



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr N Morgan

**Respondent:** Northumberland County Council

**Heard at:** Newcastle Employment Tribunal

**Before:** Employment Judge Jeram, Mr D Morgan, Ms A Tarn

**Representation:**

Claimant: In person

Respondent: Ms S Firth of Counsel

**JUDGMENT** having been sent to the parties on 2 July 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

1. By the claim presented on 22 July 2023, the claimant made a complaint of unfair dismissal and disability discrimination.
2. The case was managed by EJ Dempsey on 15 November 2023, when the complaint of unfair dismissal was dismissed, and the claimant was ordered to provide further information about his complaint. At a further case management hearing on 22 January 2024, the claimant's further information was discussed, at length. The complaint identified was a single complaint of direct disability discrimination. On 9 February 2024, the claimant made an application to amend his claim form. Regrettably, no steps were taken on that application. At the final hearing, and after a detailed discussion about the nature of his complaint and of the issues identified at the previous case management hearing, the claimant confirmed that, having taken legal advice, he did not wish to pursue his application to amend.

3. On that basis, the issues were reconfirmed, at the outset of the final hearing as follows:
  - a. The respondent agrees that it refused to allow the claimant to rescind his notice of termination. Did the respondent's treatment amount to a detriment?
  - b. Was that less favourable treatment?
  - c. The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.
  - d. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.
  - e. If so, was it because of disability?
4. We heard received written and oral evidence from the claimant and for the respondent from Julie Brentnall (Ward Team Supervisor), Chris Steele (Team Manager), Paul McLaughlin (Senior Projects and Development Manager) and Margaret Proud (Head of Service).
5. We had regard to an agreed file of documents consisting of 224 pages. We received oral closing submissions from both parties, as well as written submissions prepared by the respondent.
6. Neither party sought any reason adjustments to the hearing procedure.

### **Background Facts**

7. The claimant worked a variety of jobs, including as a door supervisor and a taxi driver, before commencing work with the respondent of 13 February 2023. He was employed as a mobile warden in the telecare team working 30 hours a week. The telecare team responds to emergency callouts at accommodation provided by the respondent to the elderly and to vulnerable service users.
8. The claimant's supervisor was Julie Brentnall ('JB') and he was managed by Chris Steel ('CS'). Mobile wardens were required to work a shift pattern comprising of four days on, followed by four days off work, on a cycle comprising two sets of day shifts, one afternoon shift and one night shift every 6 weeks. The claimant commenced his shift pattern on 12 April 2023.

9. The claimant received positive feedback in his 1:1 supervision sessions with JB on 14 March 2023, as well as later on 22 April 2023. She noted that he was well received by his team, polite and professional. The claimant regarded himself as a fast learner, a description that JB and CS agree with.
10. On 28 March 2023, the claimant was off sick for two days. He did not use the correct sickness reporting procedure as was informed that it was inappropriate email and unattended inbox.
11. On 13 April 2023, the claimant was late back from his day shift, having made a series of errors in his tasks. He was confused, attributing his own inability to trace serial numbers to the act of others, before JB identified that he had been fitting heat detectors, rather than smoke detectors. She declined his offer to rectify the mistake, and told him not to worry and that she would arrange for someone else to complete the task. She emailed him later that evening to acknowledge that he was eager to learn, and that it had taken a significant amount of time and resources to identify and rectify the problem. They spoke on a later date, about the contents of her email; JB informed her manager, CS that she considered the claimant's behaviour towards her during that discussion intimidating; the claimant in his evidence denied that he behaved this way.
12. The claimant informed JB at his supervision session on 22 April 2023, that the shift pattern that he had commenced on he was enjoying his new shift pattern and that the four days working followed by four days of rest was allowing for a work life balance. On 5 May 2023, the claimant emailed JB stating that he had not realised that he was required a two sets of day shifts in the 6 weekly cycle and that the 'extra set of days' were 'brutal'. He said he had had years of experience of shifts, and wanted away from it.
13. The claimant was due to commence his first set of night shifts on 14 May 2023. On 7 May, the claimant emailed JB and CS to say that he had approached a colleague who had agreed to swap with him to cover all his night shifts. He reiterated that his problem was working a cycle of day shifts, but dispensing with a day shift would compromise his ability to learn installation tasks. This arrangement was contrary to the respondent's policy of requiring its mobile wardens to work all shifts, to avoid the risk deskilling, save in the event of occasional events such as emergencies.
14. On 9 May 2023, JB met with the claimant to understand better his difficulties with working night shifts. He insisted the change from days shifts to night shifts were the problem and confirmed that he was content to work night shifts. He declined the suggestion that he be referred to Occupational Health, stating they were only there 'for chairs'. He told JB He said he wished to go home and reflect on matters with his partner.

