EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss K Broadhead	v	Schaeffler (UK) Ltd

Heard at: Sheffield **On**: 3, 4, 5 and 6 December 2024

Before: Employment Judge James
Ms P Pepper
Mr P C Langman

Representation

For the Claimant: In person, assisted by her son Mr D Broadhead

For the Respondent: Mr P Morgan, counsel

REASONS

The issues

1. The agreed issues which the tribunal had to determine are set out in Annex A. They are dealt with in turn in the conclusions section.

2. Judgment was sent to the parties on 5 February 2025. This document has been prepared following a request for written reasons from the claimant.

The proceedings

3. Acas Early Conciliation took place between 16 and 20 February 2024. The claim form was issued on 20 February 2024. The claimant makes claims for disability discrimination.

4. A preliminary hearing for case management purposes took place on 10 July 2024. The claimant's amendment application was considered and accepted, the issues were identified, this final hearing was listed, and related case management orders were made.

The hearing

5. The hearing took place over four days. Evidence and submissions on liability were dealt with on the first three days. It was arranged that on the fourth day, the tribunal would give its decision and reasons and, if the claimant was successful, arrange a separate remedy hearing.

6. The Tribunal heard evidence from the claimant; and for the respondent, from Andrew Philby, Team Leader; Dale Calderbank, Value Team Leader; Aaron Swiffen, Team Leader; Kevin Robson, Segment Lead for Assembly and Operations; Philip Wilkinson, Team Leader (KS (Car disc)); Ameila Wynn, HR advisor; and Daniel Thorpe, Value Stream Leader. There was an agreed hearing bundle of 276 pages.

7. During the hearing, the respondent submitted one further document and the claimant did not oppose the inclusion of that. Similarly, the claimant submitted further documents, the inclusion of which was not opposed. The claimant also submitted a further witness statement from a Michelle Young. The respondent objected to the inclusion of that witness evidence.

<u>Further witness evidence</u>

8. The tribunal decided to exclude the further witness evidence. The witness statement was not provided to the respondent until the first day of this hearing. We consider that it is of limited relevance to the actual issues before the tribunal. The case management orders made clear as to when witness statements should be exchanged. The claimant was legally represented until recently. Where were to allow this witness evidence, the respondent may need to call further evidence, which again could adversely affect the timetable and the ability of the Tribunal to conclude the case within the time available. In any event, the statement is only of limited relevance; further, Ms young was not able to attend the hearing and the evidence would only therefore have had limited weight.

<u>Amendment application</u>

9. The claimant applied to amend her claim to include allegations that, despite the advice of OH in November 2022 and January 2023, on 18 March 2023 [actually 6 January 2023] and 8 and 9 April 2024, the Claimant worked on the 0539 machine for more than 4 hours. The reasonable adjustment put forward by the claimant in relation to that situation was limiting the claimant's work on machine 0539 to no more than 4 hours. The same PCP as set out at 3.1.2 of the list of issues in Annex A potentially covered this step.

10. In relation to the nature of the amendment, the tribunal concluded that this was a substantial amendment. A further reasonable adjustments claim is being advanced, although the PCP and substantial disadvantage would be the same. In fairness to the respondent, a further witness would be required, to deal with this issue.

11. In relation to time limits, the claimant argues that this is a continuing act. However, reasonable adjustments claims are considered to be omissions, and the concept of a continuing act does not apply. Allowing the claimant potentially allow claimant was potentially out of time to proceed, when further evidence would need to be provided by the respondent, which may have meant that he was not possible to deal with the claims within the time available.

12. As to the timing and manner of the application, the application was made on 6 September 2024. What the claimant told the tribunal today, she did tell her solicitors about it before the last preliminary hearing in July. Nevertheless, it was not race on her behalf.

13. Bearing in mind the above, we consider that the balance of prejudice in relation to this application to amend the claim is very much in favour of the respondent. Allowing the claim to proceed would mean allowing claims which are potentially out of time. It is a substantial amendment, another witness being required and dealing with the issues fairly in the time available, given the number of witnesses, was already going to be a significant challenge. Even if the claimant succeeded on the claim, it would not add significantly to the potential value of it. No financial loss arises, just a possible addition to the injury to feelings of reward. The claimant already has two claims under section 15, two reasonable adjustments claims, and four allegations of harassment before the Tribunal.

Findings of fact

14. The claimant's continuous employment date commenced on 7 February 2005. The claimant started work for the respondent's predecessor, LuK (UK) Ltd (which later merged with the current respondent company) on 1 May 2006. She is currently employed in the role of Manual Assembly Operative in Car Disc Assembly (KS).

The claimant's contract of employment

15. Clause 3 of the claimant's contract states:

    Your employment with the Company is in accordance with and subject to the terms set down in the offer letter, the Company's works rules, as outlined in the Employee Handbook, the Company Policy relating to Sick Pay, the Company's disciplinary rules and procedure, and the rules of the Company's pension scheme, and any other collective agreements reached from time to time between the Company and the A.E.E.U

16. Clause 5 states:

    The title of the job in which you are employed is Assembly Operative. This title does not limit your duties, and the Company may require you from time to time to do any work within your capacity.

17. Clause 8 states:

    Your hours of work will vary according to production demands. You will be required to work in different departments, depending on where the demand for labour occurs. Starting and finishing times will be at the discretion of the Company, within the parameters of the normal working day. A minimum working week of 20 hours is guaranteed …

    It is a condition of employment that all works employees will work on any shift or rota system, including days regular, as and when required by Management. Employees should therefore work reasonable overtime as is necessary to respond to breakdowns, repairs, replacements, alterations, trials, completion of work against delivery dates and Production Cover for Weekends.

18. Morning shift hours are defined as 0600 to 1345 hours; afternoon shift hours as 1345 to 2130 hours; day shift, 0800 to 1630 hours; and night shift, 2130 to 0600 hours.

The Schaeffler Group

19. The Sheffield factory at Wales Bar is part of a clutch business unit within the Schaeffler Group. It has sites around the world which compete for work with each other, as well as in competition with other manufacturers. A budget is set for the Sheffield site which Ellie Matthews, the Plant Manager, is responsible for. To achieve budget and be cost effective, the business must match resources to demand and use its resources efficiently to produce parts. This is measured as the number of parts produced per Operator (PPO). Mr Robson is responsible for setting the PPO target. In overall numbers, the Wales Bar site currently has 148.8 FTE permanent contract employees.

20. The PPO target for the KS Section is 241 parts per Operator. This is expected to improve by 6% per year as processes and parts become more stable. In recent years, the factory has been losing efficiency. In 2022, the PPO was 228; in 2023, it was 220; and in 2024, it has been 209.

The organisation of work

21. The respondent company produces clutches for motor vehicles. The claimant works at its factory in Wales Bar, near Sheffield. Nearly 150 FTE workers are currently employed at that site.

22. The factory is split into two Segments. The Car Segment produces clutches and discs for cars. The Heavy Segment produces heavy duty clutches and discs, for tractors and other vehicles. Both segments have a Value Stream Manager (PV) who report to Kevin Robson, Segment Lead for Assembly and Operations. Daniel Thorpe is the Car Segment PV; Dave Calderbank is the Tractor Segment PV. Mr Thorpe replaced Richard Bowgen, who left the respondent in September 2023.

The Car Segment

23. The Car Segment is the larger of the two Segments and is divided into two areas/lines - KS (Car Discs) and EK (Car Clutch). The claimant works in the KS area (Car Discs). As a skilled operative, the claimant can also work in the EK area and the Tractor Segment.

24. KS and EK have a Team Leader for each shift. They report to Daniel Thorpe. The Team Leaders on KS are Andy Philby and Phil Wilkinson. There are currently 41 employees in KS and 31 in EK. Subject to skills, operators in KS work in EK when required. This includes temporary employees, charge hands, tool setters and part-time staff.

25. EK (Car clutch) has 3 production lines. EK1 is run by five operators on two shifts; EK3 by the same number on two shifts; and EK4 by 6 operators on three shifts. The Tribunal accepts that to maximise efficiency, the respondent needs to be able to allocate, when required, equal numbers of operators on each shift to run the lines. However, the Tribunal also accepts the evidence of the claimant that while she was still at work, for most of the time she was operating machines covering holidays and sickness for other colleagues on the morning shift. That was not successfully challenged during the hearing.

