EMPLOYMENT TRIBUNALS

Claimant: **R Harvey**

Respondent: **Fieldhouse Home Limited**

Heard at: Manchester **On:** 11-13 November 2024

Before: Employment Judge Batten
J Flynn
Dr B Tirohl

REPRESENTATION:
Claimant: Ms N Harvey, claimant's mother
Respondent: Mr B Khan, Director

JUDGMENT having been sent to the parties on 19 November 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. By a claim form dated 16 February 2023, the claimant presented claims of disability discrimination and unfair dismissal. On 8 March 2023, the respondent presented its response.

2. On 24 May 2023, there was a case management preliminary hearing before Employment Judge Bunting at which an agreed List of Issues was drawn up, addressing only the disability discrimination claim. This was because the claimant did not have the necessary 2 years' qualifying service to bring an unfair dismissal complaint. However, the matter of jurisdiction for an unfair dismissal complaint had never previously been formally addressed and no withdrawal or strike-out Judgment had been issued. At this final hearing, there was nothing that the claimant said which would suggest that any of the exceptions would apply and so the unfair dismissal complaint is dismissed for lack of jurisdiction. The hearing proceeded as a claim of disability discrimination only.

Evidence

3. The Tribunal was provided with a file of documents compiled by the respondent, being 94 pages long. A number of documents were added to the file at the start of the hearing, being mainly the claimant's documents. This meant that the file used at the hearing contained 122 pages of evidence in total.

4. The claimant gave evidence from a written witness statement. In addition, she called her mother who represented her today, Nicola Harvey, to give evidence in support.

5. The respondent tendered 3 written witness statements from: Mr Baba Khan, director; David Brannick, manager; and Joanna Ogden, Senior Care Assistant. Only Mr Khan gave oral evidence. The other 2 prospective witnesses were not called to give evidence and the Tribunal was told that Mr Brannick had left the respondent's employment. However, Ms Ogden, Senior Care Assistant, still works for the respondent.

6. All those witnesses who gave oral evidence were subject to cross examination. The Tribunal gave little weight to the written evidence of Mr Brannick and Ms Ogden, in the absence of an opportunity for the claimant to cross-examine them or for the Tribunal to ask questions about their evidence.

7. The claimant also gave the Tribunal a list of key events which amounted to a chronology of the shifts she worked and other events and meetings that took place during her employment. The respondent did not challenge the contents of this document.

Issues to be determined

8. At the case management preliminary hearing on 24 May 2023, it was confirmed that the issues to be determined by the Tribunal were as set out below. These were reviewed at the start of this final hearing.

9. Whilst the respondent had not initially conceded disability, it transpired that the respondent had in fact conceded disability on the afternoon of Saturday 9 November 2024, very shortly before this hearing started. The claimant had by then spent some time preparing her case to show disability, only to discover that she did not need to have done so. Section 1 of the list of issues was therefore removed.

~~**1. Disability**~~

~~**1.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:**~~

~~**1.1.1 Did she have a physical or mental impairment: epilepsy?**~~

~~**1.1.2 Did it have a substantial adverse effect on her ability to carry out day-to-day activities?**~~

~~**1.1.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?**~~

~~**1.1.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?**~~

~~**1.1.5 Were the effects of the impairment long-term? The Tribunal will decide:**~~

~~**1.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?**~~

~~**1.1.5.2 if not, were they likely to recur?**~~

2. Direct disability etc discrimination (Equality Act 2010 section 13)

2.1 Did the respondent do the following things:

2.1.1 Dismiss the claimant

2.1.2 David Brannick say to the claimant 'do you think that you are fit enough for the role' (a date in early November 2022)

2.2 Was that less favourable treatment?

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.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.

The claimant has not named anyone in particular who she says was treated better than she was.

2.3 If so, was it because of disability?

2.4 Did the respondent's treatment amount to a detriment?

3. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

3.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

3.2 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

3.2.1 A requirement to work irregular hours (with no fixed date or time of work)

3.2.2 A requirement to work alone from time to time

3.2.3 Treating all sickness absences alike

3.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that :

3.3.1 She was more likely to suffer an epileptic fit if she was working irregular hours

3.3.2 If she was working alone then the claimant would be at higher risk of harm if there was nobody to assist

3.3.3 It made no allowance for sickness due to her epilepsy?

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

3.5 What steps could have been taken to avoid the disadvantage? The claimant suggests:

3.5.1 Have fixed dates for shifts

3.5.2 Conduct a full risk assessment for her working conditions and patterns

3.5.3 Not count some or all sicknesses towards the annual allowance, or increase

3.6 Was it reasonable for the respondent to have to take those steps and when?

3.7 Did the respondent fail to take those steps?

4. Remedy for discrimination

4.1 What financial losses has the discrimination caused the claimant?

4.2 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

4.3 If not, for what period of loss should the claimant be compensated?

4.4 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

4.5 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

4.6 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

Findings of Fact

10. The Tribunal made its findings of fact on the basis of the evidence before it, taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. Where there has been a conflict of evidence, the Tribunal resolved this on the balance of probabilities, taking into account the credibility of witnesses and their conduct at the time.

