



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106963/2023

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Held in Glasgow on 12, 13 and 14 August 2024

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Employment Judge A Jones
Tribunal Member K Ramsay
Tribunal Member P Findlay

A

Claimant
Represented by:
Mr O'Keefe -
Counsel

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British Broadcasting Corporation

Respondent
Represented by:
Mr Bhatt -
Counsel

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

It is the unanimous judgment of the Tribunal that:

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1. The name of respondent's witness should be anonymised under Rule 50 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013.
2. The respondent did not fail in a duty to make reasonable adjustments in respect of the claimant in terms of section 20 of the Equality Act 2010, and
3. The respondent did not discriminate against the claimant in consequence of a disability in terms of section 15 Equality Act 2010.

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REASONS

Introduction

1. The claimant lodged a claim on 14 November 2023, alleging discrimination in relation to the protected characteristic of disability in respect of section 15 and section 20 Equality Act 2010 ('EA'). The respondent did not accept that the

claimant was a disabled person for the purposes of section 6 EA at the material time. A preliminary hearing took place on 15 February and 27 March 2024 in order to determine the issue of the claimant's disability status.

2. A judgment was promulgated on 29 April 2024 which determined that the claimant had the protected characteristic of disability during the relevant period which was said to be between 7 June 2023 and 14 November 2023. The claimant was found to be disabled by reason of the impairment of exhaustion arising from the condition of Type 2 Diabetes. Detailed written reasons for that judgment were provided.
3. An anonymisation order was made in respect of the claimant on 28 March 2024. During the course of the final hearing, parties raised the issue of the extent to which that order was in respect of the preliminary hearing only or the entire proceedings. Having considered the matter, I informed parties that the order would be required for the entire proceedings as, were that not to be the case given that a judgment had already been promulgated, it would be possible to identify the claimant in respect of the preliminary hearing judgment if the claimant were identified in the judgment of the final hearing. Parties acknowledged the position. No application was made to revoke the order and I did not consider it in the interests of justice to do so.
4. The claimant gave evidence during the final hearing and the respondent called one witness. I highlighted to parties that were the respondent's witness to be identified then it might be relatively easy to identify the claimant. I therefore formed the view that an anonymisation order should also be made in respect of the respondent's witness. Parties recognised that this was a pragmatic approach and had no objection to such an order being made. The claimant will therefore be referred to as 'A' in this judgment and the respondent's witness as 'B'.
5. A joint bundle was lodged and an agreed list of issues was provided. Parties provided written submissions on the conclusion of the oral evidence and spoke to those submissions.

Issues to be determined

6. The Tribunal was required to determine the following issues which had been identified by the parties and in respect of which the Tribunal agreed. In summary, those issues were:

- 5 a. Were the claimant's claims made within the statutory period and if not, should the Tribunal exercise its discretion to determine the claims?
- b. Did the respondent know, or should have been reasonably aware that the claimant had the protected characteristic of disability during the material period being 7 June to 14 November 2023?
- 10 c. Did the decision on 15 August 2023 to convene a disciplinary hearing regarding an error made by the claimant on 7 June 2023 amount to discrimination arising from a disability in terms of section 15 EA?
- d. Did the respondent fail in a duty to make reasonable adjustments in respect of the claimant, specifically in relation to the requirement to
- 15 work particular shifts?
- e. If the claimant's claims succeed, should the Tribunal make an award in respect of injury to feelings and if so, in what amount?

Findings in fact

7. Having considered the evidence, the documents to which reference was

20 made and the submissions of the parties, the Tribunal found the following material facts to have been established.

8. A has worked for the respondent for over 30 years and has been employed in the role of Presentation Announcer/Director for many years. The role involves working a shift pattern with various shifts between the hours of 5am and 3am.

25 The most recent shift pattern was introduced after extensive consultation and agreement with the relevant staff and trades unions. The introduction of a new shift pattern is an extremely complex exercise which requires to take into account the respondent's broadcast obligations and the needs of individual staff.