26. KS has three main finishing lines, KS1, KS2 and KS4. KS4 was installed in October/November 2023. KS1 and KS2 produce final assemblies for ‘damped discs’; KS2 and KS4 produce a low-cost line of rigid discs for aftermarket. Damped discs are more labour-intensive and require 5 to 8 operatives on the

line. Rigid discs require less labour, about 2-3 operatives. KS4 requires a single operator and sub-assembly a minimum of 4-6 operators. About 15 operators are normally required per shift.

27. KS2 and KS4 are fed by standalone, single cell machines (sub-assembly): a retainer plate segment (riveting), two facing lines (0539 and the Seckinger) and pre-damper tables (3 machines operated by one person on each). KS1 was fed by a subassembly line 0501/0507 which produces retainer plates to segments and facing all in one line. The pre-dampers 0501 and 0507 were replaced by a T-band installed on KS2 in November 2022. Consequently, KS1 now requires an additional two operatives to staff the line, increasing the number to 6-8 per shift, and there are two fewer standalone machines.

28. KS and EK operate on shift work. Since October 2022, there have been two shifts. Morning shift is from 6.00 am to 1:45 pm; the afternoon shift from 1:45 to 9:30 pm. EK also has a skeleton night shift, between 9.30 pm and 6 am, to work on the bottleneck machines – machines which can delay production if a backlog of work builds up which then prevents work on the next stage of the line.

Shift Patterns

29. When putting together the shift patterns Team Leaders take into account the skills and training of the operators available, and holidays. The claimant is one of the most skilled operators; and therefore is very flexible when there is a need to move people around the different lines/machines. There are restrictions on how long she can operate 0539 - up to 4 hours a shift on alternate shifts; and KS2 spinning - only 90 minutes a shift.

30. The weekly shift plan is a live document which can change day-to-day. A short meeting is held at the commencement of every shift to confirm the work for that day.

31. More employees are currently assigned to the morning shift, due to there being four part-timers, and the claimant, who only work a morning shift. The four part-time workers (two full-time equivalent) on KS work the morning shift with one of the other part-time workers to ensure that each of the two full shifts is covered. They commenced employment on various dates between 1997 and 2002, prior to the claimant commencing employment. Two started working 20 hours a week on 11 August 2008; two on 1 October 2006. These two have children although the youngest child is 18 for one of them and 20 for the other. Ms Wynn did not disagree when this was put to her in cross examination. One has caring responsibilities for elderly relatives; one had an accident.

32. It is noted that the hours were reduced from 20 to 19.25 in line with a collective agreement in March 2024. That change does not impact on the issues before us.

33. The respondent’s case is that these are permanent contractual arrangements. However, the Tribunal has not been provided with sufficient evidence by the respondent, in order to prove, on the balance of probabilities that these arrangements are permanent contractual arrangements. We do not find the evidence of Ms Wynn or Mr Thorpe on these matters to be reliable. We mean no offence to those witnesses by saying that. However, assertions have been made that simply do not stand up to scrutiny.

34. Mr Thorpe asserts at paragraph 29 of his witness statement:

    the contractual position [is] the part-timers were entitled to work permanent morning shifts. This arrangement had been in place for many years.

    When challenged on this by the claimant, and asked about this by the Tribunal, Mr Thorpe accepted that he had simply made an assumption. He had not checked the position. Mr Thorpe started with the respondent in September 2023, well before these discussions with the part-time workers would have taken place.

35. At paragraph 7 of her witness statement, Ms Wynn states that the arrangements for the four part-time workers on KS who work in the morning shift 'are long-standing contractual arrangements'. In evidence before the Tribunal she told us that was her 'understanding'. When asked what the source of her understanding was, Ms Wynn stated that although the written contracts refer to the same flexibility as the claimant, there had been verbal agreements, that they could just work the morning shift. When asked if there is a record of these verbal agreements, she said she thought there were minutes on their HR files. Enquiries were made during the hearing and copies of the four contracts for the four part-time staff in question were provided to the Tribunal, but no written records of any verbal agreements were found. Further, although Ms Wynn stated that the contract for Ms Evason states that her working hours are 6.00 am to 10.00 am, her contract does not in fact say that.

36. As stated above, in making these observations we do not mean any offence to these witnesses. However, the Tribunal is not impressed that assertions have been made in witness statements, with a statement of truth, which witnesses have confirmed are true at the commencement of their evidence before the Tribunal, which have turned out, in the event, to be based on assumptions or 'understandings', and not backed up by any objective evidence. We are not, for the avoidance of doubt, suggesting that these witnesses have lied. Inevitably however, this does affect our assessment of the reliability of their evidence as a whole.

37. Although Mr Morgan asserted in submissions that these arrangements were contractual due to custom and practice, there is a long established principle that custom and practice is unlikely to contradict a clear contractual provision to the contrary, without clear evidence that the written contractual term has been varied. The written contracts clearly show that flexibility is still contractually required in relation to these part-time workers working hours.

    <u>Changes to production lines</u>

38. Most of the parts used by the respondent in Sheffield are manufactured in Schaeffler Group factories in Germany and Hungary. The Sheffield factory can only build products on the basis of the parts they have. The Tribunal takes judicial notice that in the car industry, providers of parts to the principal car manufacturers are expected to make products to order, with short lead-in times. The requirement for flexibility in production has only increased over recent years.

39. The changes in product profile and the installation of KS4 have had the Following consequences:

    - KS4 is a single cell machine and now produces most of the rigid discs.

• KS1 has always been a constant as it only does the build jobs.

• KS2 is rarely used for rigid discs (which requires fewer people). It is used for damped and build jobs which are labour intensive.

40. As a consequence, on the respondent's case, it is no longer possible to concentrate labour intensive damped discs production on a morning shift and less labour-intensive rigid discs on the afternoon shift, as had been the case in the past. The Tribunal accepts that in an ideal world, the respondent needs to be able to allocate equal numbers between the shifts, when required. The more people are restricted to working the morning shift only, the less efficient production may be. It is not that is no longer possible - but that it is less efficient than it was previously to do so. This situation is not new. The Tribunal notes that in response to the claimant's grievance in 2020, the point was made that the morning shift was overstaffed.

41. The respondent says that the distribution had in the past been 60% labour on the morning shifts and 40% on afternoon shifts. The requirement now is for an equal number of operatives on the morning and afternoon shifts. Due to falling demand, KS1 and KS2 are not always run on the same shift. Some weeks all the demand is in one or the other; other weeks, a mixture of the two lines are needed to meet demand. Week commencing 14 October 2024 for example, KS1 was run on one day only, KS2 for both shifts for the rest of the week.

42. Copies of shift patterns were provided during the hearing. Mr Thorpe represented the tribunal that these would show that for about 70% of the time, there was an even number of people working morning shift compared to the afternoon shift. The claimant represented to the tribunal that it was the other way around. Having analyses figures, the Tribunal notes that from 19 May 2024 to 22 December 2024, there were 20/32 weeks where there were five or more employees more on the morning shift, compared to the afternoon shift; 62.5%. In 24 of those weeks, there were four or more people working in the morning or 75%. These figures support the claimant's case not the respondents. Further, we again find that what the respondent has presented as fact, has turned out to be contradicted by the evidence.

43. The Tribunal does accepts that the factory is not able to guarantee that one shift will always require a lower headcount – as could be done in the past for example, when to production of more rigid discs was required, which needed fewer people to produce. That work could be put on an afternoon shift with a lower headcount. Now there is less rigid work for KS2, the company has to put damped build jobs on both shifts, which are more labour-intensive. In order to <u>maximise</u> efficiency, the Tribunal accepts that the respondent needs to have the option of equalising numbers between the morning and afternoon shifts, even if, in a significant number of weeks, overall staffing levels are still weighted towards the mornings. It appears to Tribunal however that the problem that this creates, as a result of changes to production, has been overstated by the respondent.

<u>The Tractor Segment</u>

44. The assembly lines in the Tractor Segment are DKS (Discs), DC (double clutch), and machining. This is heavy work and labour intensive. DKS is heavier work than in the Car segment, because the cutches are heavy duty

and much larger. DC has four production lines, DC1, DC2, DC3 and BSC (Big Single Clutch). Machining consists of stand-alone CNC machines, which are used to machine cast iron to fit inside a gearbox.