11. It is to be noted that Mr Khan was the only witness called by the respondent to give oral evidence and he was a witness to very little of the important events in this case. Much of his evidence consisted of hearsay or his opinion on what the respondent would have done, when he did not know what had actually happened. Mr Khan admitted that he had never met the claimant nor had a meeting with her before this hearing The Tribunal considered that it was likely that Mr Khan had never spoken to the claimant before these proceedings began. The oral evidence from the respondent was therefore limited, and much of what the claimant said in evidence went entirely unchallenged.

12. The Tribunal's findings of fact relevant to the issues to be decided are as follows.

13. The claimant was employed by the respondent from 21 September 2022 as a Care Assistant until her dismissal on 25 November 2022. The claimant has the disability of epilepsy.

14. Prior to working for the respondent, the claimant had never had a seizure at work in any previous job.

15. During the recruitment process and prior to the offer of a job, the respondent's case was that the claimant did not tell the respondent of her epilepsy, and the respondent described this as "dishonest" (page 26 in the file of documents). There was a question on the job application form, which the respondent relied upon for its accusation of dishonesty. However, the question was not "Do you have a disability or medical condition?" which would in any event likely be unlawful. Rather, the question asked the applicant for information on "any medical or other condition which may influence the sort of work you are prepared to undertake and that we should be aware of". The claimant answered "no" to this question in her application form, which is dated 2 August 2022. The Tribunal considered that the claimant was not dishonest in her answer and that the respondent's retrospective attempts to blame the claimant for her dismissal were unacceptable.

16. Mr Brannick, who was the Registered Care Home Manager, offered the claimant the job of Care Assistant.

17. On 5 August 2022, the claimant told the respondent of her epilepsy. The respondent did not then withdraw the job offer nor seek to enquire about the claimant's epilepsy and so the claimant not only thanked the respondent for offering her a job but also for maintaining the offer despite her having told Mr

Brannick of her disability. The claimant made a comment to the effect that other employers may not have treated her so positively.

18. Knowing of the claimant's epilepsy, the respondent did not undertake a risk assessment and it is not clear what (if anything) the respondent did in response to that information at the time. Mr Khan was unable to assist the Tribunal on this aspect, beyond commenting that the respondent did not have any other disabled employees. In the interim, the claimant obtained her DBS certificate and undertook what was unpaid induction training and work shadowing which the Tribunal was told was a requirement for the CQC.

19. On or about 20 September 2022, the claimant was given a contract of employment (which appears at pages 16-21 in the hearing file). The contract is for 24 hours per week, working on a rota to be notified. The hours to be worked are stated to be between Monday and Sunday, so effectively the claimant could be required to work at any time within the week, there being no set pattern of hours or shifts. The rotas disclosed confirm this to be the case.

20. In her first week of work from 21 September 2022 onwards, the claimant was put on the rota to work on Wednesday to Sunday, 33 hours in total, despite that her contract was for 24 hours a week. There was a conversation about the claimant's epilepsy and, as a result, on 22 September 2022 (the second day of work) the claimant was asked to and did amend her application form to confirm that she had epilepsy and that she was on medication. In doing so, the claimant included a comment that she had never had a seizure in work.

21. In the second week of work, the claimant worked 12 hours and then she had time off for a pre-booked holiday, from 29 September to 3 October 2022.

22. On 5 October 2022, the claimant worked 6 hours in the afternoon, from 2.00pm to 8.00pm. Towards the end of her shift, the claimant was told that , on the following day, she should start work at 7.00am in the kitchen. There appeared to be no reason for this, and it was not what the claimant was employed to do nor trained for.

23. Nevertheless, on 8 October 2022, the claimant started work at 7.00am in the kitchen and she found it very stressful. The claimant’s unchallenged evidence was that she was repeatedly told to “hurry up” when she was making residents’ breakfasts and she was given tasks which were beyond her expertise and experience. By 9.00am, the claimant was so stressed that she had a seizure. The respondent’s Deputy Manager was shocked and so concerned that they sent the claimant home. The claimant made a speedy recovery and the following day, 7 October 2022, she returned to work.