9. Presentation Announcer/Directors will complete a log of any issues which arise during the course of a broadcast.
10. Two incidents arose in February 2018 in two days when A failed to go into circuit resulting in incorrect content being transmitted. Going into circuit involves the Presentation Announcer/Director taking control of the content which is being broadcast. Content may be broadcast from BBC One in London and interspersed with content from BBC Scotland. It is therefore necessary to go into circuit in order to ensure that the planned material is broadcast at the relevant time. A also worked on broadcasts of BBC Alba material. A's duties included ensuring that the correct content was broadcast and that appropriate announcements and trails of other programmes were made at the relevant time. A had a discussion with B who is A's line manager regarding these issues on 16 February 2018.
11. A meeting took place between A and B on 7 March 2018 as a result of a further error on the part of the claimant. The claimant suggested that a colleague had made a similar error. B investigated this allegation and found it not to be accurate. Following the meeting on 7 March, B sent an email to A on 9 March 2018 indicating that the email of 9 March which outlined these incidents would be kept on B's records for 12 months and should any similar issues arise from failing to go into circuit or a lack of focus on the part of A within that period, a formal disciplinary interview would result.
12. A further email was sent to the claimant by B on 25 May 2018, once B had completed investigations into the allegation made by A regarding a colleague. The email referred to a conversation between A and B on 24 May 2018 and indicated that formal proceedings would not take place but if there were any similar issues within the next 12 months, a formal disciplinary route may be followed.
13. The claimant made an error on 26 October 2018 by coming out of circuit at the incorrect time resulting in planned content not being broadcast. The claimant was informed that a disciplinary investigation would be conducted into this issue. The claimant was then off work with work related stress

between 12 December 2018 and 31 December 2018 and then 8 February 2019 and 22 February 2019.

14. A was referred to occupational health and a report was provided on 3 April 2019. The report indicated that A perceived that the relationship with B may be having an impact on A's emotional wellbeing and that A felt that communication at work had broken down.
15. A disciplinary meeting in relation to the incident of 26 October 2018 took place on 17 May 2019. A was issued with a first written warning. The warning was not issued by B but another manager.
16. An issue arose in relation to a broadcast in early December 2019. It transpired that A had not been in circuit at the relevant time which had led to the broadcast of unplanned material. A had not made a log regarding this matter at the time. No action was taken regarding this matter.
17. An issue arose in relation to a broadcast on 11 April 2022. B asked members of the team to comment on what might have occurred. A indicated that there had been a failure to take control of the service after a break A had taken and apologised for the error. B indicated that the error was serious as it had resulted in the failure to transmit two Ofcom warnings (in relation to language and content) and therefore the matter would be investigated further.
18. The claimant was issued with a written warning to be held on file for 12 months on 26 August 2022 as a result of the incident on 11 April 2022. The warning was not issued by B but another manager.
19. An occupational health assessment took place in relation to A on 7 September 2022. This report indicated that there may have been medical issues associated with the claimant which could have contributed to the claimant's error on 11 April 2022. No mention was made of the claimant's diabetes and the claimant had not at that stage been diagnosed with diabetes.
20. The claimant appealed against the written warning issued on 26 August. That appeal was not upheld and the reasons were set out in a letter of 11 January 2023.

21. On 22 January 2023 an issue arose when the claimant did not follow the Harding process and as a result a programme which was not compliant with requirements was broadcast. The Harding process involves a warning to viewers regarding flashing images being included in a broadcast.
- 5 22. The claimant applied for an attachment (that is an internal transfer) to a role in Wales in February 2023. The respondent's procedures indicate that a line manager's consent should be obtained prior to any such application. A had not sought B's consent for the application.
- 10 23. A sent B an email on the 10 March 2023 indicating that A's doctor had diagnosed Type 2 Diabetes. A requested a referral to Occupational health to discuss the effects this may have. B replied requesting further information regarding A's symptoms and how A felt they were impacting on work. A replied indicating "I have been suffering from pretty much the full spectrum of symptoms of the illness including fatigue, sleeping, headaches, thirst, disturbed vision, and disturbed sleep." A also indicated that from the tests it appeared that "my BG has been high for at least a number of months." A went on to indicate that it was not possible to identify how that would affect work and that was why the advice of OH was being sought.
- 15 24. Around this time the claimant informed a colleague of the claimant's diagnosis and indicated that the respondent would have to do something about the shifts A was required to work now.
- 20 25. B made a referral of A to occupational health and an assessment took place on 28 March 2023. The report indicated that A was temporarily unfit for work but that A's "health is likely to improve with appropriate treatment and an early resolution of work related circumstances. A further review would be useful in 8 to 12 weeks at your discretion."
- 25 26. The claimant was then signed off by the GP as unfit for work between 28 March and 25 April 2023.
- 30 27. B wrote to A by email on 3 April 2023 alerting A that A's 18 weeks' full sick pay entitlement had been exhausted due to absences between 31 March

2022 and 25 April 2023. B also reminded A of an entitlement to 252 hours of additional long service leave and asked A if that should be allocated to A's absence to allow A to maintain full pay.