45. DKS and DC operators are currently working two shifts. On average it takes seven or eight operators to run DKS and eight operators for DC. On the respondent's case, it is necessary to have equal numbers of operators on both shifts in the Tractor Segment to make it work. Machining works the night shift because there are fewer operators. Skilled CNC operators are harder to recruit and command a premium.

Flexibility between Segments

46. From time to time, operators are asked to assist with the production of car clutches and vice versa. This can be in small numbers on a daily basis, but also for longer periods depending on where the work is required, as between Tractors and Cars.

47. Over the past 12 to 18 months, Car Segment has required a higher volume output because of the large backlog for Aftersales. During the same period, the Tractor Segment production volume was lower than expected so the company made the decision to temporarily move operators to where the business required them, in the Car Segment.

48. Ten or more Tractor operators worked for an extended period in Car. As Tractor volumes have increased, all the Tractor Segment operators assisting in Car Segment had returned to Tractor by 4 November 2024. According to Mr Calderbank, the reverse has never happened as demand has usually been higher in both car and tractor. The business is now short of work in KS and up to 4 employees are moved to EK where they are needed.

Fall in demand

49. The daily production of KS discs has fallen from 11,800 in 2021 to 9,000 in 2024. In EK clutch, production has reduced from 12,000 in 2021 to 8,000 in 2024. Agency workers have previously been used to fill any gaps or at times of high demand. All agency workers have now been removed from the factory because of falling demand. Any fixed term contracts will not be renewed at the end of the year. Target headcount required for the budget in 2025 is 145.1 FTE, a reduction of 3.7 FTE workers. However, the Tribunal notes that a proposal was made on 27 November 2024 to close the whole factory. The members of the Tribunal are sorry to note that is the case.

50. The backlog in car clutches was at target level w/c 4 November 2024; in other words, no extra production is required. Tractor backlog has also reduced to target levels. There is more capacity than there is demand. There is more limited scope to send the claimant or other operatives to support EK clutch or Tractor when they are short-staffed due to lower demand.

51. Team Leaders will always find work for excess operators on shift but if they are not producing at the time the parts are actually needed, they are not adding value and overall efficiency is reduced.

The claimant's disabilities

52. The claimant was wrongly diagnosed with Type II Diabetes in 2015. She was later diagnosed with latent autoimmune diabetes in adults (LADA) in 2019. The claimant was subsequently diagnosed with diabetic neuropathy and she has

been prescribed medication for that from 2020. The claimant was diagnosed with coeliac disease in February 2023. She has also been diagnosed with depression and anxiety.

53. The respondent accepts that the claimant was at all material times a disabled person by reason of LADA (diabetes), diabetic neuropathy, and depression with anxiety. Disability in relation to Coeliac disease is not admitted. Knowledge of the impairments is admitted as follows: diabetes in January 2020; peripheral neuropathy in February 2020; depression in May 2022; and Coeliac disease in December 2023. Knowledge of substantial disadvantage due to the application of the PCPs relied on by the claimant is however denied.

54. The effect of Coeliac disease on the claimant is that she is anaemic long term. It also means she has an intolerance to gluten, which means that her diabetic control can be affected, since a lot of gluten free foods are high in sugar.

55. The claimant says her ability to work to perform high repetitive tasks and to work afternoon shifts is affected by her disabilities, particularly the side effects of medication (Gabapentin) for diabetic neuropathy. This makes her drowsy, which is why she avoids taking it until after the morning shift. If she were to work the afternoon shift, she would not be able to take the medication because she would be too drowsy; but this would mean that her ability to manage her pain would be very much reduced for that period. We accept this.

<u>OH advice</u>

56. In January 2020, occupational health (OH) advice was that the claimant could not work a three shift system (which was still being worked at that time), consisting of mornings, afternoons and nights, due to her being insulin dependent. She was subsequently moved onto a two-shift pattern. The Tribunal notes that at this stage, the change to the shift pattern was also made in order to assist the claimant in relation to caring responsibilities for her son with a disability.

57. On 18 March 2020 a letter from Dr Selvarajah confirmed that '*a regular daytime shift will minimise her discomfort and enable her to rest in the evenings'.* What was meant by 'day time shift' was not defined, although the claimant raised a grievance, regarding her being requested to continue working on a two shift system. It appears that grievance was not dealt with, due to the pandemic. The claimant was furloughed between 6 April and 31 July, returning to work on 3 August on the morning shift.

58. Between August 2020 and October 2022 the claimant worked on a new shift pattern, due to changes in the department's production demands. KS section worked on a 2-shift split system at that time, working full shifts on mornings and nights, with a skeleton afternoon shift. The claimant remained on the early shift however, 6.00 am to 1:45 pm.

59. An OH report dated 5 April 2021 advised:

- *I would recommend that Miss Broadhead has a clean and private area to go to in order to be able to self-administer her insulin before meals as she tells me that she does it on the shop floor at the moment.*
- *I would also recommend that she makes the First Aiders aware of her condition of "Lada" diabetes in case she were to have a*

hypoglycaemic attack and the First Aiders were called upon to administer first aid.

- *I would also advise that if Miss Broadhead is required to use any vibration tools at work, that prior to being exposed she has a full HAVS Nurse assessment as carpal tunnel syndrome can be made worse by using vibration tools.*

The claimant was deemed fit to attend work and a follow up review was not thought to be necessary.

60. A further OH report obtained on 22 June 2021 recommended that the claimant should not be placed on the KS2 spinning machine for three weeks, and then only for up to 90 minutes per shift. This is a highly repetitive job with high impact, which would aggravate her neuropathic symptoms. That adjustment has been maintained since.

61. The claimant made a request in December 2021 to reduce her hours to 4 hours part-time on the morning shift. The intention was for her to pick up work as an Amazon delivery driver for the other 20 hours to make up her wage. Richard Bedford considered the request. The claimant was told the respondent was unable to accommodate the request at that time. Page 111

62. A report obtained in April 2022 confirmed that the claimant was not fit to work nights. The background section at page 214 does not address whether the claimant had to be restricted to the morning shift only, or whether she could work the afternoon shift. At that stage, in any event, the claimant was still only required by the respondent to work the morning shift.

63. A further OH report was provided to the respondent on 9 May 2022 [pages 114-118 and 119-122]. The report recommended:

    • *First aiders should be made aware of the claimant's diabetes.*

    • *A workstation assessment to identify problem areas and advise on any adjustments.*

    • *Counselling/cognitive behavioural therapy*

    • *Regular welfare meetings to discuss problems and offer support.*

    • *A review after 4-6 weeks.*

64. In relation to counselling, the report noted:

    As you may be aware, there may be long waiting lists in accessing counselling via the NHS; Collingwood Health would be able to source counselling/CBT more expediently than the NHS if you as a company would be prepared to support this, if you would like Collingwood Health to arrange this then please contact our Case Management Team.

65. At a follow-up consultation on 4 July 2022, it was reported that counselling and CBT had not been organised. The claimant's mental health difficulties were not work-related at this stage. To the contrary, the claimant's attendance at work helped her overall mental health and well-being. The report continued:

    Also, as you known, Miss Broadhead has problems with ongoing depression and in my last report I recommended that she have some counselling and cognitive behavioural therapy, but she advised me that so far this has not been organised for her.

The claimant was by this stage being prescribed anti-depressant medication, but counselling had not been provided by the NHS.

66. The report further stated:

I would advise a workplace risk assessment to identify any problem areas and advise on any adjustments necessary regarding the diabetes and musculoskeletal issues.

67. The claimant was at this stage awaiting tests regarding anaemia. There appears to have been no mention of any welfare meetings at that meeting. On the respondent's case which has not been challenged, there has been no mention of welfare meetings in any subsequent medical report, grievances or meetings with the claimant. In any event, as we will see, Health and Wellbeing Meetings continued to be arranged on a regular basis.

68. A further OH report was obtained on 22 November 2022 [page 122-3]. The report, written by Ms Sweeney, noted:

She has been diagnosed with diabetic neuropathy and also to be assessed by the MSK NHS services.

Due to her ongoing symptoms including leg heaviness, fatigue, tingling the base of the neck and intermittent neck and shoulder pain manging [sic] the level of physical duties is essential.