15. After the meeting, JB updated CS about her discussions with the claimant, relaying her concerns about the claimant's conduct and attitude including that he had become, in her view, defensive and raised his voice at her, when in response to her reminder that he had 4 days off between shifts to acclimatise to the change, stating that he had had disrupted sleep in the past and said *'trust me you don't want me coming in her in 6 week's time screaming and shouting at you because I'm tired because of these shifts'*. CS shared JB's concerns.
16. On the evening of 9 May 2023, the claimant emailed JB and CS, as well as PML. He stated, that the inability to move shifts around had led him to his decision to hand in his resignation. He made it clear that he was interested in continuing in a role as bank staff. CS accepted the claimant's resignation in an email on 11 May 2023. The claimant replied on the same day, to confirm that he appreciated the respondent required their shift pattern, and that was the reason he had not accepted the offer to attend occupational health. He reiterated his offer to extend his notice period until 18 June, which he believed would assist him to transition to Bank Staff without stopping work; it assisted the respondent to cover absenteeism, also, so CS agreed to an extension of the notice period until 18 June 2024 and reminded the claimant that he could be referred to Occupational Health in the event he changed his mind.
17. On 11 May 2023, the claimant submitted his application to work as bank staff.
18. On 17 May 2023, being the last day of his night shift, the claimant again failed to follow the correct absence reporting procedure by emailing an unmanned inbox at short notice about an incident involving his partner scalding her hand, rather than telephoning the control room.
19. On 18 May 2023, the claimant attended a teams meeting with CS and a member of the HR team, EC. The purpose of the meeting was to explain to the claimant the implications of moving to a zero hours contract as bank staff. He was again informed of the ability to meet with Occupational Health, but he again declined.
20. On 22 May 2023, the claimant did not attend work. Numerous attempts to contact him had failed. CS was informed in an email from Team Manager CK that she had attended his home to carry out a welfare check, whereupon she was informed by his partner that he had been unwell during the night and that he was currently taking a shower. She stated that he contacted her an hour later, during which call he informed her of his extreme anxiety about working shifts, and his conviction that he was not being heard. He told her that he had been offered a referral to Occupational Health, which he had declined. CK informed CS that she had explained that any changes in shift patterns would be guided by advice from Occupational Health; he had

informed CK that his perception that the decision had already been made to refuse a change in shift pattern, and that that had not been corrected by the respondent. He informed her that he believed that he had not been aware of two day shifts in one 6 weekly cycle. He said a further anxiety was his belief that no vehicles were available for him to use as Bank Staff, that would accommodate his size. CK informed CS that the claimant did not feel he could work the balance of his notice.

21. On 23 May 2023 CS, CK and the head of service Margaret Proud ('MP') discussed the previous day's events. CK informed them that she was relieved that the discussion she had had with the claimant had taken place by telephone, because he had been screaming at her and that, notwithstanding her experience as a call handler, she had been quite taken aback by his aggression. MP noted that CK appeared quite shaken by incident and felt quite intimidated by him.
22. CS was informed by Occupational Health on 24 May 2023 that an appointment that CK had made to Occupational Health on behalf of the claimant, was not attended by the claimant, and this, notwithstanding his own intervention asking the claimant to be alert to receiving a call from them. The claimant on the same day contacted CS to take up the offer of a referral to Occupational Health. He said that he had not appreciated that that was a route by which his shift pattern could be handled, and that that was the reason for his change of heart; he stated that it was not a health problem that he had.
23. In the exchange that followed, the claimant confirmed that he would work until the agreed date of expiry of notice period, but would resume on 30 May after his four days off were scheduled, thereby requiring one overtime shift that he had agreed to work, to be filled at short notice. When the claimant stopped attending work, his colleagues began to report their concerns to JB, commenting that he was imperious in his attitude to his role, his ability, his training, and his superior knowledge to management. He was reported to be confident about the hours he would receive as a member of bank staff.
24. On 1 June 2023, the claimant called in sick, reporting symptoms of Covid. His fit note cited fatigue and respiratory symptoms that were being investigated.
25. On 6 June 2023, JB informed CS that she had been approached by a member of staff who had reported that the claimant had been difficult to work with, and that he was stubborn. They reported that offers of support were rejected by the claimant who responded with misplaced confidence about his own ability to carry out tasks.