24. On 9 October 2022, the claimant reported in sick, having been experiencing vomiting and diarrhoea in the night. It was the respondent’s policy that people with vomiting and diarrhoea could not come to work because of the potential for infection throughout the care home.

25. For the next 3 three weeks, the claimant worked her shifts as rota’d, and worked an average of 25 hours per week.

26. On 31 October 2022, the claimant experienced a seizure prior to her afternoon shift. The claimant's unchallenged evidence was that she was feeling stressed and apprehensive about going to work that afternoon. On arrival at work for the afternoon shift, the claimant told the respondent about her seizure that morning. The Tribunal considered this to be a reasonable and responsible thing to do.

27. The claimant was then called into a meeting with Mr Brannick and Ms Ogden, during which she was questioned about her disability. The notes of that meeting appear in the file of documents at pages 26-28. It was a confrontational meeting. The claimant was asked questions about her recent seizure including: what position was she in when she came round from the seizure? and how would the respondent know that she was telling them the truth? The claimant was told that the respondent's managers thought she could be lying about having a seizure and they suggested that the claimant was dishonest because she had failed to tell them about her disability on her application form in the first place. The claimant was in effect accused of falsely being off sick and making things up.

28. The claimant told the respondent's managers that she had found that the afternoon shifts, between 2.00pm and 8.00pm, aggravated her seizures. Mr Brannick told the claimant that there were "*now three things affecting your competency to undertake the care role*". It was not clear from the minutes what the 3 things were, but the Tribunal understood this to be a reference to be the 2 seizures and the claimant's absence for diarrhoea and vomiting. The claimant was then told that she was in a probationary period, and that she should think seriously if this was the job for her. The respondent requested a medical letter to confirm that the claimant in fact had epilepsy and, if so, to help the respondent assess the claimant's suitability for the role and the level of support that might be required.

29. The claimant quickly obtained a brief letter from Yvonne Russell, an epilepsy specialist nurse (which appears in the file of documents at page 44). This was given to the respondent the next day, on 1 November 2022. The letter confirms that the claimant suffers from epilepsy and says that the nurse was "*writing to support [the claimant] working alongside somebody*" and "*we write to support for assistance with her shift pattern*" (sic) which the Tribunal understood to be a request for reasonable adjustments. However, the Tribunal considered that that the content and meaning of the letter were vague; it did not assist the respondent to understand the precise nature of the claimant's disability nor the specifics of any reasonable adjustments that might be required. The information provided in the letter was not enough for the respondent to make an assessment or any decision. However, later on, the respondent sought to use the letter against the claimant when it suited it to do so.

30. Importantly, the respondent did not make its own independent enquiries nor seek clarification from Nurse Russell. The respondent did not undertake an Occupational Health assessment as might be expected, nor did it conduct a risk assessment in relation to the claimant's epilepsy, to explore what might be needed in terms of reasonable adjustments.

31. In the interim, the nurse asked the respondent whether somebody might be able to video the claimant if and when she next had a seizure at work. The Tribunal considered this to be a not unreasonable request in view of the fact that the claimant had not had a seizure at work in the past. It was asked so that the medical professionals involved in the claimant's care could review and try to understand what had happened, the nature of the seizure and possible causes. However, the respondent refused to contemplate the nurse's request, without considering whether it might be possible.

32. From 1-4 November 2022, the claimant worked her shifts each day. After then, she was on a period of pre-booked annual leave. On 16, 17 and 18 November 2022, the claimant worked her shifts as usual.

33. On 17 November 2022, the claimant was called to a meeting. The notes of that meeting appear on pages 33-36 of the file of documents. There were minutes of two meetings around this time in the file of documents – one said to have taken place on 16 November 2022 for which notes appear in the file of documents at pages 29-32, and the second on 17 November 2022. The Tribunal found that there was in fact only one meeting, and it took place on 17 November 2022. In reaching this conclusion, the Tribunal noted that much of the purported minutes of 16 November 2022 is exactly the same as the minutes of the meeting on 17 November 2022, and the claimant's chronology of key events records that one meeting took place, on 17 November 2022.