5 28. A responded on 4 April indicating that going on half pay would cause some difficulty and stated "It is my belief that I could have returned to work earlier last year if I had had my OH referral earlier and its recommendations acted on earlier....In the meantime, I was wondering if there is any accommodation that can be made (e.g. other duties/redeployment) while I adjust to my diagnosis of Type 2 diabetes which is, I'm sure you are aware, classed as a disability? The main issues as far as I can see affecting my health are the lack of routine, disruption to my sleep pattern, and irregular meal breaks...I would 10 far rather be working than not...it would be good to have a talk about these things to try to find the best way forward.."

15 29. B then indicated that efforts would be made to escalate A's request to come back in other duties which in the event did not prove possible.

30. B sent an email to A on 11 April setting out a proposed return to work whereby the claimant would return to work for days that week to chat through strategy coaching that the claimant had started and then setting out a plan for the following week.

20 31. The claimant returned to work on 12 April, without having informed B in advance. When B queried whether A was at work, the claimant sent B an email on 12 April confirming a return to the office and raising some issues regarding the proposal made by B.

25 32. A meeting then took place between A and B on 13 April. In advance of that meeting B sent A an email setting out a more detailed proposal regarding shifts and meal breaks. The meeting on 13 April was constructive and friendly. Following that meeting, B sent A an email confirming what had been discussed and what action would be taken as a result.

30 33. When the claimant returned to work, the claimant did not indicate to B that there was any ongoing difficulty in carrying out duties, and there was no

reason for B to be of the view that the claimant was suffering from an impairment which was likely to last long term and which could have a substantial adverse impact on A's ability to perform normal day to day activities.

5 34. The claimant made an error on 14 May 2023 by going into circuit late. The effect of this error was that the beginning of a programme screening a live football match and appropriate announcements were not broadcast.

35. A further occupational health assessment took place regarding the claimant on 30 May 2023. The report noted that A had returned to work a few weeks
10 after the initial assessment on an adjusted basis with no early or late shifts being worked. It went on to state "A has found management supportive in this regard so far, but was a little concerned that late shifts were being introduced in the next rota". This referred to A having been included in a new rota for shifts which had not previously been proposed. This had been an error which
15 was rectified by the respondent. The report recommended that A remain off early and late shifts for the time being to allow adjustment to diet and lifestyle factors. The claimant informed occupational health that no significant issues had arisen since return to work and made no reference to the error on 14 May.

36. On 2 June the claimant sent an email to a colleague with responsibility for
20 arranging rotas raising a concern that the rota suggested the claimant should be working a couple of late shifts. The claimant also indicated that there had been an issue regarding taxis arriving late after BBC Scotland shifts (which finished at midnight). B was copied in to that email. The email indicated that the issue with working the BBC Scotland shift was whether the taxi arrived on
25 time, and did not suggest that the shift itself could not be worked.

37. B replied on 5 June indicating that the OH report had just been received and that B was still considering it. B suggested a meeting would be arranged with A for the following week.

38. A replied to that email on 5 June indicating:

“when we agreed to the shifts I have been working over the past couple of months I was at the very beginning of my journey with my diagnosis and I am learning more about how the condition is affecting me as time goes on...Having now experienced the shifts while being more aware of the effects of diabetes, there are some things that don't work very well for me....”

As you rightly say, I am able to eat and drink at my desk while carrying out my duties...However, I do need to take care that I am not grazing too much since the problem I have is that my blood sugars tend to rise and most foods contain sugars in some form another (luckily my preferred drink, water, is completely sugar free!) ...As I explained to you last week, I am finding the more lengthy periods without breaks more problematic than specific times to eat...Exercise is a major tool in combatting high glucose levels...I need to be able to take breaks and use them to move around and help lower my blood sugars...The BBC Scotland shifts, due to the broadcast commitments and with the breaks you propose (I notice the times of the shift are different in your email to the rota), mean that I don't get a break for over 6 hours when the Ts & Cs state that staff should get one within six hours...Is there any way we can find a way of managing this that will allow for a break at a better time?...

...I look forward to talking this through with you along with the other recommendations in the report.”

39. The claimant spent the weekend of 3 and 4 June away at an event in Dunoon, which included performing at an event on the Saturday evening until around 11.30pm.

