly address the point about the Markdown role, namely that the respondent had failed to give the claimant first choice, contrary to the assurance given by Sarah Khan, Mrs Burman in evidence admitted that given the assurance given by Sarah Khan the claimant should have been informed first of the vacancy before it was made available to others. Further it has been noted that Mrs Burman in her witness statement, states, "I accepted that the Markdown role may have been advertised on the internal



*notice board without first being directly discussed with a claimant. (para29.3)*

40. Mrs Burman confirmed her decision and the right of appeal by letter dated 24 June 2021. (p125-127). The claimant did not exercise her right of appeal.
41. On 16 July 2021, the claimant submitted a Fit Note to 30 July 2021, and remained absent from work because of stress at work until her termination

#### The Markdown position

42. From the evidence we heard, we make the following findings;
  - (i) The Tribunal was not provided with a copy of the job advert by either party. The claimant said she forwarded the copy to her representative and was unable to locate a copy. The respondent's own search did not locate a copy either. The Tribunal is unable to ascertain if the role was suitable for the claimant.
  - (ii) The job advert was for a marketing role. It was advertised on the notice board at the store during the claimant's notice period after her last consultation meeting with Sarah Khan. According to the claimant her colleague Tracey Maloney informed her about it.
  - (iii) The claimant did not apply for the role. She accepted in evidence she could have done so, but the fact that she did not was irrelevant.

#### Tracey Brown

43. Tracey Brown was a colleague of the claimant, who was also subject to risk of redundancy . She also had consultation meetings with Sarah Khan.
44. During the consultation period she selected vacancies , 4, 7, 8, 9, & 10. (p134) She took on the cash office role vacancy 4 & the Home Shopping Role-which entailed picking food items. She increased her hours to 31 per week. (p138) She started her new roles from 9 July 2021.
45. According to the claimant, she was told that Tracey Brown, although had taken on the Home Shopping role, she continued to work in the same previous role in the back office. We reject this, as no direct evidence was heard to support this.

#### **The Law**

##### Unfair Dismissal

46. Section 94 Employment Rights Act 1996 (ERA) establishes that an employee has the right not to be unfairly dismissed by his employer and s 98 deals with fairness.
47. By virtue of s98(2)(c) redundancy is a potentially fair reason for dismissal and s98(4) requires that an employer relying upon a potentially fair reason acts reasonably in treating that reason as sufficient for dismissal, determined in accordance with equity and the substantial merits of the case. 5

48. Section s139 ERA defines redundancy:  
“1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to.....(b) the fact that the requirements of that business-.....(i) for employees to carry out work of a particular kind,... have ceased or diminished or are expected to cease or diminish.”
49. The cases Safeways Stores plc v Burrell [1997] ICR 523 and Murray v Foyle Meats Ltd [1999] ICR 827 show that there are three tests to be considered when deciding whether redundancy was the reason for dismissal under section 98(2) of the Act.
- (i) The first is to ask whether the employee has been dismissed.
  - (ii) The second is to ask whether the requirements of the business for employees to carry out work of a particular kind have diminished.
  - (iii) The third is to ask whether the dismissal is attributable, wholly or mainly, to that state of affairs.
50. The EAT in Williams and ors v Compare Maxam 1982 ICR 156, EAT laid down guidelines that a reasonable employer is expected to follow and against which fairness or unfairness is judged. These basic matters must always be considered in redundancy cases and the tribunal must ask whether the respondent's actions and decision fell within the range of conduct which a reasonable employer could have adopted. The suggested factors are:
- (i) Whether employees were warned in good time;
  - (ii) Whether employees were consulted about redundancy, and to be meaningful any such consultation ought to take place before any final decision on redundancy is taken;
  - (iii) Whether any recognised trades union's view was sought;
  - (iv) Whether any selection criteria were objectively chosen and fairly applied;
  - (v) Whether alternatives to redundancy were reasonably considered;
  - (vi) Whether reasonable consideration was given to the availability of alternative work.

#### Equality Act 2010 (“EA”)

51. Section 6 of the Equality Act 2010 (“EA”) provides that a person has a disability if they have a physical or mental impairment, and that impairment has a substantial and long-term adverse effect of a person's ability to carry out normal day-to-day activities.

#### The burden of proof

52. Section 136(2) EA 2010 sets out the applicable provision as follows: *“if there are facts from which the court could decide in the absence of any other explanation that a person (A) contravened the provision concerned the court must hold that the contravention occurred”*.
53. Section 136(3) then states as follows: *“but subsection (2) does not apply if A shows that A did not contravene the provision”*.