34. The claimant was called to the meeting on 17 November 2022 because the manager, Mr Brannick, was not happy with Nurse Russell's letter. By then, he had had the letter for 2 weeks. The respondent's record of the meeting is headed "Supplementary supportive meeting", but the Tribunal found the meeting to be far from supportive of the claimant. The minutes show the respondent's managers effectively blaming the claimant for the position she found herself in, and also blaming the claimant for the fact that her medication had been changed despite that this was on doctor's advice. At the meeting, the claimant asked to work in a 2-person team, alongside a colleague as Nurse Russell had suggested. This was dismissed out of hand by the respondent because it would have an impact on the management of the rotas. There was no regard for the respondent's obligation to the claimant to consider and make reasonable adjustments for her as a disabled person under the Equality Act 2010.

35. Mr Brannick made comments to the claimant about things which had clearly (in his view) started to affect the claimant's competency to undertake the care assistant role safely. He reminded the claimant that she was in a probationary period and told her that she should think seriously about whether this was the job for her. The respondent's record of the meeting shows that the claimant was asked whether she was confident that all her care practices will be safe, not just for her own health and safety but for that of residents and colleagues, especially given the vulnerability of elderly frail residents. The Tribunal considered that Mr Brannick's conduct, and suggestions were threatening and intimidatory of the claimant.

36. On 20 November 2022, the claimant called in sick because she was coughing and vomiting. She returned to work the following day, 21 November 2022.

37. On 22-24 November 2022, the claimant was recorded on the rota as having 'rest days'.

38. On 25 November 2022, the claimant had a major seizure at home. Sadly, in the course of her seizure, the claimant fell downstairs and was taken to hospital. The claimant's mother rang the respondent to say that the claimant was not well and in hopsital.

39. Later that day, whilst in hospital, the claimant received a letter by email from Mr Brannick, notifying her of the termination of her employment. It appears in the file of documents at pages 46-47. The claimant was given a week's notice, so the last day of her employment is recorded as 2 December 2022. The claimant was not required to work her notice period and it was unclear whether the claimant would be paid for that week in lieu.

40. The respondent's letter of termination sets out a number of clear unambiguous reasons for dismissal which the Tribunal found to be disability-related. The letter lays the blame for the termination of her employment squarely at the claimant's door, relying on the following matters cited in it: that the claimant had failed to declare her epilepsy on her job application form; that on 31 October 2022, she had asked the manager to work in a 2 person team, as a reasonable adjustment because she had had a seizure; that she had told the manager about a seizure she had had in work when the manager was off; the contents of the letter from the claimant's epilepsy nurse; that the claimant had breached the sickness reporting policy because her mother had rung to report that the claimant was sick when the claimant was contactable via mobile whilst in hospital; and that the respondent considered all suggested reasonable adjustments were not reasonable "*notwithstanding your sickness absences are high*".

41. The respondent's director was asked about the reasons for the claimant's dismissal. His evidence to the Tribunal was that the claimant had been dismissed only for 2 of her absences and that those 2 absences were not disability-related, and also because of concerns about the claimant's performance. However, the respondent's director was unable to point to any specifics of the claimant's performance which were of concern beyond what he described as "health and safety issues" arising from the claimant's epilepsy. There is no reference to any such matters in the respondent's letter of termination, which is all about epilepsy and disability, and there was no other evidence to substantiate any concerns about the claimant's performance. The Tribunal found that performance concerns had not been mentioned to the claimant at any time during her employment. In those circumstances, the Tribunal considered that the claimant was dismissed because of her disability and that the respondent's director was mistaken as to the reasoning of Mr Brannick, the manager who had dismissed the claimant.

42. The claimant tried to appeal her dismissal but her appeal was rejected by Mr Brannick. The respondent declared that its decision was final. The Tribunal considered that the respondent would not have done anything to entertain the claimant's request for an appeal except to reject it. The rejection email came from Mr Brannick who was not going to change his mind. In evidence, the respondent's director sought to suggest that in fact he had handled the appeal, but the contemporaneous documents completely contradicted that suggestion.

43. In the response form, the respondent contended that "*The claimant worked for us for a total period of two 2 months. During this period they have had a number of absences from work, not followed policies and procedures for notifying when not coming to work. Claimant performance* (sic) *and attitude at work was poor. She had been bought* (sic) *in by management on a number of times for not assisting and caring for residents appropriately*". The only evidence the Tribunal had to support any of this was in the unsigned witness statement of Ms Ogden who was not called to give evidence despite the fact that she continues to work for the respondent. There was no evidence that the claimant had ever been brought in by management for not assisting or caring for residents appropriately. The only time the claimant was brought in by management was to discuss her epilepsy.