40. On 7 June the claimant made an error at 7pm when a one minute news broadcast only broadcast for 15 seconds. The claimant had returned from a meal break at around 6.30pm and ought to have gone into circuit by 6.45pm but did not do so. Earlier that day the claimant had sent draft scripts to B earlier than was required and had given B no impression that A was suffering any difficulties at work. A had been active on social media during the shift.

41. An occupational health report action plan was put forward by B after discussion with A on 12 June. The claimant responded on 20 June indicating

5 “I have read over the action plan and I’m afraid, as I said during our chat and in the email I sent you prior to the meeting I am finding the BBC Scotland late shifts (as they are called on the rota) problematic with regard to their effect on my health at this time...the occupational report clearly states that I should not be doing early or late shifts while stabilising my blood sugars...It does not specify shifts particular to BBC One, and I believe that the vast majority of people would consider a shift that finishes at half past midnight late...”

42. On 20 June B contacted A by email seeking to arrange an informal meeting on 23 June to discuss the error which had occurred on 7 June.

10 43. B contacted HR on 23 June requesting a follow up question be asked of occupational health regarding early and late shifts. B was due to go on annual leave and indicated that the claimant was due to be on two BBC Scotland late shifts during that period and that it was assumed pending clarification from OH that the claimant could work these shifts. B also provided another contact who could deal with matters should OH indicate that the claimant was not fit to work those shifts.

15 44. A contacted B’s line manager during B’s absence on leave asking whether there was a requirement to work late shifts. A stated “My concerns are two-fold...One, these shifts aggravate the symptoms of my diabetes and make me unwell...And two, I am concerned that I may make further mistakes as a result of being unwell.” B’s line manager responded by saying “The advice from OH is not yet available, therefore, we need to continue to work on the basis that you will cover tomorrow’s late shift, as scheduled.”

20 45. The occupational health doctor replied on 4 July to the query and stated: “The shift restrictions have certainly been helpful in managing underlying diabetes and should remain in place for at least another two months until the next clinical review”.

25 46. The claimant was not able to work a shift on 19 July and said that this was because “I am feeling unwell after last night’s late shift, not helped by problems with taxis...I am not fit for my shift today..I hope to be ok for tomorrow’s.”

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47. B then sought further clarification from the OH doctor and set out the specific details of the shifts the claimant was working. The occupational health doctor was on annual leave and the respondent was informed that he would reply on his return on 24 July. B had a video meeting with the OH doctor on 24 July.
- 5 During the meeting, the doctor indicated to B that he was more concerned at the impact of other conditions the claimant may have on the claimant's work rather than the impact of diabetes. The doctor suggested that a double appointment be arranged with the claimant to discuss these issues and that the claimant be encouraged to continue with strategy coaching in the
- 10 meantime. The doctor also confirmed that the adjustments which had been put in place were helpful and should be continued.
48. A meeting took place between A and B on 13 July 2023 to discuss the error made by the claimant on 7 June. The claimant was accompanied by a trade union representative at that meeting.
- 15 49. B emailed the claimant on 7 August regarding an issue which had arisen in relation to a broadcast on 6 August.
50. The claimant attended an occupational health consultation on 14 August. The report noted that the claimant's glucose levels had been gradually improving. It also made reference to the claimant reporting feeling under stress due to
- 20 an ongoing disciplinary process relating to workplace errors. In addition the claimant reported feeling significantly fatigued after the BBC Scotland late shifts. The report stated that late shifts should be avoided in particular shifts finishing late evening or after midnight. The doctor had been asked to comment on whether errors made by the claimant in recent times could have
- 25 been caused by a medical reason. The doctor stated it wouldn't be appropriate to retrospectively try and determine if there was a clinical cause for specific errors. The report went on to note that the claimant had indicated that the cause of the errors "may potentially have been a combination of
- 30 factors including the neurodiverse condition, fatigue related to shifts and anxiety about self-management of diabetes as well as issues at work."

