



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4108529/2022

Held in Dundee on 26-27 June 2023

Employment Judge M Sangster
Tribunal Member W Canning
Tribunal Member P Fallow

Ms W Ciesielska

**Claimant
Represented by
Mr J Lawson
Solicitor**

Bertie's (Broughty Ferry) Limited

**Respondent
Represented by
Mr A Williams
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that:

1. The claimant's complaint of discrimination arising from disability succeeds. The respondent is ordered to pay the claimant the sum of **£10,727.67**, including interest, by way of compensation for injury to feelings.
2. The claimant's complaint of direct discrimination does not succeed and is dismissed.

REASONS

Introduction

1. The claimant presented complaints of disability discrimination, namely direct discrimination and discrimination arising from disability.
2. A case management preliminary hearing was held on 24 February 2022.

3. The respondent resisted the claim.
4. A joint bundle of documents, extending to 399 pages was lodged.
5. The claimant led in evidence and gave evidence on her own behalf.
- 5 6. The respondent led evidence from
 - a. Lindsey Bertie (**LB**), sole director of the respondent
 - b. Corrie Robertson (**CR**), employee of the respondent; and
 - 10 c. Keith Fettes (**KF**), partner of LB.

Issues to be determined

7. The complaints brought were discussed at the outset of the hearing. The issues to be determined by the Tribunal were as follows:

15 *Disability Status – s6 Equality Act 2010 (EqA)*

- a. Was the claimant a disabled person in accordance with the EqA at the relevant times as a result of her shoulder injury?

Direct discrimination because of disability - s13 EqA

- b. Did the respondent subject the claimant to less favourable treatment by dismissing her i.e. did the respondent treat the claimant less favourably than they would have treated others (hypothetical comparators) in not materially different circumstances?

- c. If so, was this because of the claimant's disability?

25 *Discrimination Arising from Disability – s15 EqA*

- d. Did the respondent know, or could the respondent reasonably have been expected to know, that the claimant had a disability?

- e. Was the claimant treated unfavourably by the respondent by the respondent dismissing her?
- f. If so, was this due to something arising in consequence her disability?
- g. If so, can the respondent show that that treatment was a proportionate means of achieving a legitimate aim?

Findings in Fact

8. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.

9. The respondent operates two barbers, one in Dundee and one in Broughty Ferry. They employ approximately 9 people. LB is the sole director of the respondent.

10. The claimant is a single mother with a dependent child.

11. The claimant was employed by the respondent as a barber from June 2019 to June 2021 and from 28 January to 3 August 2022. She did not receive a statement of employment particulars in respect of either period of employment.

12. In between the two periods of the claimant's employment with the respondent, the claimant injured and broke her shoulder. There was a delay in diagnosing that she had in fact broken her shoulder. By the time she returned to work for the respondent, it had been identified that the claimant would require to attend hospital for further investigations and would likely require surgery.

13. When she returned to work for the respondent, the claimant worked 5 days per week, between Monday and Saturday. There was flexibility as to which additional day could be taken off in that period.

14. Whilst, in the period from 28 January to 2 August 2022, the claimant was able to undertake her role as a barber, her shoulder injury caused her considerable pain. She was prescribed painkillers and took these on a daily basis. This

enabled her, for the most part, to get through her working day. She did however, on occasion, require to take breaks between clients and, on other occasions, for example on 30 May 2022, shoulder pain was a factor in her being unable to attend work.

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15. In the period from 28 January to 2 August 2022, when not at work and whenever possible, the claimant wore a brace on her arm, to restrict movement. Even when taking painkillers, her ability to undertake certain day-to-day activities was adversely impacted. The pain impacted her sleep. She struggled to carry heavy items, such as washing baskets or shopping bags, and required assistance to do so. She struggled to lift anything above her shoulder height. Therefore, getting items off shelves and washing and drying her hair was difficult. She required assistance cleaning her home, as hoovering and mopping were difficult with the repetitive strain. She also, on occasion, experienced difficulties when cooking and getting dressed. All of these day-to-day activities would have been significantly more difficult had the claimant not been taking prescription painkillers.