26. On 7 June 2023, the claimant emailed CS to state that he had received an appointment with Occupational Health in July i.e. after the expiry of his notice, adding that his GP was testing him for covid and vitamin B12 deficiency. He stated that he did not wish to leave 'if there was a chance of it being sorted'.
27. CS liaised with Occupational Health, subsequent to which he emailed the claimant to inform him that, again, Occupational Health were reporting to him that he had not answered a call from them. He informed the claimant that Occupational Health were aware of the need to see him before 18 June, and that he should be alert to a further call from them and that if he were to miss a call he should return the call, with a view to rearranging. The claimant acknowledged that he would.
28. On 13 June 2023, the claimant emailed CS, CK and JB, stating that his GP had confirmed that he was suffering from low levels of vitamin B12, and that the symptoms of tiredness, fatigue, head fog and irrational decision making were attributable to that. He stated that he did not wish to leave work but asked that he was given longer to allow his tablets to take effect, together with an adjustment of his rota.
29. In CS's absence on leave, the email was forwarded to EC, the HR advisor, who advised that the claimant should be permitted to rescind his resignation as she believed that the respondent did not '*have the justification not to accept*'. Also in the absence of CS, his manager, Paul McLaughlin ('PM'), dealt with the claimant's email. He had been informed by CS of: the claimant's repeated failure to report his absence correctly, despite reminders and the unpleasant exchanges between the claimant and JB on 9 May. He had also been made aware by CK of the nature of exchange on 22 May. PM discussed with MP about the claimant's request to rescind his notice. His view was that the role of mobile warden required team work to deliver emergency care support to vulnerable people; that they were by their nature the 'salt of the earth' type of employees. MP decided that, notwithstanding HR advice, she would not allow the claimant to rescind his notice because of his behaviour towards his colleagues, principally towards CK, and because he had failed to follow sickness absence reporting procedures, despite reminders. It fell to PM to speak to the claimant about MP's decision.
30. PM called the claimant to inform him of the decision. The claimant asked him to provide reasons. PM informed him that the claimant had behaved unacceptably, reminding him that his conduct towards CK on 22 May, was contrary to the respondent's code of conduct. He stated that the claimant had failed to follow sickness reporting procedures, despite being repeatedly informed by CS of the correct procedure. PM sent to the claimant a brief email the same day, confirming the decision.

31. Immediately after the call from PM, the claimant emailed CK, ostensibly to apologise unreservedly about his own conduct on 22 May. In evidence, we remained unclear whether the claimant was accepting that his conduct on that day fell below acceptable standards, and whether his apology was genuine, however he did not seek to maintain his own assertion in his email that '*aggressive and impulsive behaviour*' was a symptom of vitamin B12 deficiency.
32. The claimant asked for the matter to be escalated, because he stated that the only reason that he had handed in his resignation was a failure on the part of management to provide him with a solution to his reported tiredness and fatigue. On 15 May 2023, MP emailed the claimant to inform him that she understood that the news would be disappointing for him but that he had made it clear that the shift pattern was unsuitable for him and that the service could not accommodate his requests. The claimant complained that he had not been given the opportunity to speak with Occupational Health; MP confirmed that there was no appeal route available to him.
33. The claimant's employment terminated on 18 June 2023, at a time when he was still in his probationary period.
34. MP concluded that her reasons for refusing to allow the claimant to rescind his notice were equally applicable to his suitability as a member of Bank Staff, and she refused to endorse his application. Unfortunately, a member of the temporary staffing team had misconstrued the purpose of the meeting that had taken place on 18 May, and erroneously communicated to the claimant that his application to join the bank staff had been approved. Previously, PM had made a decision refusing to allow a different employee to rescind her notice of resignation, after that employee learned that she had received a final warning for her conduct; that employee was not disabled.

### **The Law**

35. Section 13 of the Equality Act 2010 ('EqA') provides that: '*A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others*'.
36. Section 136 of the Equality Act 2010 identifies where the burden of proof lies. A prima facie case is established if, in accordance with section 136(2), there are facts from which the Tribunal could decide, in the absence of any other explanation, that the employer contravened the provision concerned. A difference in status and a difference in treatment is not, without more, sufficient material from which a tribunal 'could decide' that, on the balance of probabilities, the respondent had committed an unlawful act of

discrimination: *Madarassy v Nomura International plc* [2007] ICR 867. That is not a rule of law, however and the process of considering whether, or what, inference to draw and whether the burden shifts, is situation and fact specific; there does need, however, to be some fact or feature which the Tribunal identifies as potentially capable of supporting an inference of discrimination: *Jaleel v Southend University Hospital NHS Foundation Trust* [2023] EAT 10.