44. The response goes on to say that *"When the claimant commenced work with us, in her application she advised that she had no medical conditions and later on when she was absent from work, she advised that she suffered from Epilepsy*". In addition, the response form says, "*Claimant was not truthful from the outset, and this has continued while she was at work for us for the very short period*". The Tribunal found these statements to be factually incorrect. The claimant was truthful; she answered the question as put in the application form honestly and for the respondent to suggest otherwise was an attempt to besmirch the claimant.

45. The claimant was dismissed with effect from 2 December 2022. This was immediately before Christmas, a time when the job mark is at its quietest. The claimant was shocked and distressed to be dismissed. The Tribunal accepted her unchallenged evidence, that she had struggled with the fact of her dismissal and struggled to get out of the house. Christmas was a miserable time for the claimant and there was little work to apply for until after the Christmas holidays. When the claimant applied for jobs she was, on at least 2 occasions, turned down because of her epilepsy, which she had declared in good faith. The claimant found that she was not eligible for unemployment benefits - because of the low number of hours she had worked for the respondent, she fell below the threshold for payment of National Insurance contributions.

46. Eventually, the claimant found work, by chance, at a local bakery, where she started working on 1 April 2023. She outlined the bakery's approach to her, in contrast to the attitude of the respondent – the bakery had conducted a risk assessment of her epilepsy and found there were certain tasks that she could not or should not do and other tasks where she could work alongside a colleague. Reasonable adjustments were made as a consequence. The

claimant said that her self-esteem and confidence had suffered because of the manner of the termination of her employment by the respondent and, as a result, she chose to work significantly less hours at the bakery than she had at the respondent whilst she recovered from events. Her claim for lost earning was therefore limited to the period she was out of work, up to 31 March 2023.

The applicable law

47. A concise statement of the applicable law is as follows.

Disability discrimination

48. The complaint of disability discrimination was brought under the Equality Act 2010 ("EqA"). Disability is a relevant protected characteristic as set out in section 6 and schedule 1 EqA.

49. Section 39(2) EqA prohibits discrimination by an employer against an employee by subjecting her to a detriment. By section 109(1) EqA an employer is liable for the actions of its employees in the course of employment.

50. The EqA provides for a shifting burden of proof. Section 136(2) and (3) so far as is material provides as follows:

(2) 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.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

51. Consequently, it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the EqA. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

52. In *Hewage v Grampian Health Board [2012] IRLR 870* the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in *Igen Limited v Wong [2005] ICR 931* and was supplemented in *Madarassy v Nomura International plc [2007] ICR 867*. Although the concept of the shifting burden of proof involves a two-stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

Direct discrimination

53. Section 13 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. The relevant protected characteristics include race.

54. Section 23 EqA provides that on a comparison for the purposes of establishing less favourable treatment between B and others in a direct discrimination claim, there must be no material difference between the circumstances of B and of the comparator(s).

55. The effect of section 23 EqA as a whole is to ensure that any comparison made must be between situations which are genuinely comparable. The case law, however, makes it clear that it is not necessary for a claimant to have an actual comparator to succeed. The comparison can be with a hypothetical person not of the claimant's race. In analysing whether an act or decision is tainted by discrimination, an Employment Tribunal may avoid disputes about the appropriate comparator by concentrating primarily on why the claimant was treated as she was, known as the "reason why" approach, in *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11*. Addressing the "reason why" involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator, and it may be possible for the Tribunal to make a finding as to the reason why a person acted as he or she did without the need to concern itself with constructing a hypothetical comparator. If the protected characteristic (in this case, race) had any material influence on the decision, the treatment is "because of" that characteristic.

56. Very little direct discrimination is overt or even deliberate. In *Anya v University of Oxford [2001] IRLR 377 CA* guidance was given that Tribunals shall look for indicators from a time before or after the particular act which may demonstrate that an ostensibly fair-minded decision was or was not tainted by bias, in *Anya* racial bias. Discriminatory factors will, in general, emerge not from the act in question but from the surrounding circumstances and the previous history.

Reasonable adjustments

57. The duty to make reasonable adjustments, in section 20 EqA, arises where:

(a) the employer applies a provision criterion or practice which places a disabled employee at a substantial disadvantage in comparison with persons who are not disabled; and

(b) the employer knows or could reasonably be expected to know of the disabled person's disability and that it has the effect in question.

58. As to whether a "provision, criterion or practice" ("PCP") can be identified, the Equality and Human Rights Commission Code of Practice in Employment ("the EHRC Code") paragraph 6.10 says the phrase is not defined by EqA but "*should be construed widely so as to include for example any formal or*

informal policy, rules, practices, arrangements or qualifications including one-off decisions and actions".