Can work on covering others work as she has a break as may only be on one job for 2 days and then work on another area. Week to week and a day to day and in shift variety assists to manage her conditions rather than doing the same job week after week.

69. Ms Sweeney confirmed that a workstation risk assessment was not required as the claimant was rotating daily and weekly; and in a report dated 6 December 2022, that the claimant was receiving physiotherapy for weakness of both upper and lower limbs. The report also stated that the claimant could operate machine 0539 4 hours a day, but that doing so on consecutive days would exacerbate her neuropathic symptoms. She could operate the machine every day for half shifts.

70. Around this time an issue arose with regard to the claimant working on machine 0539. On the claimant's case, Mr Wilkinson asked her to work on it for 8 hours, when the report had said she should work no more than 4 hours. Mr Wilkinson disputes that; it is not necessary for the purposes of the issues before us to make a determination on that factual dispute. In any event a further OH report was obtained on 15 December 2022. The referral to OH states:

Miss Broadhead has Lada Diabetes and has previously been assessed by OH who advised that she was unable to work nights or afternoon shifts. In addition to this, Miss Broadhead has now said that she is unable to work on a particular machine namely 0539. This poses a huge problem for the lines as an adjustment was previously made to amend Miss Broadhead's shift patterns, the Company cannot make further adjustments at this time.

We therefore require OH to assess Miss Broadhead's fitness for work and fitness to work the three shift rotation. There are no guarantees that the adjustment to only work mornings can continue due to the vast changes to

the sections shifts; this further problem is leaving the Company with no option but to review Miss Broadhead through the capability policy.

71. The 15 December 2022 report advised that the claimant was undergoing physiotherapy privately, at work and at hospital. David Woodley, the author of the report, confirmed that the claimant could operate machine 0539 for the whole shift but preferably should do so on an as needed basis. He also advised that she should not work a three shift system, particularly night shift and recommended that she 'work day shift only'.

    It is my clinical opinion that Miss Broadhead is fit to continue in her current role but would advise that she works on day shift only.

    She can work any machine on the line but should only work the 0539 on a short-term basis.

72. It was noted that Mr Woodley's report contradicted Ms Sweeney's suggestion that the claimant could only work half shifts on alternative days on machine 0539 and Ms Sweeney pointed this out in an email to Ms Wynn on 10 January 2023.

<u>January 2023 grievance</u>

73. The claimant raised a grievance on 25 January 2023 against Richard Bowgen and Phil Wilkinson. Mr Calderbank upheld the grievance in part, concluding that communication between the claimant and Phil Wilkinson had deteriorated. He felt that both needed to be calmer and more professional. He recommended that Mr Wilkinson be given training on communication skills and that difficult issues should be discussed away from the section and after a gap of at least half an hour.

74. Mr Bowgen left the respondent's business on 18 August 2023.

75. The claimant was dissatisfied with the grievance outcome provided on 2 May 2023. She submitted a grievance appeal on 11 May 2023. Mr Robson heard the grievance appeal on 4 July 2023 (the claimant having been absent on sick leave between 2 May and 4 July 2023 with stress). The claimant attended the hearing with a regional official from Unite, Richard Bedford. The outcome was provided by letter on 14 August 2023; and then in a meeting on 28 September 2023. Garyth Callaghan accompanied the claimant at that meeting.

76. One of the issues raised on the appeal was upheld, regarding the claimant being sent to see OH to see if she could work three shifts. The assessment for the claimant's suitability to work a 2-shift system was said to be outstanding. None of her other appeal points were upheld.

<u>Suggestion of flexible working application</u>

77. On 28 November 2023 the claimant attended an informal meeting with Mr Thorpe to discuss the potential for her to work the two shift pattern. During the meeting, the claimant was told she could put in a flexible working request if she wanted to continue working morning-shift only on a permanent basis. The claimant argued that was unnecessary as she had already been working morning shift as a reasonable adjustment for her disabilities; and Occupational Health had already recommended she work the morning shift only. The

claimant was informed that another OH referral would be made. The reason for the referral was because:

> *The company would like Miss Broadhead to move onto 2 shifts working mornings and afternoons and would like to understand how we may be able to implement this.*

December 2023 OH report

78. The OH report dated 4 December 2023 stated that the claimant's conditions were likely to be classed as disabilities under the Equality Act, including diabetes and the mental health conditions. The report was provided to the respondent on 22 December 2023. It confirmed:

> *It is my clinical opinion that she is not suitable to work a multi shift system. The main reason for this is her diabetes, but also the diabetic neuropathy. The diabetes from the point of view, that she needs to eat regular meals to help maintain her diabetic control. The treatment for her diabetic neuropathy has side effects as previously mentioned.*
>
> *Were she to work a multi shift system, then she is likely to lose control of her diabetes to some extent and also, she is likely to be in pain, due to the irregular gabapentin treatment, owing to side effects.*
>
> *She would not be able to take the medication until after the afternoon shift, were she to work two shifts. As when she started the afternoon shift, she would still be having side effects from the morning dose. This is why she takes the medication once she gets home, after the morning shift and at night.*

79. The report confirmed that the claimant should work morning shifts only and recommended a risk assessment be conducted and that counselling be provided. The claimant was at that stage still on the waiting list for counselling. By the time of the next Health and Wellbeing Meeting (on 13 February 2024 - see below), the claimant was receiving NHS counselling.

January 2024 grievance

80. On 25 January 2024, the claimant raised another grievance concerning delays in implementing the OH recommendations and the request that she submit a flexible working request.

81. The grievance hearing took place on 7 February 2024. Mr Swiffen chaired the hearing. The claimant again attended with her trade union representative, Garyth Callaghan. During the meeting, the claimant requested that the arrangements that were already in place were formalised. She explained that the length of time it was taking to agree the changes requested was adversely affecting her mental health.

82. The grievance outcome letter dated 8 February 2024 partially upheld the grievance regarding the delays and not arranging a meeting following receipt of the OH report in December 2023. It did not uphold any of the other concerns. Mr Swiffen says that the grievance was nothing to do with alleged harassment by Daniel Thorpe. There was no mention of the claimant being asked to make a flexible working request.

83. A Health and Wellbeing Meeting took place on 13 February 2024 to discuss the OH report. Again, the claimant's trade union representative was present,

as were Daniel Thorpe and Ms Wynn. The claimant was told that it could not be guaranteed that she could just work the morning shift and the respondent would therefore look at different options available. The claimant was told that a risk assessment would be arranged. The possibility of part-time work was canvassed, but the claimant said she could not afford to do that and driving delivery jobs were no longer readily available.

84. After the meeting, the claimant was approached by Mr Thorpe who informed her he was making another referral to Occupational Health with the appointment due to take place on 11 March 2024. He wanted a report from an OH Physician, to be sure of the options and the advice the company was receiving. She was also told that he would be conducting a risk assessment including a stress risk assessment. That was not arranged before the claimant started her current period of sick leave.

<u>March 2024 OH report</u>

85. The appointment on 11 March 2024 was with the OH physician, Dr Basu. The report was provided on the same date. The report advised:

> *Despite her concerns, such as the high-sugar content of a gluten-free diet for which there are alternatives, I am of the view that her diabetic medication and her coeliac disease can be managed on a two-shift pattern.*
>
> *The point raised which I believe is reasonable is that of the management of her neuropathy. The medication for this is sedating and it is reasonable that she would not wish to take it before work in the morning to avert side-effects and possible safety risks when using machinery. Other forms of painkilling relief are unlikely to be suitable and/or result in similar side-effects.*
>
> *Accordingly, with the proposed scenario in the referral, she would be working a late shift with diminishing pain relief from medication taken the night before.*
>
> *Ms Broadhead is aware of the possible implications of my advice for her tenure.*

86. With regard to the specific questions asked, Dr Basu advised:

> *1. Please see my advice above. Specifically, because of her medication timings, working a late shift [i.e. the afternoon shift] is not medically advised.*
>
> *2. The only other adjustment I can suggest is that the second shift is essentially one that starts slightly later in the morning (I would suggest no later than 10am), to minimise the loss of pain relief from her night-time medication. I am sceptical of the practicalities of this for the business, however.*

<u>Volunteers for the afternoon shift</u>

87. Mr Thorpe sent an email to Mr Wilkinson and Mr Philby on 5 March 2024 to see if anyone would be willing to do a permanent afternoon shift. The email says:

> *Can you ask whether anyone would be willing to do a permanent afternoon shift?*
>
> *I understand the answer will be a no but we need to ask the question please?*

88. Although one individual, Dawn, said she might be interested, she subsequently decided against it.

89. On 27 March 2024 Mr Calderbank was asked in an email from Daniel Thorpe leader if the business could accommodate the claimant working permanent mornings or if there are any volunteers for a permanent afternoon shift. Mr Calderbank analysed how it would look with extra operators on the morning shift. In his evidence, he could not make it work. He called a short meeting on the shop floor and asked operators with a similar skill set to the claimant, if they were interested in doing permanent afternoon. These are operators from individual cells which should not require specialist skills, unlike damp machines which take about a year's training to get up to speed. (Although we note that it is also the respondent's case that people are now much more multiskilled than they were 2 to 3 years ago and that multi-skilling training is ongoing). He did not ask operators on the DC lines, because the DC training schedule will be 12 months long and not achievable by everyone.