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16. The claimant's hospital appointments were generally accommodated by her swapping her day off. She attended for a hospital appointment on 17 May 2022 and was informed that she required to have two operations as soon as possible. She informed LB of this by text. LB asked the claimant how long she would be off work for. The claimant indicated that she had been informed she would require to be off for at least 6 months after the operation.

17. On 30 May 2022 the claimant sent a text to LB stating that she was unable to work that day as she had been unable to sleep the night before, her mood was low and her shoulder was too sore.

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18. On 13 June 2022, the claimant sent a text to LB stating that she was unable to work that day as her shoulder was too sore and she had been up most of the night. Later that day she sent a further text stating that she had been signed off for two weeks. She returned to work on 27 June 2022.

19. On 6 July 2022 the claimant received a letter from NHS Tayside indicating that her surgery was scheduled for 11 August 2022. She forwarded the letter to LB by text that day.
- 5 20. A few days later, LB stated to the claimant that her and KF had chatted and decided that it would be best for the claimant to be 'paid off' when she had her surgery, as she would receive more benefits during her absence that way and it would also be better for the respondent. The claimant did not want to leave her employment.
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21. On Monday 10 July 2022, LB sent a text message to the claimant stating *'How is your shoulder x I have moved you I ferry, I had to need Amanda back as she will go full time when you leave, will need to come talk to you about when your back sort out what's best to do x'*. The claimant responded *'I saw, and I don't really want be in ferry on Monday. And u do what is best for u. I can't leave job because of my opp, I'm totally understand but I have to think about my health and what is good for me too x'*. LB then responded stating *'I know but need to move you its only 1 day a week I moved too and reece, yeah agree with you your shoulder needs fixed, I feel like you think I am angry am not I understand it needs done, but I need to do what's best for shops too x'*
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22. On 27 July 2022, LB sent a further text to the claimant stating *'What date do you leave 11th your last day?x'*. The claimant responded *'I don't know Lindsey x'*. LB stated in response *'Did you not say it was 11th ?x'*. The claimant responded *'Yes, but I don't know I want to leave, I don't want to be paid off x'*. LB responded *'I would have to I told you this x'*. The claimant stated in response *'I know, if you have to just do it, I'm not leave my job b by myself, I wont be off because I'm lazy, u know about my shoulder before u take me back, so Lynsdey do what you have to but definitely it not my choice.'* The claimant sent a further text after that stating *'Just find good reason to paid me off Lynsdey Because I don't have any to leave xx'*. LB responded *'I told you when I talked to you in the shop, and when your shoulder is healed I will help you get a job with me or one of my barber friends x'*
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23. At 06:28 on 1 August 2022, the claimant sent a text to LB stating that she was unable to work that day.
24. At 08:28 on 2 August 2022, the claimant sent a text to LB stating 'Good morning Lynsdey I just called the doctor for sick notice because I'm not feeling well in my head just now, I have anxiety and feeling sick so I will take few days till nex Wednesday and probably that me off I'm really sorry about the time but I'm scared to go out from home. I'm sorry xx'. LB responded that she would call her later.
25. The claimant attended her GP later that day. She explained that her shoulder was very sore and that she was very anxious about the operation itself and also about who would look after her child and dog when she was in hospital. She stated that she had been informed by the hospital that she should isolate as much as possible in advance of her operation. She was provided with a Statement of Fitness for Work indicating that she was unfit to work for a period of 1 month because of shoulder pain. In the comments section, the GP stated '*having operation, needs to isolate beforehand and recover after*'.
26. There were a few missed calls between the claimant and LB that evening. They spoke for 2 minutes at 21:15. LB was angry when she made the call. She stated to the claimant that she was not happy. She stated to the claimant that she was 'fucking pissed off' with the claimant going off sick and would be paying her off from the following day. The claimant raised that she had a fit note, which she wanted to send to LB. LB stated that she did not want it, as the claimant's employment was not continuing.
27. On 3 August 2022 at 11:18 the claimant sent a text message to LB asking for confirmation of exactly from when she was paid off. LB responded 'Today'. There was some further discussion about whether LB could do so. LB maintained her position. There was no mention in the subsequent messages between LB and the claimant's employment had been terminated.