59. As to whether a disadvantage resulting from a provision, criterion or practice is substantial, section 212(1) EqA defines substantial as being "*more than minor or trivial*". In the case of Griffiths v DWP [2015] EWCA Civ 1265 it was held that if a PCP bites harder on the disabled employee than it does on the able-bodied employee, then the substantial disadvantage test is met for the purposes of a reasonable adjustments claim.

60. The duty is to take such steps as it is reasonable, in all the circumstances, to take to avoid the provision criterion or practice having that effect. The duty is considered in the EHRC Code. A list of factors which might be taken into account appears at paragraph 6.28, but (as paragraph 6.29 makes clear) ultimately the test of reasonableness of any step is an objective one depending on the circumstances of the case. An adjustment cannot be a reasonable adjustment unless it alleviates the substantial disadvantage resulting from the PCP – there must be the prospect of the adjustment making a difference.

61. Under section 136 EqA, it is for an employer to show that it was not reasonable for them to implement a potential reasonable adjustment.

Remedy for discrimination

62. The Equality Act 2010, section 124(2), provides that the Tribunal may make a declaration, award compensation and make appropriate recommendations.

63. There is no upper limit on a compensatory award for discrimination which should comprise of all harm caused directly by the act of discrimination, whether or not such loss was not reasonably foreseeable. The eggshell skull principle applies – the discriminator must take the victim as he/she finds them. The aim, per *Ministry of Defence v Cannock & others [1994] ICR* 918 is that "*as best as money can do it, the applicant must be put into the position she would have been in but for the unlawful conduct*". Losses include past and future loss of earnings, loss of opportunity and injury to feelings, the latter being to reflect the degree of hurt felt by the particular claimant as a result of the discrimination.

64. The size of an injury to feelings award is largely at the Tribunal's discretion. The case of *Vento v Chief Constable of West Yorkshire Police [2002] EWCA Civ 1871* provides a starting point, determining that there shall be 3 bands for potential awards. The bands are uprated each year following Presidential Guidance on the matter. This claim was presented after 6 April 2022. The applicable bands are therefore: a lower band of £990 to £9,900 for less serious cases; a middle band of £9,900 to £29,600 for cases that do not merit an award in the upper band; and an upper band of £29,600 to £49,300 for the most serious cases.

65. In determining the appropriate Vento band, guidance is contained in *Armitage, Marsden and HM Prison Service v Johnson [1997] IRLR 162 EAT*, that an award for injury to feelings must be just to both parties, must compensate the claimant fully without penalty or punishment of the respondent and must not be so low as to diminish respect for the equality legislation nor so excessive as to be seen as awarding untaxed riches.

66. The case of *Marshall v Southampton Area Health Authority (No. 2) [1993] IRLR 445* held that interest shall be awarded in all cases. The rules are contained in The Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 SI no. 2803, whereby interest on financial loss runs from a date midway between the act of discrimination and the Tribunal's calculation date, whilst interest on awards for injury to feelings runs from the date of the discrimination. The rate of interest is the current Judgment rate, being 8% per annum.

Conclusions (including where appropriate any additional findings of fact)

67. The Tribunal has applied its relevant findings of fact and the applicable law to determine the issues in the following way, having regard to the fact that disability has been conceded.

Direct disability discrimination

68. The Tribunal first considered the acts of discrimination contended for by the claimant. It is not disputed that the respondent dismissed the claimant. On the issue of whether Mr Brannick said to the claimant "*do you think you are fit enough for the role*" in early November 2022, this was a matter which the claimant had not dealt with in her witness statement nor referred to in evidence or submissions. Nevertheless, the respondent brought no evidence to refute the assertion nor to explain what is meant by the notes, on page 28 of the file of documents, about asking the claimant to think about her "suitability for the job". In those circumstances, whilst the Tribunal suspected something adverse had been said, it was unable to find that Mr Brannick had used those specific words. The Tribunal therefore could not conclude that Mr Brannick had spoken as contended for, but has found that the claimant was dismissed.

69. Dismissal is a detriment. The Tribunal considered that the claimant had met the first limb of the burden of proof by showing facts from which the Tribunal could decide that the respondent had contravened EqA, taking account of her evidence about the circumstances leading to her dismissal.