90. Mr Calderbank said he did the same for both shifts and their responses were 'no chance'. We accept that all or most employees prefer working morning shift to the afternoon shift. The respondent does not struggle to find volunteers for morning shifts. Mr Calderbank emailed Mr Thorpe on 28 March 2024 with this information.

<u>March 2024 Health and Wellbeing Meeting</u>

91. At a Health and Wellbeing meeting on 28 March 2024 the claimant met with the respondent to discuss the latest OH report, with her union representative present. It was confirmed to the claimant that the other production departments were either working a three shift or two shift pattern.

92. The only available position that was offered to the claimant, was a permanent early shift, as a job share as a tool setter in the KS area. That would have involved a reduction in working hours from 36 to 19.25 hours per week, resulting in a drop in salary of around £12,000 per year-page. The other two options given to the claimant were to find someone to work the later shift or go against the OH advice and work both the early and later shift. It was stressed that the latter option was not something the company was pressuring the claimant to do, it was entirely up to her. The options were confirmed to the claimant in writing on 3 April 2024. The two shift option was not mentioned in the letter.

93. There was a further Health and Wellbeing Meeting on 18 April 2024. The respondent reported that no one had come forward to work on the later shift on a permanent basis in her department or another department where a two shift system was in place. The claimant confirmed she would not accept a part-time position. She confirmed that going against the advice of occupational health professionals to return to a two shift pattern was not a viable option and made clear her disappointment that this had been proposed at all.. It was agreed that the claimant and Mr Callaghan would try to find somebody to work permanent afternoons and that another meeting would be arranged after five weeks to allow that to be discussed.

<u>Sick leave</u>

94. On 23 April 2024 the claimant suffered a panic attack. The following day, she commenced a period of sick leave due to anxiety and depression. The claimant was still on sick leave by the time of the hearing.

95. On 28 May 2024, Ms Wynn, HR adviser sent an email to team leaders, with a notice to go on the notice boards, inviting applications to work permanent afternoon shifts-pages. The notice was displayed on the notice boards in DKS and DC and Machining. Danny Proctor, a team leader reporting to Mr Calderbank, replied to the follow up email on 10 June, confirming there had been no applications from Tractor.

96. The notice was put up on the EK section notice board and EK3 notice Board. No positive responses were received and Mr Swiffen informed Ms Wynn of that on 10 June 2024, in reply to a follow up email from her.

97. Mr Wilkinson put up the notice in KS on the notice boards in the department, and spoke to the team again. As before, no one was interested in working an afternoon shift on a permanent basis.

98. Two agency workers came forward and offered to work permanent afternoons on condition that they were given permanent contracts. At that stage there was a worldwide recruitment freeze due to the merger talks with Vitesco. Further, due to falling volumes the number of agency workers was being reduced across the company. The claimant was told that a 12-month fixed term contract could be offered to the claimant on 11 June 2024 but she said she was seeking a permanent day shift.

99. An operative in EK, Robert Iordache, offered to work permanent afternoon shifts in KS, but only if he could be guaranteed two hours overtime per day to compensate him for the loss of his night shift premium. That would have considerably over-compensated him for any loss and understandably, was refused by the respondent. (The night shift allowances is £2.04 per hour and hight shifts are worked once every three weeks; the overtime rate on KS is £17.67 per hour). At a further meeting with him on 17 July 2024, he confirmed that he was not willing to compromise on the basis that he would have first refusal on overtime.

<u>June 2024 Health and Wellbeing meeting</u>

100. Another Health and Wellbeing Meeting with the respondent took place on 11 June 2024. Mr Callaghan confirmed that he had been unsuccessful in his efforts to find anyone to work a permanent afternoon shift. The claimant confirmed she did not wish to consider the option of working part-time as a tool setter. No other suggestions were put forward by either the claimant or the company. During the meeting the claimant asked whether she would be dismissed. She was told by Mr Thorpe that she would be invited to a meeting to discuss the situation fully, but a possible outcome could be termination on capability grounds.

101. A summary of the discussion was sent to the claimant by Ms Wynn. The letter suggested a cut-off date of 18 August for the claimant and Mr Callaghan to find someone to work on a permanent afternoon shift. A review was proposed at the end of August to discuss whether she could be accommodated on a morning shift. The letter was sent on 18 July 2024. As it happens, the review and the meeting in September have not taken place.

102. The claimant also argues she was placed at a significant disadvantage as a result of her general contractual duties in the respondent's health and well-being meetings which on her case, exacerbated her already poor mental health. She says a reasonable adjustments which could have been implemented were a stress risk assessment, workplace counselling and regular welfare meetings as recommended in May 2022.

103. The claimant says that allowing her to work as a 'floater', rotating between different machines and covering absences and holidays prevented her carrying out repetitive tasks that exacerbated her musculoskeletal issues. Moving around between different tasks help to avoid repetitive strain injuries and the arrangement she says is essential to manage her conditions and ensure her body can rest appropriately.

104. The claimant was hoping to return to work around September 2024, on a part-time, phased return basis. She canvassed the possibility, but as she came closer to the date of returning, she felt unable to do so. She remained off work at the time of the hearing.

Relevant law

Discrimination arising from disability (section 15)

105. Section 15 Equality Act 2010 reads:

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

106. In a disability discrimination claim under section 15, an employment tribunal must make findings in relation to the following:

106.1. The contravention of section 39 of the Equality Act relied on – in this case section 39(2)(d) - detriment.

106.2. The contravention relied on by the employee must amount to unfavourable treatment.

106.3. It must be "something arising in consequence of disability"; for example, disability related sickness absence.

106.4. The unfavourable treatment must be <u>because</u> of something arising in consequence of disability.

106.5. If unfavourable treatment is shown to arise for that reason, the tribunal must consider the issue of justification, that is whether the employer can show the treatment was "a proportionate means of achieving a legitimate aim".

106.6. In addition, the employee must show that the employer knew, or could reasonably have been expected to know, that the employee or applicant had the disability relied on. Knowledge that the something arising led to the unfavourable treatment is not however required.

See the decisions of the EAT in *T-Systems Ltd v Lewis UKEAT0042/15* and *Pnaiser v NHS England [2016] IRLR 170 (EAT)*.

107. As stated expressly in the EAT judgment in *City of York Council v Grosset* ***UKEAT/0015/16*** *(1 November 2016, unreported)*, the test of justification is an objective one to be applied by the tribunal; therefore while keeping the respondent's 'workplace practices and business considerations' firmly at the centre of its reasoning, the ET was nevertheless acting permissibly in reaching a different conclusion to the respondent, taking into account medical evidence available for the first time before the ET. The Court of Appeal in *Grosset* (***[2018] EWCA Civ 1105, [2018] IRLR 746***) upheld this reasoning, underlining that *'the test under s 15(1)(b) EqA is an objective one according to which the ET must make its own assessment'*.

Reasonable adjustments (sections 20 and 21)

108. Section 39(5) of the Equality Act 2010 imposes a duty on an employer to make reasonable adjustments.

109. Section 20 provides that where a provision, criterion or practice (a PCP) applied by or on behalf of an employer, places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable to have to take in order to avoid the disadvantage. The same duty arises where the substantial disadvantage arises from a failure to provide an auxiliary aid or a physical feature of premises.

