Case No: 1801620/2019(V).

EMPLOYMENT TRIBUNALS

Claimant: **Mrs Lisa Fenton**

Respondent: **Mrs Sandra Nicholson**

Heard at:	**Hull in person**	**On:**	**3 & 4 December 2019**
	By CVP		**9 & 10 December 2020**
	Deliberations		**8 January 2021**

Before: **Employment Judge T R Smith**
Members: **Mrs C Sanders**
Mr M Brewer

Representation
Claimant: In person
Respondent: Mr Bartle, lay representative and charity worker

RESERVED JUDGMENT

1. The Claimant's complaint of harassment relating to her disability is not well founded and is dismissed.

2. The Claimant's complaint of discrimination arising from disability is not well founded and is dismissed.

3. The Claimant's complaint of harassment related to disability is dismissed

4. The Claimant's complaint of being subject to a detriment contrary to section 45A of the Employment Rights Act 1996 is dismissed

REASONS

Evidence.

1. The Tribunal had before it a bundle of documents totalling 184 pages. Much of the first day of the hearing was wasted dealing with arguments as to what was and was not in the bundle and should have been in the bundle. A

supplemental bundle was eventually produced which the Tribunal marked A2, (pages 1 to 10).

2. A reference to a number is a reference to a page in the bundles.

3. The Claimant gave oral evidence and was cross examined.

4. The Claimant also called her mother Mrs D. Maloney and she gave evidence in accordance with a statement dated 30 October 2019 (which the Tribunal allowed to be admitted in evidence at the start of the resumed hearing on 09 December 2020 for the oral reasons it gave).

5. Originally, in the statement bundle, there were statements from Ms Fennell, Mr G. Fenton and Mrs D Maloney (which differed from her statement referred to above) which bore various dates. The Claimant made it clear that she did not rely upon those statements, and on that basis, the Tribunal had no regard to them

6. The Tribunal heard oral evidence from the Respondent, Mr Stephen Beech, Miss Lorraine Beech and Mr Christopher Shaw, care workers, on behalf of the Respondent.

7. The Tribunal indicated at the start of proceedings that it would deal solely with whether the Claimant succeeded in some or all of her complaints. If she did, it would then consider the issue of remedy/compensation at a separate hearing.

8. The Tribunal did not find either the Claimant or the Respondent to be particularly credible and noted the obvious hostility between the two parties. Mr and Miss Beach and Mr Shaw were not related to either party and, whilst they occasionally had difficulties remembering incidents, the Tribunal found them to be the more reliable witnesses.

The Issues.

9. The issues were agreed at a preliminary hearing chaired by Employment Judge Maidment on 02 August 2019. Subject to a couple of amendments in relation to typographical errors they are set out verbatim.

10. ***"Section 26: Harassment relating to disability"***

    10.1. *Did the Respondent engage in unwanted conduct in saying to the Claimant on 17 March 2019 "if you can't do your job you shouldn't be here?"*

    10.2. *Was the conduct related to the Claimants disability?*

    10.3. *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*

    10.4. *If not, did the conduct have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant*

10.5. *In considering whether the conduct had that effect, the Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect.*

11. ***Section 15 discrimination arising from disability.***

11.1. *The allegation of unfavourable treatment as "something arising in consequence of the Claimant's disability" falling within section 39 Equality Act is firstly the alleged comment made by the Respondent as set out above and secondly the Respondent requiring the Claimant to work additional hours*

11.2. *Does the Claimant prove that the Respondent treated the Claimant as set out above?*

11.3. *Did the Respondent treat the Claimant as aforesaid because of the "something arising" in consequence of the disability? The Claimant maintains that the alleged comment was made by the Respondent out of frustration in the Claimant's limitations due to her physical condition and that requirement that she worked extra hours was an attempt to force her out of her job in circumstances where the Claimant had already said that her existing work was too much for her*

11.4. *Does the Respondent show that the treatment was a proportionate means of achieving a legitimate aim?*

11.5. *Alternatively, has the Respondent shown that it did not know and could not reasonably have been expected to know, that the Claimant had a disability*