28. The claimant felt very sad and disappointed that her employment with the respondent ended. She felt that she had previously had a very good working relationship with LB. The change in that relationship was sudden and unexpected. She felt LB was a completely different person when she terminated the claimant's employment: she was mean and cold. Losing her job exacerbated the claimant's pre-existing mental health issues. She was suddenly without any income, struggling to pay bills and buy food. She required to borrow money for her and her daughter to survive. She felt embarrassed at having to explain to family and friends that she had been dismissed and having to ask for money as a result. The claimant consulted her GP on 1 November 2022, at which point she was having thoughts of self-harm and suicide.

29. The claimant has not worked since the termination of her employment with the respondent and is not currently looking for work. The claimant had her operation on 11 August 2022. With effect from 27 September 2022, she was assessed as qualifying for Adult Disability Payment, principally as a result of mental health issues. She receives £92.40 per week. The claimant had received universal credit payments while employed by the respondent. These were around £114.83 per month. These increased gradually following the termination of the claimant's employment. By 24 December 2022 she was receiving £385.87 per month. By 24 May 2023, this had increased to £420.45 per month.

Claimant's submissions

30. Mr Lawson, for the claimant, lodged a written submission, which he supplemented with a brief oral submission. In summary, he submitted that:
- a. The claimant's evidence should be preferred to that of the respondent. The respondent's credibility is undermined by the change in their position regarding the reason for dismissal and the evidence lodged.
 - b. The claimant's shoulder injury amounted to a disability.

- c. The claimant was dismissed because she was disabled. Her complaint of direct discrimination should accordingly be upheld.
- d. Alternatively, it is clear that the claimant was dismissed as a result of the fact that she required time off before and after her surgery. This arose as a result of her disability. No justification defence has been pled or argued – the respondent simply argued that the claimant’s absence was not the reason for her dismissal. The reasons for dismissal asserted by the respondent are not credible and should be rejected. The complaint of discrimination arising from disability should accordingly be upheld.
- e. In relation to remedy, the Tribunal should make an award for financial loss equivalent to 5 weeks’ pay, followed by SSP for 26 weeks. An award in the middle Vento band should also be made for injury to feelings.

Respondent’s submissions

31. Mr Williams gave a brief oral submission. In summary he submitted that:
- a. The evidence demonstrates that, while there had previously been a friendly and accommodating working relationship between the claimant and LB, there was an irretrievable breakdown in that relationship on 2 August 2022. During the telephone call between the claimant and LB that evening, LB indicated to the claimant that she understood that she was about to isolate, when there was no basis for her to do so. The claimant overreacted and became defensive and abusive towards LB. As a result of the claimant’s lies and her abusive conduct, LB decided, during the call, to terminate the claimant’s employment. This had nothing to do with the claimant’s shoulder injury, nor anything arising in consequence of this.
- b. The respondent does not concede disability status, principally on the basis that the respondent does not accept that the claimant had a substantial impairment. It is clear that she was able to continue working.

Relevant Law*Disability Status*

32. Section 6(1) EqA provides:

'A person (P) has a disability if —

- 5 (a) *P has a physical or mental impairment, and*
- (b) *the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.'*

10 33. Schedule 1 EqA contains supplementary provisions in relation to the determination of disability. Paragraph 2 states:

'The effect of an impairment is long-term if-

- (a) *it has lasted at least 12 months,*
- (b) *it is likely to last for at least 12 months, or*
- (c) *it is likely to last for the rest of the life of the person affected.'*

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34. Paragraph 5 of the schedule states:

'5(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if –

- 20 (a) *measures are being taken to treat or correct it; and*
- (b) *but for that, it would be likely to have that effect...*

35. The 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (the **Guidance**) does not itself impose legal

obligations, but the Tribunal must take it into account where relevant (Schedule one, Part two, paragraph 12 EqA).

5 36. The Guidance at paragraph B1 deals with the meaning of '*substantial adverse effect*' and states '*The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect.*'

10 37. Paragraphs B4 and B5 state that:

'An impairment might not have a substantial adverse effect on a person's ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effect on more than one activity, when taken together, could result in an overall substantial adverse effect.