110. Section 21 of the Equality Act provides that an employer discriminates against a disabled person if it fails to comply with a duty to make reasonable adjustments. This duty necessarily involves the disabled person being more favourably treated in recognition of their special needs.

111. In *Environment Agency v Rowan 2008 ICR 218* and *General Dynamics Information Technology Ltd v Carranza 2015 IRLR 4,* the EAT gave general guidance on the approach to be taken in the reasonable adjustment claims. A tribunal must first identify:

(1) the PCP applied by or on behalf of the employer;

(2) the identity of non-disabled comparators; and

(3) the nature and extent of the substantial disadvantage suffered by the claimant in comparison with those comparators.

Once these matters have been identified then the Tribunal will be able to assess the likelihood of adjustments alleviating those disadvantages identified. The question is whether the PCP 'bites harder' on the claimant (*Griffiths v Secretary of State for work and Pensions [2017] ICR 150* at #58. There just needs to be a prospect of the step alleviating the substantial disadvantage;

there does not need to be not a 'good' or a 'real prospect' - *Leeds Teaching Hospital NHS Trust v Foster [2011] UKEAT/0552/10 at #17.*

112. A PCP must be more than a one-off act. In *Ishola v Transport for London* [2020] IRLR 368, Simler J held:

> *The words 'provision, criterion or practice' are not terms of art, but are ordinary English words. They are broad and overlapping, and in light of the object of the legislation, not to be narrowly construed or unjustifiably limited in their application. However, it is significant that Parliament chose to define claims based on reasonable adjustment and indirect discrimination by reference to these particular words, and did not use the words 'act' or 'decision' in addition or instead. As a matter of ordinary language, it was difficult to see what the word 'practice' added to the words if all one-off decisions and acts necessarily qualify as PCPs*.

113. The test of reasonableness imports an objective standard. The Statutory Code of Practice on Employment 2011 published by the Equalities and Human Rights Commission contains guidance in Chapter 6 on the duty to make reasonable adjustments. Paragraph 6.28 sets out some of the factors which might be considered in determining whether it is reasonable for an employer to have to take a particular step in order to comply with the duty to make reasonable adjustments. These include whether taking the step would be effective in preventing the substantial disadvantage, the practicability of the step, the cost to the employer and the extent of the employer's financial and other resources.

114. As for knowledge, for the S.20 EQuA duty to apply, an employer must have actual or constructive knowledge both of the disability and of the disadvantage which is said to arise from it (EQuA para 20, Schedule 8).

115. During their employment, a claimant does not need to suggest any adjustments, for the duty to arise – see Royal Bank of Scotland plc v Ashton [2011] ICR 632. However, when it comes to the tribunal proceedings, a tribunal will consider the reasonable adjustments that have been suggested by the claimant and which form part of an agreed list of issues - Newcastle City Council v Spires UKEAT/0334/10.

Harassment (section 26)

116. Section 26 Equality Act 2010 reads:

> *26 Harassment*
>
> *(1) A person (A) harasses another (B) if—*
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
> *(b) the conduct has the purpose or effect of—*
> *(i) violating B's dignity, or*
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
> *(2) A also harasses B if—*
> *(a) A engages in unwanted conduct of a sexual nature, and*
> *(b) the conduct has the purpose or effect referred to in subsection (1)(b).*

(3) ……
(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

117. A harassment case therefore involves five questions. First, did the conduct took place at all. Second, was the conduct unwanted? Third, was the conduct related to sex? Fourth, did the conduct of the person responsible had the proscribed purpose. Fifth, if not, did the conduct have the proscribed effect, taking into account (a) the perception of B; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect.

118. In Richmond Pharmacology v Dhaliwal [2009] IRLR 336 Underhill J (as he then was) said at paragraph 15:

A respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. That, as Mr Majumdar rightly submitted to us, creates an objective standard. However, he suggested that, that being so, the phrase 'having regard to … the perception of that other person' was liable to cause confusion and to lead tribunals to apply a 'subjective' test by the back door. We do not believe that there is a real difficulty here. The proscribed consequences are, of their nature, concerned with the feelings of the putative victim: that is, the victim must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created. That can, if you like, be described as introducing a 'subjective' element; but overall the criterion is objective because what the tribunal is required to consider is whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so. Thus if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt

119. We also note Land Registry v Grant [2011] ICR 1390) in which the head note records:

*When assessing the effect of a remark, the context in which it is given is always highly material. A humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker. It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect. It will also be relevant to deciding whether the response of the alleged victim is reasonable*Under

s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that person A has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A can show that he or she did not contravene the provision.

120. As to the question as to whether or not conduct is related to sex, this was considered in *Blanc de Provence Ltd (appellant) v Ha (respondent) - [2024] IRLR 184* at paragraphs 31 and 32 of which the EAT states:

> ***31*** *It is clear that the test of whether conduct is 'related to [sex]' is different to that of whether it is 'because of [sex]' as is required to make out a claim of direct sex discrimination. The term 'related to [sex]' is wider and more flexible than 'because of [sex]'. Conduct could be found to be 'related to [sex]' where it was done 'because of [sex]', but that is not a requirement. So, for example, if A subjects B to unwanted conduct with the purpose of 'creating an intimidating environment for B' in circumstances in which it is established that A would not have subjected a man to the same conduct, that would establish that the conduct was 'related to [sex]'. But there are many other ways in which conduct could be 'related to [sex]' such as where there is conduct that is inherently sexist such as telling sexist jokes.*
>
> ***32.*** *Where it is asserted that the conduct is said to be 'related to [sex]' because the alleged perpetrator would have treated a man differently (so that the treatment is 'because of [sex]') that allegation should generally be put fairly and squarely to the alleged perpetrator. As Simler J (P) put it in Dunn v Secretary of State for Justice (2017)* ***(2017) UKEAT/0234/16****/DM:*
>
> > *'Fairness and proper procedure does demand that the substance of an allegation is put to a witness so that he or she has a proper opportunity to rebut or explain it. However, as Mr Bousfield submits there are many different ways in which the substance of an allegation can be put, though he agrees, put it must be. Moreover, we consider that in all but the most obvious cases involving direct discrimination a critical part of the tribunal's consideration is the mental processes, whether conscious or subconscious, of the putative discriminator (see to this effect the observations of Lady Hale at [62] to [64], in R (on the application of E) v Governing Body of JFS and Ors* ***[2010] IRLR 136*** *SC). If those matters are not explored and a claimant's case is not put, it is difficult to see how a tribunal can properly consider them.'*

Burden of proof

121. Guidelines on the burden of proof were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258. The tribunal can consider the respondents' explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)

122. The Court of Appeal in Madarassy, a case brought under the Sex Discrimination Act 1975, held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. LJ Mummery stated at paragraph 56:

Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.'

123. Further, it is important to recognise the limits of the burden of proof provisions. As Lord Hope stated in Hewage v Grampian Health Board [2012] IRLR 870 at para 32:

They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

Conclusions

124. In arriving at the following conclusions on the issues before the Tribunal, the law has been applied to the facts found above. The Tribunal will not repeat every single fact, in order to keep these reasons to a manageable length. The issues are dealt with in turn.

125. In reaching our conclusions, we have considered the burden of proof provisions. These have been particularly relevant when it comes to the reasonable adjustments claim.

126. We have considered each alleged incident of discrimination separately and we have also considered them collectively. The sub-headings below refer to the allegations under each date in the ET1.

Time limits

127. Mr Morgan accepts that time limits are not an issue in the case before us, save for the claim in respect of risk assessment/welfare meetings. For reasons given below, that claim is not upheld, so the Tribunal did not need to decide if that was brought in time.

Disability

128. For the sake of completeness, whilst the Tribunal would not have found that the effects of Coeliac Disease on the claimant amounts to a disability in and of itself, the cumulative effect of the symptoms of that condition, taken together with the diabetes and neuropathy, mean that the claimant also had a disability as a result of the combined effect of those three conditions.