Discrimination arising from disability

54. Discrimination arising from disability is defined in s15 EA 2010:
- (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.
55. Section 15(2) applies only if the employer did not know (and could not reasonably have been expected to know) about the disability itself: ignorance of the consequences of the disability is not sufficient to disapply s15(1).
56. As for the correct approach when determining section 15 claims guidance is given in Pnaiser v NHS England and others UKEAT/0137/15/LA at paragraph 31. The relevant steps to follow are summarised as follows:
- a) the tribunal must identify whether there was unfavourable treatment and by whom – no question of comparison arises;
  - b) the tribunal must determine the cause of the treatment, which involves examination of conscious or unconscious thought processes. There may be more than one reason but the “something” must have a significant or more than trivial influence so as to amount to an effective reason for the unfavourable treatment;
  - c) motive is irrelevant when considering the reason for treatment;
  - d) the tribunal must determine whether the reason is “something arising in consequence of disability”; the causal link between the something that causes unfavourable treatment and disability may include more than one link – a question of fact to be assessed robustly;
  - e) the more links in the chain between disability and the reason for treatment, the harder it is likely to be able to establish the requisite connection as a matter of fact;
  - f) this stage of the causation test involves objective questions and does not depend on thought processes of the alleged discriminator;
  - g) knowledge is required of the disability only, section 15 (2) does not extend to requirement of knowledge that the “something” leading to unfavourable treatment is a consequence of disability;
57. It does not matter precisely which order these questions are addressed. Depending on the facts the tribunal might ask why the respondent treated the claimant in an unfavourable way in order to answer the question whether it was because of “something arising 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.
58. When considering justification, the role of the Tribunal is to reach its own judgment, based on a critical evaluation, balancing the discriminatory effect of the act with the business/organisational needs of the Respondent.

59. Under s15 it is the treatment which must be justified, rather than any policy which might lie behind the treatment. The test is reasonable necessity and the Tribunal must make its own objective assessment, weighing the real needs of the undertaking against the discriminatory effect of the unfavourable treatment.

#### Duty to make reasonable adjustments

60. Section 20 EA 2010 states that:

(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.

61. Section 21 EA 2010 states that:

- (1) A failure to comply with the first ... 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.

62. In Environment Agency v Rowan [2008] ICR 218, the EAT set out how an employment tribunal should consider a reasonable adjustments claim (p24 AB, para 27). The tribunal must identify:

- a) the provision, criterion or practice applied by or on behalf of an employer or the physical feature of premises occupied by the employer;
- b) the identity of non-disabled comparators (where appropriate); and
- c) the nature and extent of the substantial disadvantage suffered by the claimant.

63. Section 212(1) EA 2010 defines 'substantial disadvantage' as one which is more than minor or trivial and whether such a disadvantage exists in a particular case is a question of fact and it is to be assessed on an objective basis. It is necessary for a Tribunal to identify the nature and extent of any alleged disadvantage suffered and to determine whether that disadvantage is because of disability. In order to do so, the Tribunal should consider whether the employee was substantially disadvantaged in comparison with a non-disabled comparator. If a non-disabled person would be affected by the PCP in the same way as a disabled person then there is no comparative substantial disadvantage (Newcastle Upon Tyne Hospitals NHS Trust v Bagley (2012) UKEAT/0417/11/RN, para 72).

#### Conclusión

##### a. Unfair Dismissal

64. The claimant has accepted there was a redundancy situation. On the facts The Tribunal is satisfied there was a genuine redundancy situation.

65. The Tribunal considered the issue of procedural unfairness as argued by the claimant as set out below;

Was the dismissal unfair because the Markdown position was not brought to the claimant's attention and that it was wrongly assumed she would have rejected it.

66. The Tribunal rejects that the failure to first offer the Markdown position to the claimant renders the dismissal to be procedurally unfair.
67. The Tribunal accepts that at the consultation meeting with Sarah Khan on 20 May 2021, the claimant was told that if any vacancies arise these will be discussed with the claimant who will be given first option to accept or decline. We accept, the claimant was not informed of this vacancy when it became available and that she found out about it from Tracey Moloney. The vacancy was advertised on the notice board which would have been viewed by others. This failure to notify the claimant and give her first refusal is not a breach at law in the context of this case and neither does it render the dismissal unfair. There was no formal agreement. The discussion was held during the consultation process.
68. Even though the claimant was not given the first option, the fact is, she did not apply for the post. She could have done, but chose not to do so. She still had the opportunity to do so. In cross examination the claimant replied, "*It was my choice not to apply for the role*". This confirms that she would not have applied for the position in any event.
69. Further, the Tribunal has not been provided with a copy of the advertisement, which would confirm the details of the role, working hours and suitability for the claimant given her desired working hours. If the claimant had established it was a suitable alternative role that should have been offered to her or for which she should have been considered, then her argument may have had some merit, as it may have been considered that the employer acted unreasonably.