12. ***Reasonable adjustments section 20 and section 21.***

12.1. *Did the Respondent apply the following provision, criteria and/or practice (the provision) generally namely: -*

- *Requiring care workers to sit on a kitchen chair for long periods*
- *Requiring care workers to work additional hours, in particular from December 2018.*

12.2. *Did the application of any such provision put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that:-*

- *Sitting on the kitchen chair caused the Claimant significant discomfort*
- *The Claimant was unable to work additional hours due to the physical pain she was suffering*

12.3. *Did the Respondent take such steps as were reasonable to avoid the disadvantage? The burden of proof does not lie on the Claimant; however, it is helpful to know the adjustments asserted as reasonably required and they are identified as follows*

- *Providing a suitable comfortable chair and/or allowing the Claimant to sit on the sofa (the Claimant maintains that on the Respondent's acquisition of a new sofa in October 2018, the care workers were no longer allowed to sit on it)*
- *Allowing the Claimant to keep her existing hours*
- *Did the Respondent not know, or could the Respondent not be reasonably expected to know that the Claimant had a disability or was likely to be placed at the disadvantage set out above*

Detriment relating to the Working Time Regulations.

13. Did the Claimant refuse (or propose to refuse) to comply with a requirement the employer imposed (or proposed to impose) in contravention of the Regulations (limits on the night working) or to forego a right conferred by them (see section 45A (1) (a) (b) of the Employment Rights Act 1996. Was there an actual or proposed breach of the Regulations?

14. Alternatively did the Claimant allege that the employer had infringed such a right? Was the allegation made in good faith?

15. Did the Respondent subject the Claimant to any detriment on the grounds of the Claimant's refusal/allegation? In terms of detrimental treatment, the Claimant maintains that she was targeted amongst the care workers and individually pressured to work more hours."

16. It is appropriate the Tribunal records that at the above preliminary hearing an express admission was made by the Respondent that it accepted that the Claimant was a disabled person within the meaning of section 6 of the Equality Act 2010 ("EQA10") at the material time, being the time when the alleged acts of discrimination took place. Whilst Mr Bartle appeared to resile from that concession in one of his skeleton arguments, when questioned by the Tribunal, he accepted he stood by the concession.

17. The admitted disability was chronic back pain.

18. The Respondent continued to maintain that she did not know the Claimant was disabled at the material time.

Submissions

19. Both parties made written submissions, the Respondent more than one.

20. The Claimant's submission concentrated upon factual matters. The Tribunal had full regard to those submissions.

21. The Respondent's submissions were extremely lengthy and made numerous references to decided cases particularly on the burden of proof. None of those authorities were, in the Tribunal's judgement, contentious.

22. As both sets of submissions are contained on the Tribunal file, and this is a case that turns on facts and the application of those facts to the law, the

Tribunal means no disrespect to either party by not repeating those submissions.

Findings of fact.

23. A great deal of evidence was in dispute. The Tribunal's findings of fact are limited to those issues it had to determine having regard to the agreed issues.

Introduction.

24. The Respondent is the widow of Mr Gary Nicholson.

25. Sadly, Mr Nicholson suffered serious health difficulties for some 11 years, until his untimely death on 28 August 2019.

26. The Respondent initially cared for Mr Nicholson herself, but as his condition deteriorated, a formal care package was provided by the local authority and subsequently funded by the NHS under the continuing healthcare provisions

27. The Respondent was unhappy as to the consistency and reliability of carers provided by the local authority and was advised by her social worker to utilise the direct payment scheme.

28. The direct payment scheme meant that the Respondent was allocated a sum of money which she could budget to best provide for Mr Nicholson. She in turn became the employer of the carers, although the local authority provided, via an organisation known as Choices and Rights, a payroll service and some limited support.

29. The Respondent had no experience of ever employing anyone else and had no experience in the care industry. She herself had a number of medical challenges.