Discrimination arising from disability (Equality Act 2010 section 15)

2.1 Did the respondent treat the claimant unfavourably by:

2.1.1 Presenting the option of going against OH advice and working a two shift pattern on 28 March and 18 April 2024?

129. We conclude that suggesting to the claimant that she go against OH advice and work a two shift pattern was unfavourable treatment. It is difficult to conceive of circumstances in which allowing an employee to work a shift pattern against OH advice could be compatible with an employer's duty of care towards that employee. The claimant was upset by the suggestion, understandably so.

2.1.2 Threatening to dismiss the claimant on 11 June 2024?

130. The Tribunal understands that the claimant perceived this as a threat. However, the Tribunal has found that this was said to the claimant in response

to a question from her. The Tribunal concludes that in those circumstances, it was reasonable for the employer to inform the claimant, in response to that question, that a possible outcome of the process in due course could be dismissal on the grounds of her inability to work the 2-shift system. That was simply stating a fact. It would have been dishonest to suggest otherwise. It was not a threat.

2.2 Did the following things arise in consequence of the claimant's disability:

2.2.1 Her inability to work a two-shift pattern and only being able to work one shift due to her physical impairments? [see 2.1.1 above]

131. Yes; and we understand this is not disputed by the respondent in any event.

2.2.2 Her being off sick with work-related stress due to her mental health impairment? [see 2.1.2 above]

132. We accept this was the case from 24 April 2024.

2.3 Was the unfavourable treatment because of any of those things?

133. In relation to the option of going against OH advice, the Judge did suggest at the outset that this claim appeared to be based on a somewhat circular argument, as the Employment Judge at the Preliminary Hearing had suggested. However, having now had the opportunity to listen to the evidence over three days and consider this issue at length, the Tribunal concludes unanimously that the suggestion to the claimant that she could go against OH advice, was indeed because of her inability to work the two shift system. On reflection therefore, the Tribunal concludes that this is not a circular argument at all. The unfavourable treatment was because of the something arising set out in 2.2.1 above. That was the context in which the unfavourable treatment took place. Further, the Tribunal concludes that this allegation actually works better as a section 15 claim than as a disability-related harassment claim, for reasons which we will come onto in due course when considering the harassment allegation.

134. In relation to 2.1.2, the Tribunal has found as a fact that the claimant was not threatened with dismissal. That allegation therefore fails on the facts. The Tribunal would add that if the claimant had been invited to a capability dismissal hearing, and that was the allegation of unfavourable treatment, the conclusion may well have been different; that is not however this case.

2.4 Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

135. In order to meet demand and operate the lines [most] efficiently, the Respondent therefore requires an equal number of Operators on the morning and afternoon shifts (30B, Amended GOR). The Tribunal accepts this is a legitimate aim, subject to the addition of the word in square brackets above. That is an important qualification when it comes to considering the question or reasonable adjustments.

2.5 The Tribunal will decide in particular:

2.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

136. The Tribunal concludes that it was not necessary to suggest to the claimant that she go against Occupational Health advice, in order to achieve this aim. On the contrary, it was not necessary to make this suggestion at all.

2.5.2 could something less discriminatory have been done instead;

137. It is not necessary to reach a conclusion on this issue in light of the conclusion to issue 2.5.1 above.

2.5.3 how should the needs of the claimant and the respondent be balanced?

138. Again, it is not necessary to reach a conclusion on this issue in light of the conclusion to issue 2.5.1 above.

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

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

3.1.1 The requirement to work a two-shift pattern?

3.1.2 the requirement for the claimant to work her contractual duties?

139. The respondent accepted that these PCPs were applied during the period with which the Tribunal is concerned, in relation to the reasonable adjustments claimed.

3.2 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that she was unable to work a two-shift pattern because of her physical impairments and struggled to work her contractual duties due to her mental health impairments?

140. The Tribunal concludes that the substantial disadvantage is made out in relation to the two shift pattern. The Tribunal is less convinced in relation to the claimant not being able to work the two-shift pattern or her contractual duties due to her mental health impairments; but it is not necessary to reach a conclusion on that since substantial disadvantage is established in relation to the two shift pattern alone.

3.3 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage? The respondent admits it became aware of the claimant's diabetes in January 2020; peripheral neuropathy in February 2020; depression in May 2022; and coeliac disease in December 2023. Further, the respondent says that it only became aware that the claimant should only work morning shifts due to the side effects of diabetic neuropathy on 4 December 2023.

141. The respondent's concessions on knowledge of disability are noted. On the facts of this case, no further conclusions are necessary.

142. The Tribunal concludes that the respondent did have or should have had knowledge of substantial disadvantage in relation to the claimant not being able to work a two shift system. The OH reports referred to the findings of fact show the following:

    142.1. the 18 March 2020 OH report recommended that the claimant work a 'day time' shift;

    142.2. the 4 July 2022 OH report recommended that a workplace risk assessment be carried out;

142.3. on 15 December 2022 the report recommended the claimant work a day shift only;

142.4. the grievance appeal in May 2023 noted that the claimant's suitability to work a two shift pattern was still outstanding;

142.5. it was not until December 2023 that a further occupational health report was obtained, dealing with that question, and not surprisingly, this confirmed that the claimant could not.

143. Bearing in mind all of those, the respondent should have been aware of the claimant's inability to work the two shift system, well before November 2023.

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

3.4.1 Allowing the claimant to work permanently the early shift from 6am – 1:45pm or a shift beginning no later than 10am and ending no later than 5:45pm, such as the 8am – 4:30pm shift which the claimant maintains was available [see 3.1.1]

144. The Tribunal agrees that a possible step was allowing her to continue to work the morning shift between 6.00 am and 1:45 pm. The day shift, 8.00 am to 4:30 pm was not a practical possibility, because the department she was assigned to did not work on the Day Shift.

3.4.2 providing a workstation and stress risk assessment, workplace counselling and regular welfare meetings [see 3.1.2]

145. On the basis of the Court of Appeal authority of <u>*Tarbuck v Sainsbury's Supermarket Ltd*</u>, the Tribunal concludes that the carrying out of a risk assessment or workstation assessment is not a relevant step in relation to the reasonable adjustment duty. It is something that should have been carried out, which Mr Thorpe accepted, to his credit, in cross examination, when he accepted this was an oversight on his part.

146. Providing counselling at the expense of the respondent, and regular welfare meetings were possible steps but they would not have avoided the disadvantage. The failure to carry out a risk assessment earlier did not prevent the claimant from working on a two shift system - even if it had been carried out, the position would still have been the same. It would simply have confirmed the position. The same can be said of counselling at the employer's expense, and regular welfare meetings. In any event, as can be seen from the findings of fact, there were regular Health and Wellbeing Meetings with the claimant.

3.5 Was it reasonable for the respondent to have to take those steps and when? The claimant clarified at the Preliminary Hearing that the failure to make a reasonable adjustment as to her shift patterns is said to have arisen as from the respondent's suggestion that she work two-shift pattern on or around 28 November 2023, her working requirements having previously been accommodated.

147. As to the step set out at 3.4.1, the Tribunal's findings of fact in relation to the part-time workers are significant, when it comes to the question of the reasonableness of the adjustment. The Tribunal has found as a fact that, on the balance of probabilities, the four part-time workers working only morning shifts in the KS section do not have contractual arrangements to that effect.

The evidence before the Tribunal shows that those employees are still subject, in relation to their duties and working hours, to the same contractual flexibility as their colleagues. In those circumstances, the respondent could have approached at least two of these individuals and asked them to work afternoon, as well as morning shifts, in line with their contractual obligations.

148. There was only evidence before the Tribunal that one of those individuals still had relevant caring responsibilities, in relation to her parents. Whether that would still prevent her from working afternoon shifts has never been actively canvassed with her. In any event, on the balance of probabilities, the Tribunal concludes that had at least two of the part-time workers been required to work afternoon shifts as well, the claimant could have taken their place. This was eminently possible.

149. Mr Robson told the Tribunal that such an adjustment would 'severely impact the output'. That is not however a suggestion made in his witness statement; nor have any figures been put to the Tribunal to back up that statement. In the light of all that has already been said, the Tribunal cannot help but conclude that again, the position has been somewhat overstated. In any event, the respondent did not put forward any figures to the Tribunal, as to the specific adverse financial effect on the business of any reduced productivity of the claimant, because of the restrictions to her working hours. It has therefore failed to prove the argument made.