51. On 15 August, B informed A that B had decided to progress the incident regarding 7 June to a formal hearing. The claimant had been working that day and went home ill, unable to complete the shift. The claimant was then signed off work from 19 August to 9 September because of “work related stress; type 2 diabetes”. The claimant was further signed off work for those reasons between 8 September and 9 October.
52. B wrote to the claimant on 8 September by email proposing an adjusted shift pattern which involved working no later than 10.10pm in any shift on the basis of two types of shifts.
53. The claimant was invited to an informal welfare meeting by letter dated 30 October as the claimant had still not returned to work. B agreed to the claimant being accompanied by a trade union representative at that meeting although that was not normal procedure.
54. The claimant lodged a claim at the Tribunal on 14 November 2023.
55. The claimant remained signed off work. An occupational health assessment took place on 8 December. The report recommended that the claimant could return to work in an alternative role with regular social hours (9am-5pm). An early resolution to the pending disciplinary proceedings was also recommended.
56. A further welfare meeting took place on 20 December 2023 at which time the claimant was again accompanied by a trade union representative. The issues regarding the recommendation made by occupational health were discussed.
57. The claimant returned to work around 1 February 2024
58. A disciplinary meeting concerning the issue of 7 June 2023 was held on 1 February 2024. The claimant was informed by letter dated 6 March 2024 that while it was right that a disciplinary investigation had taken place because of the seriousness of the allegations and because the claimant had been disciplined for similar issues in the past, the allegations were not upheld. The disciplining manager indicated that it was concluded that the claimant’s health

had an impact on what happened on 7 June. Various recommendations were made by the disciplinary manager.

59. The claimant returned to work in a 9-5 basis and is now working shifts between 10am and 6pm. This involves the claimant working a 0.3 full time equivalent. The claimant continues to be paid full pay as has been the case throughout the adjusted shift pattern the claimant has been working.

Observations on the evidence

60. The Tribunal only heard from two witnesses. It was clear to the Tribunal that A and B had known each other for a long time and had previously worked together prior to B becoming A's line manager. It also seemed to the Tribunal that while there had previously been a close and positive relationship between the two, there had been tensions developing in the relationship for a number of years and in particular since the disciplinary investigation commenced by B in respect of A in 2018.

61. In addition, the claimant's view of the impact the diagnosis of diabetes and other conditions which caused the claimant to have adverse symptoms had developed over time. The Tribunal came to the conclusion that the claimant's perception of how type 2 diabetes had affected the claimant was different now to what it had been in 2023. The Tribunal does not suggest that the claimant was in any way deliberately revising events but that over time the claimant has, in reflecting on matters, sought to attribute symptoms of diabetes and other conditions as being the cause of errors made at work. The claimant has viewed past events through the lens of their current view regarding the impact the claimant's health difficulties have had over the years.

62. The claimant was somewhat evasive in answering questions in cross examination and became on occasion argumentative. However, the Tribunal took into account that the claimant was clearly under a significant degree of stress when giving evidence.

63. While B also found giving evidence on these events a stressful and difficult experience, the Tribunal formed the view that the evidence given by B was

credible and reliable. The Tribunal also found B to be a diligent and empathetic manager who did their best to support the claimant and take any steps that would allow the claimant to return to and remain at work.

5 64. There was little in the way of actual dispute on the evidence. The issues for determination related more to how that evidence should be interpreted.

65. It is also worth noting that no medical evidence other than the occupational health reports was provided to the Tribunal. There was no medical evidence provided for instance from the claimant's GP or any specialist to provide guidance or information in relation to the various health issues the claimant had, or the extent to which the claimant's performance at work was adversely impacted by any or all of the conditions or their specific symptoms. While the claimant gave evidence about what in their view was the cause of errors at work, there was no independent evidence in that regard. While the occupational health reports made reference to what the claimant had informed the doctor at the time, there was little in those reports by way of analysis of the separate conditions the claimant had either been diagnosed with or expected a diagnosis. Therefore, while it is not suggested that the claimant misrepresented the symptoms experienced, there was no evidence provided which supported the claimant's opinions, which appeared to have developed over time and with a deepening understanding of the health challenges being faced.

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Relevant law

66. In terms of section 20 EA, an employer will be under a duty to make reasonable adjustments in circumstances where a person with a disability is placed at a disadvantage in comparison with persons who are not disabled in relation to a provision, criterion or practice applied by an employer. The duty to make reasonable adjustments will not arise unless the employer knew or ought to have known that the person was disabled and that the person was likely to be substantially disadvantaged by the provision, criterion or practice.

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67. Factors to be considered in determining the extent to which an adjustment may be reasonable are set out in the EHRC Code of Practice on Employment at Chapter 6 of that Code.

68. Section 15 EA provides that discrimination will occur where a disabled person is treated unfavourably because of something arising in consequence of the person's disability and where the employer cannot show that the treatment is a proportionate means of achieving a legitimate aim. Discrimination will not arise where the employer shows that they did not and could not reasonably have known that the person was disabled.