30. The Claimant was a family friend. The Claimant's brother and sister-in-law were neighbours of the Respondent. The Claimant's mother also lived in the same road as the Respondent

31. The Claimant had experience within the care sector and had previously worked for the local authority. She also had experience of the local authority direct payment scheme, having cared for her father.

32. Following an approach from the Claimant's brother to assist the Respondent, the Claimant had discussions with Mrs Nicholson. She agreed to provide assistance.

33. The Tribunal found that the Claimant took the lead in assisting the Respondent to set up the direct payment arrangement, including preparing paperwork, assisting with the recruitment of staff, drawing up rosters, night sitting for Mr Nicholson and general liaison with the local authority. She recommended to the Respondent two experienced carers. The Claimant was far more experienced in such matters than the Respondent.

34. The reason the Claimant did not initially start formal employment with the Respondent was that she was regarded as a disabled person for the purposes of the personal independence payment scheme (PIP). She wanted

to ascertain whether if she worked it would affect her PIP entitlement and also whether she be able to undertake the duties involved of acting as a carer. The Respondent was aware that the Claimant was in receipt of a PIP payment.

35. One of the very few areas of common ground was that the Claimant was a very dedicated and compassionate carer who worked hard to support Mr Nicholson. Even the Respondent praised the quality of the Claimants care and also her assistance in arranging the direct payments to support Mr Nicholson.

36. The Tribunal found it was the Claimant who prepared the staff rosters until she left the Respondents employment. In addition, it was the Claimant who would sort out roster queries such as covering sickness or holidays. In practical terms staff regarded the Claimant as the person they would go to with requests such as holidays although, as a courtesy, they would repeat the request to the Respondent. In practical terms the Claimant was seen by other carers as the person to go to in respect of any matters involving their work of Mr Nicholson.

37. Mr Nicholson was cared for at home and extensive adaptions were made to the property in which he resided. The nature of the adaptions included mechanical aids to minimise any form of lifting and handling.

38. Mr Nicholson required both daytime and night time care. Under the direct payment scheme, funding was initially available for 20 hours per week.

39. Carers were therefore retained both for day and night time working.

40. The Tribunal found that the Claimant always worked on the night shift. She did not work weekends.

41. Initially the Claimant worked 9 hours per night, quickly increased to 10 from October 2018

42. The day shift worked 10 hours as did the nightshift.

43. The Claimant was a night worker as defined by the Working Time Regulations 1998.

44. There was a handover period between the day and the night shift. Mr Stephen Beech worked on the day shift although he had regular contact with the Claimant at handovers. He rarely worked with the Claimant on nights.

45. The night shift consisted of two members of staff. The staff took it in turns to look after Mr Nicholson during the night, as required, with one leading for part of the shift and the other being available to assist, if required, but been allowed to read, watch downloaded programs or sleep. There was an electronic monitor which allowed the night staff to monitor Mr Nicholson between visual checks.

46. The night shift consisted of the Claimant, who worked between 3 to 5 nights per week, Sharon Mills who worked just Tuesday night, Cathy Fenton, the Respondents daughter who worked two nights (sometimes more), Chris

Shaw who acted as a relief and mainly worked days, but also worked some nights, Amy Ward who worked two nights until she left in late February/ early March 2019 and Tracey Nicholson who worked approximately one night per week.

47. Neither party was able to give the Tribunal an exact date (indeed both parties were remarkably vague on most dates), but doing the best it can, it appeared to the Tribunal that from the end of December 2018 to the start of January 2019 funding increased to provide Mr Nicholson with 24-hour care.

48. When the care package for Mr Nicholson increased from 20 to 24 hours the Tribunal found the Claimant did make enquiries as to night time working and understood that there was a limit on night time working of eight hours in a 24-hour period. She based this upon what she was told by Choices and Rights, her experience of working for the local authority, and also a telephone call she made to ACAS. She did not explain to ACAS the nature or the circumstances of her employment. However, having gleaned this information she was quite happy to work a 10-hour night shift and raised no concerns as to the length of the same.

49. The Claimant walked out of her job on 17 March 2019 and was initially signed off as sick for two weeks but then never returned.