150. Further, in relation to the four part-timers (equivalent to 2 FTE employees), working the morning shift, Mr Robson simply stated that: '*they were budgeted for*'. If two of the part-time workers could have been required to work afternoon shifts as well, the business would continue to have the equivalent of two FTE employees working mornings only, which it had already budgeted for. There was no suggestion to the Tribunal that, in relation to those four part-time employees, there was any pressure to change their working hours because the cost of that in terms of efficiency was no longer sustainable. Rather, that simply appears to have been 'budgeted for'.

151. In saying this, the Tribunal does of course take due notice of the facts found in relation to the reduction in demand, and the financial pressures on the business. Indeed, the Tribunal is aware that the closure of the whole factory is currently being consulted on. However, as Mr Robson also confirmed to the Tribunal, the consumption deviation was to the tune of 1 to 2 million pounds in the red. The restriction on the claimant's working hours cannot have had more than a negligible effect on that overall deviation. As the Tribunal has already noted, there is no specific financial evidence to the contrary.

152. Yet further, the Tribunal notes the findings on the balance between the numbers working on morning shifts, compared to afternoon shifts, for the last 32 weeks prior to the hearing. Those findings reinforce the conclusion that it was a reasonable adjustment – since the majority of shifts had four or more extra on the morning shift in any event; presumably, that reflected the business need. It would not make sense otherwise, given the financial difficulties.

153. Further, even if none of the part-timers were able to work afternoon shifts every other week because of ongoing caring responsibilities, the Tribunal concludes that it would have been reasonable for the respondent to 'budget for' the claimant to work mornings as well. The respondent has failed to establish the burden of proving that the costs of doing so would not have been reasonable,

by failing to provide any specific numbers in relation to the effect on the business, financially, of any such restrictions.

154. As for the step at 3.4.2, no further conclusions are necessary.

3.6 Did the respondent fail to take those steps?

155. Yes, in relation to both steps; but the step at 3.4.2 was not a reasonable step to take in the circumstances.

4. Harassment related to disability (Equality Act 2010 section 26)

4.1 Did the respondent do the following things:

4.1.1 "Repeatedly" insist on 28 November 2023 that the claimant complete a flexible working request; 4.2 If so, was that unwanted conduct?

156. This was not repeated, but it was made on one occasion and to that extent is made out. The Tribunal accepts that it was unwanted. The claimant was not making a request for flexible working; she was making a request for a reasonable adjustment. As Ms Wynn said in answer to a question from the Tribunal panel, that is not the way that she would have dealt with the situation.

4.1.2 further refer the claimant to OH on 28 November 2023 and 1 March 2024 when there was no change in the claimant's situation and the respondent had full information as to her capabilities already; 4.2 If so, was that unwanted conduct?

157. This did occur and the claimant did find it unwanted.

4.1.3 presenting the option of going against OH advice and working a two-shift pattern on 28 March and 18 April 2024; 4.2 If so, was that unwanted conduct?

158. Yes it was unwanted and did occur.

4.1.4 threatening to dismiss the claimant on 11 June 2024 which arose in consequence of her only being able to work one shift, due to her physical impairments and being off sick with work-related stress due to her mental health impairment; 4.2 If so, was that unwanted conduct?

159. This fails on the facts – see the conclusion in relation to issue 2.1.2 above. The claimant was not threatened with dismissal. She was informed of that possibility, in response to a direct question by her.

4.3 Did it relate to disability?

160. In relation to allegation 4.1.1, the Tribunal concludes that this did relate to disability.

161. In relation to allegations 4.1.2 and 4.1.3 however, the conduct found to have occurred was not related to disability in the way required by s.26 of the Act. Rather, the claimant's disability was merely the background against which (or the context for) the conduct that occurred.

162. Further, in relation to allegation 4.1.3, that has been upheld as a s.15 claim. The disability was the background for the unwanted conduct and that was sufficient for the claim under s.15 of the Act to succeed; that indirect causal link is not however sufficient for it to be classed as being 'related to disability' in the way required for a section 26 claim to succeed.

163. No conclusion needs to be reached regarding issue 4.1.4, since that has failed on the facts.

4.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

164. No. It was never the respondent's purpose to do so in relation to any of the allegations.

4.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

165. Since the harassment claims fail on the related to disability question, we will deal with this issue briefly.
166. Allegation 4.1.1 – yes it was reasonable for it to have that effect, but the allegation fails on the 'related to disability' question.
167. Allegation 4.1.2 – no, it was not reasonable for the conduct to have that effect. A further referral was necessary at that stage.
168. Allegation 4.1.3 – yes, it was reasonable for it to have that effect - See the conclusions in relation to 2.1.1 above.
169. Allegation 4.1.4 – this failed on the facts so no conclusion is necessary. Had it been necessary to do so, we would have concluded that it did not.

Employment Judge James
North East Region

Dated 14 February 2025

Sent to the parties on:

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For the Tribunals Office

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

ANNEX A – LIST OF ISSUES

The issues the Tribunal will decide are set out below.

1. Time limits

1.1 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010. The Tribunal will decide:

1.1.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.1.2 If not, was there conduct extending over a period?

1.1.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.1.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.1.4.1 Why were the complaints not made to the Tribunal in time?

1.1.4.2 In any event, is it just and equitable in all the circumstances to extend time?

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

2.1 Did the respondent treat the claimant unfavourably by:

2.1.1 presenting the option of going against OH advice and working a two shift pattern on 28 March and 18 April 2024?

2.1.2 threatening to dismiss the claimant on 11 June 2024?

2.2 Did the following things arise in consequence of the claimant's disability:

2.2.1 Her inability to work a two-shift pattern and only being able to work one shift due to her physical impairments? [see 2.1.1 above]

2.2.2 her being off sick with work-related stress due to her mental health impairment? [see 2.1.2 above]

2.4 Was the unfavourable treatment because of any of those things?

2.4 Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

2.4.1 In order to meet demand and operate the lines efficiently, the Respondent therefore requires an equal number of Operators on the morning and afternoon shifts. [30B, Amended GOR]

2.5 The Tribunal will decide in particular:

2.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

2.5.2 could something less discriminatory have been done instead;

2.5.3 how should the needs of the claimant and the respondent be balanced?

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

3.1 A “PCP” is a provision, criterion or practice. Did the respondent have the following PCPs:

3.1.1 The requirement to work a two-shift pattern?

3.1.2 the requirement for the claimant to work her contractual duties?

3.2 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant’s disability, in that she was unable to work a two-shift pattern because of her physical impairments and struggled to work her contractual duties due to her mental health impairments?

3.3 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage? The respondent admits it became aware of the claimant’s diabetes in January 2020; peripheral neuropathy in February 2020; depression in May 2022; and coeliac disease in December 2023. Further, the respondent says that it only became aware that the claimant should only work morning shifts due to the side effects of diabetic neuropathy on 4 December 2023.

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

3.4.1 Allowing the claimant to work permanently the early shift from 6am – 1:45pm or a shift beginning no later than 10am and ending no later than 5:45pm, such as the 8am – 4:30pm shift which the claimant maintains was available [see 3.1.1]

3.4.2 providing a workstation and stress risk assessment, workplace counselling and regular welfare meetings [see 3.1.2]

3.5 Was it reasonable for the respondent to have to take those steps and when? The claimant has today clarified that the failure to make a reasonable adjustment as to her shift patterns is said to have arisen as from the respondent’s suggestion that she work two-shift pattern on or around 28 November 2023, her working requirements having previously been accommodated.

3.6 Did the respondent fail to take those steps?

4. Harassment related to disability (Equality Act 2010 section 26)

4.1 Did the respondent do the following things:

4.1.1 “Repeatedly” insist on 28 November 2023 that the claimant complete a flexible working request;

4.1.2 again refer the claimant to OH on 28 November 2023 and 1 March 2024 when there was no change in the claimant’s situation and the respondent had full information as to her capabilities already;

4.1.3 presenting the option of going against OH advice and working a two-shift pattern on 28 March and 18 April 2024;

4.1.4 threatening to dismiss the claimant on 11 June 2024 which arose in consequence of her only being able to work one shift, due to her physical

impairments and being off sick with work-related stress due to her mental health impairment.

4.2 If so, was that unwanted conduct?

4.3 Did it relate to disability?

4.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

4.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.