70. The respondent's evidence and submissions were confused about its reasons for dismissal and the respondent brought little evidence to explain or clarify such. The author of the dismissal letter, Mr Brannick, did not give oral evidence. Mr Khan for the respondent sought to argue that the claimant had been dismissed for 2 absences which were not disability-related, despite that the termination letter said nothing about those 2 absences. The respondent also suggested that dismissal was justified because the claimant was in her probationary period and that she was also being dealt with under a sickness

absence policy which was not shown to the Tribunal. The Tribunal was told that action under the sickness policy was triggered upon 3 absences in a 12 months' period under the Bradford scheme and that the respondent could therefore justify dismissing the claimant for her sickness. However, there was no evidence that the respondent had in fact dismissed the claimant under any sickness policy nor for having reached the 3-absence trigger. Rather, taking Mr Khan's submissions at their highest, the Tribunal found that the respondent had dismissed the claimant after 2 absences in two months, at least one of which was for vomiting and diarrhoea and that the claimant had on that occasion been told to stay away from work because it was the respondent's policy that people with vomiting and diarrhoea could not come to work because of the potential for infection throughout the home.

71. The Tribunal took account of the fact that, in the response to the claim, the respondent relied upon the fact that the claimant's contract of employment stated that the first 6 months of employment would a probationary period and that "*This meant that if [the respondent was] not happy with her performance at work and felt she was not suitable for the role [the respondent was] able to terminate her contract*". However, there was no evidence produced by the respondent to support any performance concerns or unsuitability. In those circumstances, the Tribunal considered that the respondent thought it could just dispense with the claimant's services because of her disability and that, because she was in a probationary period, there would be no comeback, in effect denying the claimant's right not to suffer unlawful discrimination.

72. In any event, the Tribunal considered that a non-disabled employee would not have been sacked for 2 absences in 2 months and there was certainly no evidence of such happening to any other employee in a probationary period. This also conflicted with the respondent's evidence that the home was short-staffed, that recruitment was difficult, and that the respondent needed to retain staff. In light of the respondent's evidence on recruitment/retention, the Tribunal considered that the respondent would not have sacked any employee for what were 2 short absences. This brings into focus the added factor of the claimant's disability which, on any reading of the dismissal letter, was evidently an important consideration for the respondent when it dismissed the claimant.

73. In all the circumstances, and given the contents of the dismissal letter, the Tribunal concluded that the claimant was dismissed because of her disability and that she was treated less favourably than a non-disabled employee in similar circumstances would have been treated. In reaching this conclusion, the Tribunal took account of the contents of the dismissal letter which are clear and unambiguous. The respondent's manager had in mind 4 absences which included 2 disability-related absences; hence the claimant was over the trigger and dismissed, notwithstanding the fact that the claimant's disability features heavily in the dismissal letter in any event.

Reasonable Adjustments

74. On the issue of whether the respondent knew, or could reasonably be expected to know, the claimant had the disability, the Tribunal has found that

the claimant told the respondent of her epilepsy, on or about 2 August 2022 and certainly from 5 August 2022, the respondent knew about it.

75. The claimant contends for a PCP of a requirement to work irregular hours and the tribunal found that to be the case, having regard to the respondent's work rotas. Every employee on those rotas was working different hours on different days, week to week, and it is difficult to discern any set pattern of working except for the managers. The vague provisions as to working hours and days/time of day in the claimant's contract support such – see the Tribunal's findings of fact at paragraph 19 above.

76. The claimant's unchallenged evidence was that there was a PCP to the effect that she was required to work along from time to time. Mr Khan agreed that this was the case, citing financial/staffing costs as the reason for such.

77. The Tribunal also found that the respondent's practice was to treat all sickness absences alike. There was no written policy shown to the Tribunal and the respondent's treatment of the claimant's absences leading to her dismissal support the claimant's argument that all sickness absences were treated alike. The dismissal letter refers to all the claimant's absences, making no distinction between those which were disability related and those which were not. The Tribunal considered that the respondent had changed its stance once these proceedings were issued – whether that was on advice or because of advice is not known.

78. Having found the respondent to have all 3 PCPs, the Tribunal considered whether the PCPs put the claimant at a substantial disadvantage. The claimant tendered medical evidence that she was more likely to suffer an epileptic fit if she was working irregular hours. This evidence also stated that if the claimant was working alone, she would be at higher risk of "harm" if there was nobody around to assist her. However, the "harm" is not identified and there was no evidence that having somebody to assist the claimant might have alleviated any particular disadvantage – the Tribunal was mindful of the fact that lone-working could be said to pose potential risks for any employee. In those circumstances, the Tribunal could not conclude that PCP 3.2.2 put the claimant at a disadvantage in the way it is framed. The evidence did suggest that the claimant's disability was likely to cause her to be absent (by reason of her disability) and so to a greater degree than an employee who did not have the claimant's disability. In those circumstances, by making no allowance for disability-related sickness, the respondent put the claimant at a substantial disadvantage. Ultimately, that disadvantage led to the claimant's dismissal.