50. There is no complaint before the Tribunal as to the termination of the Claimants employment.

The core factual issues.

51. This case centres around a number of disputes.

Knowledge of disability

52. What, if anything, did the Respondent know of the Claimant's disability, and when, and did the respondent know the disability put the Claimant at a substantial disadvantage?

53. The Respondent's case was that she was in ignorance that the Claimant had a disability whilst working for the Respondent and had no knowledge of any substantial disadvantage.

54. The Respondent's case was based upon the fact that firstly the Claimant was issued with a specimen written particulars of employment which contained an obligation (page 58) upon an employee to inform the Respondent of any health or other matter which could put the employee at risk. No declaration was made by the Claimant to the Respondent of any back condition.

55. Secondly the Claimant did not have any time off work for ill-health.

56. Thirdly the Claimant was able to care for Mr Nicholson.

57. The Tribunal is satisfied that the Respondent knew or ought to have known the Claimant had a disability and knew of it at the time of the alleged discriminatory acts. It's reasoning for this conclusion is set out below.

58. Before the Claimant formally started working for the Respondent the Respondent accepted the Claimant said she could not do any heavy lifting because of her back.

59. The Respondent was aware that the Claimant had a disability parking badge and parked in disabled spaces, as she had been transported to various locations by the Claimant.

60. The Respondent knew before the Claimant started work that the Claimant was in receipt of PIP payments. The Respondent accepted that the Claimant wanted to see if she could manage caring for Mr Nicholson before she gave up those payments

61. The Claimant did not find sitting on the kitchen chair comfortable which she attributed to her back and the Tribunal found that the Respondent knew of this because the Claimant brought in what was described as a camping/fishing chair as she said she found it more comfortable. The Respondent's assertion that she had never seen the Claimant with this chair was devoid of credibility, especially when the Tribunal accepted the Claimant had asked permission to bring the chair into her home, and all the other witnesses had seen the chair and make comment about it.

62. The Respondent knew the Claimant received mobility allowance because of a conversation between the Claimant and Mr Beach at which the Respondent was present, when there was a discussion about the Claimant purchasing a VW campervan with her mobility allowance.

63. The Respondent knew of the surgical operations the Claimant had had on her back. There were a series of serious operations. The nature of those operations was such the Respondent must have realised that the Claimant had a particular vulnerability to any moving and handling and had difficulties with her posture.

64. The Respondent accepted the Claimant had said to her on several occasions she had aching in her back and was a bit concerned about carrying on working.

65. The Respondent knew the Claimant used cannabis oil to ease her back pain and asked the Claimant if she could try a sample on Mr Nicholson.

66. The Claimant made a number of comments to members of the caring team as to her disability. The Tribunal has reminded itself that discussions between the Claimant and other staff as to her back difficulties did not necessarily mean that knowledge was imputed to the Respondent. However, given the nature of the small personal team operating in the Respondent's house it considered that it was more probable than not that the Respondent was aware of the Claimant's disability from comments made by staff. The Claimant had discussed with Miss Beach that she had a back problem, Mr Shaw accepted the Claimant mentioned she applied cannabis oil to alleviate her back problems, Mr Beach noted on occasions the Claimant had problems with her gait and she explained he was due to a disc issue. When Mr Beach worked on night shift with the Claimant, he accepted that he would assist the Claimant because he knew she had a bad back.

67. Whilst the Tribunal has been cognisant of the lack of declaration by the Claimant it is satisfied that given the close personal relationship between the Claimant and the Respondent at the start of the employment it was clearly known the Claimant had a serious back problem. The mere fact that Claimant did not have time off work did not mean, in the Tribunal's judgement, an assumption could be made that the Claimant did not have a back problem and nor could it be assumed that simply because she was able to cope with the care of Mr Nicholson that she had no such problem. It must be remembered that on nights there was double teaming, for much of the time Mr Nicholson would be asleep, and the home was fitted with all appropriate devices including lifting hoists, lifting rails set in this ceiling, adapted showers and other necessary equipment to minimise physical effort.