37. There will be no contravention, however, if the employer shows that it did not contravene the provision: section 136(3). This is the second stage and it is only reached if the claimant has successfully discharged the burden on him; it requires careful consideration for the employer's explanation for the treatment complained about: *Igen Ltd v Wong* [2005] ICR 9311 approved by the Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054.
38. It is not obligatory to apply the two-stage process, particularly where the Tribunal is in a position to make positive findings on the evidence one way or another; *Hewage*.
39. In the case of direct discrimination, it is necessary to consider the mental processes, conscious or unconscious operating on the mind of the alleged discriminator: *Amnesty International v Ahmed* [2009] ICR 1450 EAT. Motive is irrelevant. In order for the treatment to be 'because of' the protected characteristic, it is sufficient that it was an effective cause.
40. Sometimes the question of whether there has been less favourable treatment cannot be resolved without, at the same time, deciding the reason why the claimant received that treatment: *Shamoon v Chief Constable of the RUC* [2003] UKHL 11.

### **Discussion and Conclusions**

41. The respondent accepts that the claimant was a disabled person within the meaning of s.6 Equality Act 2010 by reason of his vitamin B12 deficiency and that, furthermore, it had acquired knowledge of that before MP made her decision to refuse to allow the claimant to rescind his resignation.
42. The question for the Tribunal is whether the respondent refused to allow the claimant to rescind his resignation because he was a disabled person. Although the claimant's impairment was communicated to the respondent before MP made her decision to refuse to allow him to rescind his resignation, that only indicates the possibility that the respondent behaved as it did because of his disability. What is required is sufficient facts that would allow a Tribunal to decide, in the absence of an explanation from the respondent, that it did contravene s.13 EqA 2010.



43. We heard much evidence that concerned the claimant about whether or not he had been adequately informed about the shift pattern before he commenced; or whether and if so, to what extent he had lost his temper when he spoke to JB or CK; or whether the respondent had adequately informed him of the function of Occupational Health, and what they could do (although the fact that the offer had been repeatedly made was not in issue). Those matters were ancillary to the central question i.e. what was in the mind of MP, that led her to refuse the claimant's request. We had no concerns about the reliability of the evidence of MP; we accepted her considered evidence that the feeling between herself and PM was that the claimant was not displaying the necessary work ethics of a mobile warden at such an early stage in his career, that his conduct towards CK, being a team leader, was unacceptable, and that he could not be relied upon to ensure that he did not jeopardise the ability of the respondent to provide a seamless service, by failing to report his absence as required. His lack of proper reporting meant that the respondent was delayed in identifying his absence, and therefore compromised in its ability to backfill his shift, at such notice.

44. We note that the claimant had not completed his probationary period and although he had started strongly, his popularity with his colleagues had waned in circumstances where he had not yet established his input and value to the respondent. Furthermore, MP had, in the past, taken a similar decision to refuse to rescind the notice submitted by a colleague who had presented conduct issues to the respondent. We considered that refusal in not dissimilar circumstances to be evidentially significant.

45. We considered whether MP's reference to the respondent's apparent inability to accommodate the claimant's request for an altered shift pattern in her email of 15 May betrayed disability as an unconscious factor in her decision making. We decided it did not, for the following reasons. First, no part of PM's evidence suggested that he and MP had considered his disabled status as part of their reflection and decision-making process. Second, PM had informed the claimant that his conduct towards CK had been unacceptable, as evidenced by the claimant's immediate sending to her an email seemingly apologising to her. Third, the claimant himself does not suggest that any part of his discussion with PM betrayed his disabled status as being part of the reason; nor does his email to PM. Finally, although the contents of the email written by MP dated 15 May are on the face of it, somewhat surprising, it was written in direct reply to the claimant's email suggesting that he had been a victim of a failing on the part of her management team.

46. The claimant has not adduced sufficient evidence to establish a prima facie case of direct disability discrimination. Insofar as it was necessary to

consider it, we are satisfied that the respondent's explanation is a complete and non-discriminatory explanation for its refusal to allow the claimant to rescind his notice.

47. Put another way, when the Tribunal asks itself why the respondent refused to allow the claimant to rescind his notice of termination, it arrives at the conclusion that the claimant's attitude and behaviour to his colleagues was unacceptable, as was his disregard for his own impact on the service when refusing to adhere to absence reporting processes. He was new to the service, and the positive impression he had made on the supervision team at the start of his employment was something that he had been unable to maintain.

48. The claimant's case is not well founded.

Employment Judge Jeram

Date 14 October 2024