79. The Tribunal considered that the respondent knew that counting all sickness absences equally put the claimant at a disadvantage. Indeed, the respondent sought to justify its dismissal of the claimant by including all her absences and using them against her. The respondent had a note from the claimant's nurse which put the respondent on notice to make further enquiries about the claimant's disability and absences, but it simply chose not to make any allowance for the claimant's disability.

80. The claimant contended for 3 ways that the respondent could have taken steps to avoid the disadvantages. The Tribunal considered the respondent's working arrangements and rotas and concluded that it would be possible to allocate fixed dates for shifts. There was nothing in the evidence to suggest the respondent could not do this or that it would be unreasonable to do so. The Tribunal accepted that this might involve some work to arrange, perhaps moving the rotas around, but the Tribunal did not find that it was impossible for the respondent to do so. Therefore, fixed dates for shifts was a reasonable adjustment, noting from the Tribunal's industrial experience that such is an accepted reasonable adjustment for a number of disabled employees in various jobs.

81. The Tribunal agreed with the claimant that the respondent should have conducted a full risk assessment of the claimant's working conditions and patterns. However, the Tribunal did not find this to be a reasonable a reasonable adjustment because it is not something which will directly alleviate the disadvantages of the job. It might well enhance the respondent's understanding of the claimant's disability and thereby determine what reasonable adjustments could be made, but the Tribunal did not agree that a risk assessment was, of itself, a reasonable adjustment.

82. In the circumstances of this case, it is apparent that discounting some or all sickness when computing an annual allowance of sickness before a trigger would have been a reasonable adjustment for the claimant. If the respondent had taken account only of the 2 absences which were not disability-related, the claimant would not have reached the trigger for action under the respondent's sickness policy. Having said this, the Tribunal noted the respondent's apparent confusion in submissions about the operation of its sickness policy. In any event, the Tribunal found no evidence that any, or any formal capability proceedings were undertaken and, when this was pointed out, the respondent's submissions changed to be that, because the claimant was in a probationary period, capability proceedings were not necessary.

83. In light of all the above, the Tribunal concluded that it was reasonable for the respondent to have taken the steps identified by the claimant, points 3.5.1 and 3.5.3 in the list of issues, as reasonable adjustments to its PCPs but the respondent failed to do so.

84. The claim of disability discrimination is therefore well-founded and succeeds in terms of direct discrimination and also a failure to make reasonable adjustments.

Remedy

85. Having given judgment on liability, the Tribunal heard further evidence under oath from the claimant, who was cross-examined on remedy by the respondent's director. Thereafter, both parties made submissions on remedy, taking account also of the claimant's schedule of loss and supporting documents.

86. The claimant worked for the respondent for 24 hours per week, at a rate of £9.90 per hour, producing weekly earnings of £237.60. This figure was agreed with the parties. The claimant was out of work for 17 weeks and 18 hours, producing a figure for compensation for past financial losses of £4,217.40 for the period to 31 March 2023.

87. Interest on compensation for past financial losses is calculated in accordance with the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 at the rate of 8% per annum from the mid-point of the date of the act of discrimination complained of, 25 November 2022, and the calculation date, 13 November 2024 so that the midpoint is 18 November 2023 (51 weeks) and interest on financial losses is therefore £330.90.

88. The Tribunal decided to award compensation for injury to feelings in the mid-band of Vento, and settled on the sum of £19,750.00 as an appropriate award for injury to feelings in the circumstances of this case, having regard to the hurt caused to the claimant. In arriving at this figure, the Tribunal took account of the evidence of the traumatic effect on the claimant of her dismissal, by email when she was in hospital, the fact that the claimant was ill thereafter and felt unable to go out of the house for a period of time, and that her Christmas was miserable – she had little money and no job, and her self-esteem and confidence plummeted.

89. Interest on compensation for injury to feelings is calculated in accordance with the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 at the rate of 8% per annum from the date of the act of discrimination, 25 November 2022, to 13 November 2024 (a period of 102 weeks) giving a figure for interest of £3,099.23.

90. The judgment of the Tribunal on remedy is therefore that the respondent shall pay to the claimant compensation in the total net sum of **£27,397.53.**

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Employment Judge Batten
Date: 24 January 2025

REASONS SENT TO THE PARTIES ON:
4 February 2025

FOR THE TRIBUNAL OFFICE

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