68. The Tribunal reminded itself of the provisions of the Code and in particular paragraph 5.15 *"An employer must do all they can reasonably be expected to do to find out if a worker has a disability"*

69. Pulling all the evidence together the Tribunal found the Respondent knew or ought to have known the Claimant had a serious back problem from the commencement of her employment and knew that placed her at a substantial disadvantage compared with a person who did not have such a disability.

Seating arrangements

70. A central issue the Tribunal had to resolve was whether carers, and in particular the Claimant, had to sit on a kitchen chair which the Claimant contended hurt her back.

71. The Tribunal determined that there was no such requirement for the reasons set out below.

72. Firstly, the Tribunal was satisfied that other seats were available for carers. In particular carers were allowed to use the lounge. The Claimant could have sat in the lounge. Indeed, there was some evidence from Lorraine Beach, who the Tribunal regarded as a credible witness, that the Claimant had sat on a sofa in the lounge on a number of occasions. The lounge contained two settees and a reclining chair. Carers sat in the lounge sometimes to watch television and sometimes to sleep. Initially staff slept on one of the settees but when the Respondent obtained a new one a clear instruction was given that it was not to be used for sleeping. It did not make sense, given that all witnesses including the Claimant accepted the Respondent had given such an instruction, that such an instruction would be given if the staff could not utilise the seating in the lounge.

73. Mr Beach said he had sat and slept in the reclining chair in the lounge. He had also slept on a settee.

74. Secondly the Claimant chose to use a camping/fishing chair. The Respondent knew (despite her protestations to the contrary) she used such a chair as the Claimant asked permission to bring one in. It follows that the Respondent knew the Claimant was not sitting on the kitchen chair. No action was taken. This all points away from there being a requirement that carers had to sit on the kitchen chair.

The Roster

75. The Claimant drafted the staff roster each and every week. The Respondent had no involvement whatsoever.

76. As the Tribunal has previously observed, when the care package consisted of 20 hours per day, day and night staff worked an equal number of hours. At the end of December 2018/early January 2019 Mr Nicholson's care package increased to 24 hours per week and the Respondent started to see whether steps could be taken to recruit more staff.

77. In the interim the Tribunal accepted there was a difficulty in covering all the hours, having regard to the preferences of the existing staff, some who have childcare responsibilities or other jobs.

78. The Claimant drew up a draft roster. Day shift staff were required to work 14 hours and the nightshift only 10. Day shift staff considered it was unfair that they were being asked to work substantially more hours than the night shift staff. Some of the daytime staff indicated they would consider leaving if they have to work 14 hours. The Respondent was aware of this and she was anxious, because of the emotional attachment between Mr Nicholson and his regular carers, to maintain the team if that was possible. She told the Claimant to come up with another proposal.

79. Consideration was given to a three-shift system with each shift working eight hours which would involve recruiting more carers The Respondent would not permit such an arrangement because of her desire to ensure continuity of care to Mr Nicholson by people he knew. She considered the three-shift system would cause him confusion and distress.

80. She asked the Claimant to see what else could be devised pending the recruitment of additional staff.

81. The Respondent, although the employer, in reality was emotionally overwhelmed by the fact that her husband was dying and abdicated her responsibility as an employer in respect of the roster. All she wanted was the staff to sort out amongst themselves what hours they were going to work and left it to the Claimant to lead on this. She had no interest in who worked what hours. Her only interest was to ensure that her husband had 24-hour care. It is for this reason the Tribunal found that whilst another employer may well have called a staff meeting to try and resolve issues, the Respondent was so emotionally involved that she simply asked staff to make things work while the local authority tried to source additional carers. There was no formal staff meeting. There was no electronic communication such as emails or via a social messaging site. It was left to staff to hold discussions on the handover period between day and night shift staff. Given different staff work different days it took a number of weeks to ascertain each person's own preferences.

82. It was in this situation where the staff were left to try and sort matters out themselves that various discussions took place. Mr Beach was prepared to work 14 hours on day shift Monday to Friday but no more. He however suggested it would be more equitable if the 24 hours was divided equally between day and night staff.