10 Discussion and decision

Reasonable adjustments claim

Did the respondent have actual or constructive knowledge that the claimant was a disabled person at the material time?

69. As set out above, an employer will only be under a duty to make reasonable adjustments in circumstances where they knew or ought to have known that an employee was disabled for the purposes of section 6 EA.

70. In this case the material time is between June and November 2023.

71. The claimant relies on various correspondence between the claimant and the respondent in seeking to demonstrate that the respondent knew that the claimant was disabled. In submissions, reference is made to the emails from the claimant on 10 and 13 March, that the claimant was signed off with diabetes related fatigue from 28 March, that an occupational health referral was made on 21 March asking whether the claimant's concentration might be affected and that adjustments were required for the claimant on return to work. The claimant's submissions also highlighted the duty of enquiry on the part of the respondent.

72. The claimant went off sick following an occupational health assessment on 28 March. That report made reference to the claimant having been recently diagnosed with Type 2 diabetes and work related stress. The subsequent fit

note which was provided also made reference to Type 2 diabetes and work-related stress. The claimant was signed off as unfit for work until 24 April. However, having been informed by B that A had exhausted their entitlement to full sick pay, A sought to return to work early. A was only off work for 2 weeks. The claimant had sought redeployment but this was not offered. The claimant returned to work on the basis that was agreed with B. That return to work was on the basis of 0.7 full time equivalent and the claimant was not being required to work the full contractual shift pattern. The claimant gave no indication to the respondent of unfitness for the duties or hours agreed. While the claimant did make reference to fluctuating symptoms including extreme tiredness, there was no suggestion that the claimant was not fit to return to work after only 2 weeks of absence.

73. The occupational health report of 30 May made reference to the claimant's diabetes symptoms improving and that medication might be required in the future. It also noted that the claimant had informed occupational health that the claimant had not experienced any significant difficulties with the requirements of attention to detail and quick reactions necessary to perform their role. In addition the report indicated that the claimant was managing their duties and it was hoped that there should be little if any impact on the claimant's performance other than restrictions on shift working at that time.

74. There was therefore nothing at this point to suggest that the claimant was suffering from an impairment which was likely to have a substantial and long term impact on their ability to perform normal day to day activities.

75. While the claimant raised some concerns in emails of 2 and 5 June in relation to working conditions, there was nothing in those emails which would suggest that the claimant was a disabled person for the purposes of section 6 EA. The claimant also raised issues in an email of 20 June. Occupational health advice was sought and the respondent was informed on 4 July that "the shift restrictions had been helpful in managing the claimant's underlying diabetes and should remain in place for at least another two months until the next clinical review". The claimant had 1 day's sickness absence on 19 July having worked a BBC Scotland late shift the previous day. A further occupational

health assessment took place on 11 August. The report which was dated 14 August, but which B did not receive until 25 August 2023 made reference to three separate conditions which the claimant had either been diagnosed with or was expecting a diagnosis. This report indicated that the claimant remained fit for work, but that late shifts should be avoided. The report also made reference to an improvement in the claimant's diabetes control. In answer to the question as to whether mistakes made by the claimant might have been caused by a medical reason the report indicates that the claimant had suggested that the reason for the errors may have been a combination of factors including fatigue related to shifts, anxiety about self-management of diabetes, issues at work and neurodiversity.

76. The claimant had been off work sick from 15 August after being informed that a formal disciplinary investigation was being commenced in relation to the error made on 7 June.
77. The Tribunal formed the view that taking all of these circumstances into account and having regard to the authorities referred to by parties in their submissions, the respondent was not and could not have been reasonably aware that the claimant was disabled at this point by reason of exhaustion arising from Type 2 diabetes. The claimant had complex health issues. However, the disability relied upon in the present case only related to the impairment of exhaustion arising from Type 2 diabetes. The claimant was attending work, there was no indication from the claimant's GP or occupational health that the claimant's diabetes could not be brought under control and indeed the reports suggested that the symptoms were improving. The respondent was aware that the claimant was continuing to sing in a band and had performed at an event in Dunoon on the weekend before the error on 7 June. The fit notes which were provided in March and August stated the reasons for the claimant's absence as being work-related stress and type 2 diabetes. It was clear that the claimant was suffering from stress as a result of the perceived deterioration in the relationship with B and the prospect of further disciplinary action. In addition, the Tribunal accepted B's evidence that A appeared well while at work.