Was the claimant treated inconsistently compared with her colleague, Tracey Brown, who selected an alternative role as a "Home Shopper" but did not carry out that role but continued to work in the back office.

70. The Tribunal rejects the claimant's assertion for the following reasons;
- (i) We accept the evidence of Sarah Khan, as she conducted the consultation with Tracey Brown. Contrary to the claimant's belief, Tracey Brown took on a split role that of Cash Office and Home Shopping role. She accepted Vacancy 4 working in the back office, and undertook further hours working in the Home Shopping Dept, which increased her hours.
  - (ii) In cross examination, Sarah Khan, confirmed Tracey Brown did undertake the role of Home Shopper, which entailed picking goods and placing in the trolley. This required lifting. She chose to do this role, and that she (i.e Sarah Khan) had no reason to know that Tracey was not able to do the role because of her hernia.
  - (iii) The claimant has provided no supporting evidence to show that Tracey Brown did not carry out the Home Shopper role. In cross examination, the

claimant said she found out about Tracey Brown's role after her employment ended. She was told by a friend who she did not initially name, but then admitted it was Kelly Flecknell (Manager) who gave her a copy of Tracey's contract. In the absence of firm documentary evidence we dismiss the claimant's assertion.

Substantive unfairness

71. The Tribunal considered if the dismissal was substantively unfair due to the failure by the respondent to consider the claimant's physical impairment when offering alternative roles.
72. The Tribunal rejects the claimant's claim that the dismissal was substantively unfair for the following reasons;
- (i) The claimant had no desire to do another role. She wanted to remain in her existing role as maintained in the consultation process.
  - (ii) By the second consultation meeting the claimant made it clear that; (page 92)
    - She had changed her mind about the previous roles;
    - She has decided to reduce her working hours because of her husbands work & did not want to leave her daughter alone, and therefore could only offer working one weekend in four;
    - That "*I am in stage of my life that I don't need to compromise*".
  - (iii) She did not raise her back problems/impairment being the reason why she needed a role which suited her, except when referring to the Home Shopping role, which she said she could not do due to backpain which was an ongoing chronic medical condition.
  - (iv) The reason why she wanted hours to suit her was because of her husband's working hours and childcare reasons and not because of her back condition. We accept the evidence of Sarah Khan (Para 33)
73. Accordingly, for the reasons stated the Tribunal is satisfied that the claimant's dismissal was procedurally and substantively fair, and that the decision to dismiss was within the band of reasonable responses open to the respondent.

Discrimination arising from disability – s15 EAct 2010

74. The Tribunal first considered whether the respondent knew or could reasonably have been expected to know that the claimant had a disability, and from what date?
75. We find that the OH Report dated 18 June 2019 to the respondent (Miss S Dorota) (p74) gave the respondent actual knowledge of the claimant's back condition.
76. As for Sarah Khan, we are of the view, she did not have personal knowledge until the final consultation meeting of 20 May 2021, at which the claimant mentioned her back pain was a chronic medical condition. (p94) Although,

it does not appear that further details were given or that further questions were asked by Sarah Khan, to ascertain the significance of the condition, we are satisfied that Sarah Khan had some knowledge of the claimant's condition.

Did the Respondent treat the claimant unfavourably by not offering alternative employment in the back office.

77. We do not find the claimant treated unfavourably by not being offered alternative employment. Like other colleagues who were affected by the re-organisation, the claimant was given the same list of vacancies for consideration and discussion. The claimant was given the opportunity to apply for the vacant roles. She decided not to do so. This was not because of her back condition but because she was not interested in applying for the position. The start times did not suit her for reasons connected with her childcare and family reasons, and also as she wanted to stay in her current role, as she reiterated even in her final consultation meeting on 20 May 2021. (p94)
78. The Tribunal also noted the claimant has not provided any medical evidence to support her contention that start time of 7am was not suitable because of her back condition.
79. On this finding the claimant has not shown unfavourable treatment. Nonetheless the Tribunal went on to consider the next question.

Did the following thing arise in consequence of the Claimant's disability, namely, her inability to work 16 hours.