83. A 12 hour/12-hour shift pattern could not be agreed.

84. Staff were broadly in agreement for the day shift to work 13 hours and the nightshift 11 hours. The Tribunal found the evidence of Ms Beech to be cogent that the night staff were prepared to all work 11 hours per night but for a variety of reasons could not work 12. The Claimant would not work 11 hours on nightshift.

85. The Tribunal found that in early 2019 the Respondent did ask the Claimant on a number of occasions whether she would work more than a 10-hour night shift. At no stage was she threatened with any form of disciplinary action if she refused. At no stage was she told that her shifts would be cut. At its highest the Respondent hoped the Claimant would change her mind. It is likely in the Tribunal's judgement that the Claimant told the Respondent she did not want to work more than 10 hours because of her back.

86. It is clear that it was not only the Claimant who was asked if she could work more hours (86). There was no targeting of the Claimant, as alleged, for just her to work additional hours on the nightshift.

87. Pending recruitment of additional carers, the Respondent's family offered to work a few hours.

88. Before a final decision could be reached on the hours and the roster the Claimant walked out and was never to return. No final roster was in place before the Claimant left. Up to the time the Claimant walked out she was still rostered to work 10 hours on nightshift

89. The irony of that was that Mr Beach was prepared to work 14-hour day shifts but would not work at weekends. The Claimant would not work weekends. It follows that rostering Mr Beach on day shift with the Claimant on nightshift, opposite each other, would have resolved the situation in respect of the Claimant. This did not appear to be something the Claimant considered.

90. The Respondent had no intention to try and force the Claimant out of her employment as alleged. She wanted exactly the opposite.

91. The Tribunal is satisfied that the Respondent did not want the Claimant to leave her employment, given she valued the Claimant's caring abilities and also her experience within the care sector. The Respondent relied heavily on the Claimant, not only as an experienced carer but also because she had a very good relationship with Mr Nicholson. She also, in practice, undertook almost all of the functions an employer would undertake. It was not in the Respondent's interests to fail to try and accommodate the Claimant. The Claimant was not forced to work additional hours, although the Tribunal accepted, she was asked on a number of occasions by the Respondent if she was prepared to do more. The Tribunal does not equate a number of requests with compunction although reminded itself that the dividing line may be thin in a caring situation in a position where the Claimant had an emotional attachment to the patient.

17 March 2019.

92. On 17 March 2019 there was a difficulty in rostering a second person to work with the Claimant. As a result, the Respondent agreed to act as a carer. It was during this shift that a comment was made which in the Tribunal's judgement related to the finalisation of the roster.

93. The Tribunal accepted that the Claimant was reluctant to allow Mr Beach to have a direct involvement in drawing up the rosters although he made several suggestions for their improvement.

94. The evidence of both the Claimant and Respondent is contradictory and relying upon its own findings the Tribunal have set out below what it considered to be the most probable course of events albeit it does not tally wholly with the evidence of two unreliable witnesses.

95. The Tribunal found the Respondent did say to the Claimant on 17 March 2019 that the staff had concerns as to the roster and if she couldn't sort it out she so shouldn't be doing the job. Staff were becoming disenchanted by delays in finalising the roster as they had their own commitments and wanted some certainty. It is also likely the Respondent raised with the Claimant whether she could work any additional hours. The Tribunal found it unlikely, for the reasons already given, that in any way would the Respondent have said if she didn't work additional hours she effectively should leave her employment.

96. The context of the remark is everything. The context was the roster and if the Claimant couldn't do the roster why was she doing it.

97. The Claimant walked out and subsequently lodged a sicknote.

98. The Tribunal found the Respondent did not want the Claimant to leave hence why she tried to speak to the Claimant the following day but without success. It was for that reason that she spoke to the Respondent's mother.

The Working Time Regulations.

99. The Tribunal accepted that the Claimant honestly believed that there was a limit on night-time working of eight hours in every 24 hours.

100. However, this was not a reason why she left. The Claimant's own evidence was that she was happy to work 10 hours per night shift. What she was not prepared to do was to work longer but this had nothing to do with the Working Time Regulations. She was perfectly content to work over eight hours per night which, in her mistaken belief, was unlawful.