78. It was not until the report of 8 December that occupational health indicated that the claimant was covered by the EA by virtue of being a disabled person. However that report did not specify why the claimant was disabled other than by reference to “the medical condition(s)” as recorded above. There were
5 three conditions recorded and the claimant was noted as having expressed anxiety at the prospect of returning to work due to the perception that B might deal with issues harshly.

79. Therefore the respondent was not and could not reasonably have been aware that the claimant was a disabled person between June and November 2023
10 by reason of the impairment of exhaustion arising from type 2 diabetes. There was therefore no duty to make reasonable adjustments in that regard.

If so, was it a reasonable adjustment for the respondent to have permitted the claimant to work a stable shift pattern, and/or one which did not involve early or late shifts?

15 80. However the Tribunal went on to consider whether, if it was in error in relation to the issue of knowledge, the respondent had failed in a duty to make reasonable adjustments. It is recognised that it is not for an employee to specify what reasonable adjustments ought to be made. The duty is that of
20 the employer to make reasonable adjustments. However that necessarily involves a degree of discussion between the parties in order to fully understand what the disadvantage being experienced by the employee is and what steps might be taken to address that disadvantage.

81. There is no dispute that the claimant’s contract required them to work a shift pattern which involved early, day and late shifts. The pattern was over an 8
25 week period in order to reflect the number of staff on the rota. There were 8 full time staff on the rota. The rota had been agreed after a long process of consultation with both staff and unions. It had been a complex exercise.

82. The respondent did make significant adjustments to the rota to accommodate the claimant’s needs. From April to August 2023, the claimant worked a shift
30 pattern where the latest shift ended at midnight and that shift was only worked

on 7 occasions over that period. The claimant's hours were reduced by 30% but full pay was maintained.

83. The claimant suggested that what would have been a reasonable adjustment would have been for the claimant to be placed on a stable shift pattern involving 9-5pm working or something similar within a reasonable period from 6 June 2023 for a period of 2 to 3 weeks.
84. The Tribunal concluded that this was not a reasonable adjustment. There was no medical evidence that the claimant could not work evenings and the claimant did not suggest to the respondent that she couldn't work evenings at that stage. The claimant did not suggest that she would only be able to work the same shift every day. The medical information suggested that the claimant's diabetes symptoms were improving once there had been a diagnosis. The claimant's claim did not suggest that the reasonable adjustment now being proposed would involve a change to the claimant's contractual arrangements. What seems to be suggested is that the claimant should have only been required to work 30% contractual hours while being paid at 100%. While the Tribunal is not suggesting that this could never be a reasonable adjustment, in the present circumstances it was clear that the claimant was very concerned to maintain full pay. The claimant's sickness absence from August resulted in full pay being paid.
85. Moreover, it was not clear to the Tribunal that the provision of such a shift pattern for a 2-3 week period would be effective in preventing any substantial disadvantage. There was simply no evidence that this would be the case. In addition, under cross examination the claimant did not seem clear as to why a period of 2-3 weeks was being proposed and gave no evidence as to in what way this would have removed any substantial disadvantage. Rather the claimant stated when pressed on the issue "I didn't know myself what would work, I was relying on advice from OH." Occupational health did not at this stage make any suggestion similar to this proposal. The claimant's main concern appeared to be related to being able to have a proper break for food rather than the actual time of the shift being worked.

86. The respondent also advanced various reasons why such an adjustment would not be reasonable. For instance the BBC charter requires that the diversity of viewers is reflected in the voices heard on the channel. If the claimant only worked day time, then that would be the only voice heard over the period. The respondent would have to pay freelance staff to cover the hours which could not be covered by the claimant's colleagues. The claimant's colleagues shift patterns would have to be adjusted and they would have to work additional late shifts.
87. The Tribunal is also mindful that it should consider what was reasonable at the time and not what has happened subsequently. The claimant is now said to be working a pattern of shifts from 10am-6pm, which is a reduction of 70% in contractual hours. It is not known how long this pattern is to be maintained.
88. In addition if the adjustment ought to have been made from June 2023, notwithstanding the claimant's agreement to working the pattern which had been proposed at that time, then the claimant's claim is out of time. There was no evidence that the adjustment should have been made at any earlier stage. The claimant was only at work until 15 August and then went off sick following being advised that a disciplinary hearing was taking place. It was not suggested that a change in shift pattern at that stage would have resulted in the claimant returning to work.
89. However, even were the claimant's claim to have been lodged in time, the Tribunal is of the view that it is bound to fail. The Tribunal's conclusion is that in so far as the respondent was under a duty to make reasonable adjustments, it complied with that duty by agreeing with the claimant to an amended shift pattern. The respondent followed occupational health advice. In addition they did not simply blindly follow that advice and sought clarification and regular updates. This therefore seemed to the Tribunal to be more in line with the facts of *Donelien v Liberta* [2018] EWCA Civ 129 rather than *Gallop v Newport City Council* [2013] EWCA Civ 1583. The proposal that the claimant work a stable shift pattern within normal office hours for a period of 2 to 3 weeks while remaining on full pay was not, in the particular circumstances of this case, a reasonable adjustment.