80. The Tribunal is not satisfied that the claimant was unable to work 16 hours because of her back condition. Apart from the claimant's own assertion that she reduced her working hours to manage her condition, the claimant has not produced any documentary evidence to support this.
81. The Tribunal finds that the reason why the claimant reduced her working hours was primarily due for family reasons. At the second consultation meeting on 6 May 2021 (p92) the claimant said she changed her mind. She said she was now only prepared to work 10 hours on Weds & Thurs 9am-2pm, and she was not prepared to work weeknds because for family reasons. There is no mention that the reason why she could not work more than 12 hours was because of her back condition. In fact, the claimant does not give this reason in any of her consultation meetings, and neither does she specifically mention her inability to work 16 hours because of her condition. It is noted the claimant in her grievance letter dated 14 June 2021 does mention her not being able to perform the roles due to health limitation and/or childcare responsibilities. That is not specifically saying I cannot do 16 hours per week.
82. Given the above findings the Tribunal did not need to give consideration to the question if dismissal was proportionate to achieve the legitimate aim relied upon by the respondent.

Reasonable Adjustments -s20 & 21 EA 2010

83. In determining this complaint, the Tribunal found that the respondent had knowledge of the claimant's disability as confirmed in paragraphs 76 & 77 above.

84. The Tribunal then considered and determined the issues below.

Did the respondent have the following provision criterion or practice, namely that any back office roles were for a minimum of 16 hours per week, spread over 3 days.

85. The Tribunal is not satisfied that the respondent applied this PCP. The Tribunal accepts the vacant roles were advertised for 16 hours a week. However, the Tribunal is persuaded by Sarah Khan's evidence, that there was flexibility for employees to either reduce their hours, or if they wanted to they could seek an increase in their hours as for example Tracey Brown did. The situation was that the affected employees were losing their jobs and working hours, and the employees were looking to work the hours available to them. We are not satisfied that the working hours offered were subject to a minimum of 16 hours per week, except that the start time of 7am was fixed due to the nature of the role. The Tribunal also noted there was a Pharmacy role at 12 hours (Vacancy 6. (p131) which was available.

86. The claimant's reason for choosing her working hours was related to her family reasons, and her attitude, "*I am in stage of my life that I don't need to compromise*" (p92) It was not because of her condition.

87. Based on this finding the complaint for reasonable adjustments fails at the first hurdle. The Tribunal is therefore not required to consider the issue of disadvantage and the steps that could have been taken to avoid the disadvantage.

88. However, if the Tribunal is wrong on this issue of the PCP, the Tribunal makes the following observations to the issues of disadvantage and the steps that could be taken to avoid the disadvantage.

Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability in that the claimant's condition precluded her from working that number of hours (i.e minimum 16 hours per week)

89. The claimant has not provided any medical or other supporting evidence to show that any increase in her working hours/working days would have caused her a disadvantage because of her back condition. Taking note of the OH Report (p74) the recommendation is for the claimant to take regular breaks from sitting. There is no evidence put forward by the claimant that this would not have been possible in any of the available roles. In fact this issue was not explored in evidence.



90. During the consultation process the claimant did not say that her back condition was the reason she was unable to work 16 hours per week. As confirmed earlier, the claimant's decision for choosing her working hours was related to her family reasons, and her attitude, "*I am in stage of my life that I don't need to compromise*" (p92) It was not because of her condition. Therefore, the Tribunal is not satisfied the claimant would have been put at a substantial disadvantage.

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

91. Based on the findings of fact, the Tribunal does not find that the respondent would or could have reasonably been expected to know that the claimant was likely to have been placed at a disadvantage. The reasons for this are;

- (i) The claimant did not during the consultation process, disclose or want to discuss with Sarah Khan, about her condition, except that she mentioned she could not do the Home Shoppers role due to not being able to lift heavy items;
- (ii) The claimant did not when talking about the available vacancies assert that her condition was the reason for not wanting to either consider and/or apply for the vacant roles;
- (iii) There was no evidence before Sarah Khan that the claimant's working hours had in the past been reduced because of her back condition.

What steps could have been taken to avoid the disadvantage

92. The claimant says the steps which could have been taken would have been to work 12 hours per week over 2 days.

93. The Tribunal accepts that had the claimant made out her case, the proposed steps would have been reasonable to take. On the facts, the claimant did not propose this. If at all, she indicated to reduce her working hours to 10 hours and then work the days she wanted to. Given that there was no meaningful discussion this was not explored further. The Tribunal prefers Sarah Khan's evidence that the respondent was flexible in agreeing working hours and days, and had there been a discussion it is likely that reasonable adjustments would have been made by the respondent.

94. For the reasons stated above, the claimant's claim is not well founded and is dismissed.

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**Employment Judge Bansal**

**Date 12 August 2024**

REASONS SENT TO THE PARTIES ON  
13 August 2024

FOR THE TRIBUNAL OFFICE

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