Conclusion and analysis

101. In looking at the law under the EQA10 the Tribunal reminded itself that it was obliged to have regard to the EHRC employment statutory code of practice. It has taken into account the code in its assessment.

Reasonable adjustments.

102. The duty to make reasonable adjustments set out in section 20 EQA10.

"(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply;

and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—

(a)removing the physical feature in question,

(b)altering it, or

(c)providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—

(a) a feature arising from the design or construction of a building,

(b) a feature of an approach to, exit from or access to a building,

(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d) any other physical element or quality.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column."

103. There was no provision criterion or practice operated by the Respondent that required care workers to sit on a kitchen chair for long periods. Carers were free to sit in the sitting room on the settees or the reclining chair, although not to sleep on one of the settees.

104. Even if the Claimant was to establish there was a PCP she was not placed at any substantial disadvantage as she never contented that utilising either the settees or reclining chair would cause her discomfort.

105. There was no provision criterion or practice operated by the Respondent that required care workers to work additional hours, in particular from December 2018. There were requests from the Respondent as to whether staff would be prepared to adjust their hours but that is not the same as a provision criterion or practice. Nothing was done when, for example night staff would be unable to work 12-hour shifts.

106. Given there was no requirement to work a 12-hour night shift the Claimant was not placed at a substantial disadvantage. She remained on her existing hours of 10 per night shift until she walked out of her employment.

107. In the circumstances the Claimant's complaint of a failure to make reasonable adjustments must be dismissed.

Discrimination arising from disability

108. Section 15 of the EQA provides:

"15(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. "

109. The EAT in **Pnaisier v NHS England and another 2016 IRLR 170** helpfully sets out the steps that must be undertaken.

"(a) Tribunal must first identify whether there was unfavourable treatment and by whom: in other words it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just

as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so to, there may be more than one reason in a section 15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial influence on the unfavourable treatment), and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant.

(d) The Tribunal must determine whether the reason/cause or, if more than one, a reason or cause is "something arising in consequence of B's disability". That expression "arising in consequence of" could describe a range of causal links. Having regards to the legislative history of section 15 of the act…,the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it may be a question of fact arising robustly in each case where something can properly be said to arise in consequence of disability.

(e …the more links in the chain there are between disability and the reason for the impugned treatment, the harder it is likely to establish the requisite connection as matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

…(i)…it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal may ask why A treated the Claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the Claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a Claimant that leads to "something" that causes the unfavourable treatment".

110. The Claimant relies upon two acts, firstly the comments allegedly made on 17 March 2018 and secondly a requirement to work additional hours.

111. As the Tribunal has already indicated in its findings of fact although words were spoken to the Claimant they were not as asserted by the Claimant.

112. Was that unfavourable treatment? Whilst noting the threshold is low and no comparison is required the Tribunal found the comment was made in the

context of the Claimant organising the rosters. It was not in connection with her disability. It was not unfavourable treatment. There was dissatisfaction that the person who is responsible for the rosters could not finalise a workable roster for all staff.

113. Dealing with the second matter the Tribunal can dispose of this relatively easily given it did not find that there was a requirement, for the reasons already given, for the Claimant to work increased hours.

114. The Tribunal should record that the Respondent did not lead any evidence, if there was discrimination arising from disability, that her actions were a proportionate means of achieving a legitimate aim.

Harassment.

115. Section 26 of the EQA 2010 defines harassment as follows:

(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 an offensive environment for B

(2) 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.

116. Under section 26 (1) the Claimant can succeed if she can show that the unwanted conduct has the purpose of violating his dignity or it has the effect of violating his dignity. The two are separate and distinct.

117. In **Richmond Pharmacology Limited v Dhaliwal 2009 IRLR 366** Underhill P (as he was) set out three essential elements of a harassment claim namely:

- Did the Respondent engage in unwanted conduct?
- Did the conduct have either (a) the purpose or (b) the effect of either (i) violating the Claimants dignity or (ii) creating an offensive environment?
- Was the conduct related to a relevant protected characteristic? This means that the conduct must be more than have a simple association with the relevant protected characteristic.