Discrimination arising from a disability

90. The Tribunal then went on to consider the claimant's claim that the decision that she be required to attend a disciplinary hearing amounted to discrimination arising from a disability.

5 *Did the respondent know or should reasonably have known that the claimant was a disabled person at the material time?*

91. The claimant was informed on 15 August 2023 that B had decided to progress to a formal hearing regarding the error made by the claimant on 7 June. The claimant's position is that this decision was a discriminatory act. For the reasons stated in relation to the question of reasonable adjustments, the Tribunal concluded that the respondent did not know that the claimant was a disabled person at that point. It had still not received the subsequent occupational health report and as set out above even had that report being received by the time of the decision being taken, the respondent's knowledge about the claimant's condition was not such that it ought to have viewed exhaustion suffered by the claimant from diabetes type 2 as amounting to a disability.

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If so, did the respondent treat the claimant unfavourably because of something arising in consequence of the claimant's disability?

20 92. However in the event that the Tribunal is in error in relation to the question of knowledge, the Tribunal went on to consider whether the decision amounted to unfavourable treatment arising in consequence of the claimant's disability.

93. The claimant's argument appeared to be that the mistake made on 7 June was made because of exhaustion which was something arising from the claimant's disability. The Tribunal was not at all satisfied that the error made by the claimant on 7 June was caused in any material sense by exhaustion arising from the claimant's disability. There was no evidence to suggest that exhaustion was the reason for the error other than that this was the opinion subsequently formed by the claimant as the reason for the error. The claimant gave no indication of unfitness to work on that day. Occupational health

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advice did not suggest that the claimant was unfit to work. The claimant did not refer to exhaustion in the log completed in relation to the incident. The claimant had been performing at an event on the weekend before the error. The claimant had sent scripts for checking earlier that day that had been required and gave no indication of suffering from exhaustion. The error itself was that the claimant did not 'go into circuit', that is take control of what was being broadcast, until 45 seconds into a one minute news bulletin. The Tribunal accepted that it would have been appropriate to have gone into circuit at least 15 minutes prior to the broadcast. There was no suggestion that the claimant had fallen asleep due to exhaustion. The claimant had returned from a meal break at around 6.30pm. Even if the Tribunal were to accept the claimant's evidence that blood sugars can peak in the hour after eating and that this can cause tiredness, this does not explain why the claimant did not take control of the broadcast until 45 seconds after it had commenced. The claimant suggested that fatigue might have been exacerbated by having worked a Scotland late shift the previous day. However, B's evidence was that the claimant had sent a 'perky email' with the draft scripts, and there was no reason to believe that the claimant was too tired to carry out the necessary duties. Therefore the Tribunal did not accept that there was any evidence that the error had in any material respect, been caused by the claimant's disability.

If so, was this a proportionate means of achieving a legitimate aim?

94. The Tribunal noted that the claimant was not complaining that disciplinary action had been taken in relation to this matter, simply that the issue would proceed to a disciplinary hearing which would allow the respondent to consider all of the evidence and determine whether any formal action should be taken. There was no dispute that the error was a serious one. A news bulletin had not been broadcast by the national broadcasting company. The claimant had made a number of similar errors in the past. The respondent was entitled to explore in detail what the reasons for that error had been. The respondent was entitled to consider whether any action should be taken against the claimant as a result of the error. In the event, no disciplinary action was taken and it was subsequently accepted that the claimant's health in

5 general rather than any specific symptom arising from type 2 diabetes was a contributory factor. Therefore, even if it could be said that the error was caused by claimant's disability, the respondent had a legitimate aim in exploring the reasons for the error and pursued this legitimate aim in a proportionate manner. In so far as it could be said that the claimant had been subjected to discriminatory treatment, that treatment was justified.

95. The claimant's claims therefore fail in their entirety and are dismissed.

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Date sent to parties

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A Jones

Employment Judge

21 August 2024

Date

10 September 2024