118. This test was clarified and extended in the case of **Pemberton v Inwood 2008 EWCA Civ 564** where the court added that when considering where the conduct had the prescribed effect the Tribunal must take into account the following factors:

" In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the prescribed effects under sub paragraph (1)(b), a Tribunal must consider both…..whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and ….whether it is reasonable for the conduct to be regarded as having that effect (the objective question). It must also…take into account all the other circumstances-subsection (4)(b)."

119. Although the Claimant contended that the comment made by the Respondent was *"if you can't do your job you shouldn't be here?"* The Tribunal found that wasn't not actually said. What the other staff were complaining of was that the Claimant was making, in their view, a mess of the roster and if she couldn't organise it, she shouldn't be doing it.

120. This was said in the context of the Respondent seeking to reach agreement with the Claimant as to the roster. Subjectively the Tribunal is not satisfied that the Claimant saw the comment as been related to her disability because the first thing she did was to throw the roster down and then become upset. She then told the Respondent to take the roster to "Duncan" at Choices and Rights to sort it out. The reference to "it" was the roster. The Claimant was sick of the comments made by other staff when she considered she was doing her best to devise a roster. It was this that prompted her to walk out.

121. Thus, the comment was not related to the Claimants protected characteristic of disability.

122. In the circumstances therefore, the complaint of harassment must be dismissed.

Working Time Regulations 1998

123. Regulations 6 sets out the limitations on the length of night work.

124. Briefly a night workers normal hours should not exceed an average of eight hours for every 24 hours, over a 17-week reference period.

125. A reference period, in the absence of any agreement, is each successive period of 17 weeks.

126. Regulation 6(5) sets out a formula to determine whether or not the regulations have been complied with.

127. An analysis of the roster (to the extent it was produced to the Tribunal) shows given the number of nights the Claimant worked the Regulations were never breached. It is therefore not necessary the Tribunal to consider in any detail the Respondent's argument that the Claimant was a special case within Regulation 21. Suffice to say the Regulations are based on the Working Time Directive and their principal aim is the health and safety of workers . It follows therefore that the special case exception must be examined narrowly. The Tribunal is not satisfied that it could be said that looking after Mr Nicholson was the provision of care in a similar establishment to a hospital (Regulation 21 (c) (i). That said the Tribunal was satisfied the Claimant did believe that the Regulations were breached because she was unaware of the need to look at the hours worked over a reference period.

128. Under section 45A (i) (b) of the Employment Rights Act 1996 a worker, which includes an employee, shall not be subjected to a detriment by any or any deliberate failure to act by an employer on the ground that the worker has refused or proposes to refuse to forego a right conferred under the Working Time Regulations. Further a worker shall not be subject to a detriment if the worker alleged that an employer has infringed a right under the Working Time Regulations. For this latter claim it does not matter whether the worker has the right or whether the right has been infringed provided the claim is made in good faith.

129. It follows that even though the Tribunal found the Claimant's interpretation of the Working Time Regulations 1998 was in error she still was potentially protected if she was subjected to a detriment.

130. At the core of this complaint is whether the Claimant was subject to a detriment by the Respondent and the Tribunal does not accept the Claimant was subjected to any detriment. The Claimant herself had great difficulty in seeking to formulate what she said the detriment was, other than she believed that she was being asked to work additional hours to force her out of employment. That was not the case; there were discussions between all care workers and the Respondent had raised with all care workers whether they could work additional hours. It was the last thing on the Respondents mind to force the Claimant out given she relied so heavily upon her . This is supported by the steps the Respondent took to try and speak both directly and indirectly to the Claimant to get her to return to work because she was a vital cog in the care package of Mr Nicholson.

131. In the circumstances therefore on the basis of the evidence presented to the Tribunal the Claimant's complaints must be dismissed in their entirety.

Employment Judge T R Smith

Date: 13 January 2021