15 *For example, a person whose impairment causes breathing difficulties may, as a result, experience minor effects on the ability to carry out a number of day-to-day activities such as getting washed and dressed, going for a walk or travelling on public transport. But taken together, the cumulative result would amount to a substantial adverse effect on his or her ability to carry out these normal day-to-day activities.'*

20 38. Paragraph B1 should be read in conjunction with Section D of the Guidance, which considers what is meant by '*normal day-to-day activities*'.

25 39. Paragraph D2 states that it is not possible to provide an exhaustive list of day-to-day activities.

40. Paragraph D3 Provides that:

'In general, day-to-day activities are things that people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking

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and travelling by various forms of transport, and taking part in social activities.'

41. D16 provides that normal day-to-day activities include activities that are required to maintain personal well-being. It provides that account should be taken of whether the effects of an impairment have an impact on whether the person is inclined to carry out or neglect basic functions such as eating, drinking, sleeping, or personal hygiene.
42. The Equality and Human Rights Commission: Code of Practice on Employment (2011), at Appendix 1, sets out further guidance on the meaning of disability. It states at paragraph 7 that '*There is no need for a person to establish a medically diagnosed cause for their impairment. What is important to consider is the effect of the impairment, not the cause.*'
43. At paragraph 16 it states '*Someone with impairment may be receiving medical or other treatment which alleviates or removes the effects (although not the impairment). In such cases, the treatment is ignored and the impairment is taken to have the effect it would have had without such treatment. This does not apply if the substantial adverse effects are not likely to occur even if the treatment stops (that is, the impairment has been cured).*'
44. In **Goodwin v Patent Office** [1999] IRLR 4, the EAT held that in cases where disability status is disputed, there are four essential questions which a Tribunal should consider separately and, where appropriate, sequentially. These are:
- a. Does the person have a physical or mental impairment?
 - b. Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?
 - c. Is that effect substantial?
 - d. Is that effect long-term?
45. The burden of proof is on a claimant to show that he or she satisfies the statutory definition of disability.

Direct Discrimination

46. Section 13(1) EqA provides that:

'A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.'

5 47. The basic question in a direct discrimination case is: what are the grounds or reasons for treatment complained of? In ***Amnesty International v Ahmed*** [2009] IRLR 884 the EAT recognised two different approaches from two House of Lords authorities - (i) in ***James v Eastleigh Borough Council*** [1990] IRLR 288 and (ii) in ***Nagaragan v London Regional Transport*** 10 [1999] IRLR 572. In some cases, such as ***James***, the grounds or reason for the treatment complained of is inherent in the act itself. In other cases, such as ***Nagaragan***, the act complained of is not inherently discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the alleged discriminator to 15 act in the way that he or she did. The intention is irrelevant once unlawful discrimination is made out. That approach was endorsed in ***R (on the application of E) v Governing Body of the Jewish Free School and another*** [2009] UKSC 15.

20 48. The Tribunal should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions), as explained in the Court of Appeal case of ***Anya v University of Oxford*** [2001] IRLR 377.

25 49. In ***Shamoon v Chief Constable of the RUC*** [2003] IRLR 285, a House of Lords authority, Lord Nichols said that it was not always necessary to adopt a sequential approach to the questions of whether the claimant had been treated less favourably than the comparator and, if so, why. Instead, they may wish to concentrate initially on why the claimant was treated as they were, leaving the less favourable treatment issue until after they have 30 decided on the reason why the claimant was treated as they were. What was the employer's conscious or subconscious reason for the treatment?

Was it because of a protected characteristic, or was it for some other reason?

Discrimination Arising from Disability

50. Section 15 EqA states:

- 5 ‘(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.
- 10 (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.’

Guidance on how this section should be applied was given by the EAT in ***Pnaiser v NHS England*** [2016] IRLR 170, EAT, paragraph 31. In that case it was highlighted that ‘arising in consequence of’ could describe a range of causal links and there may be more than one link. It is a question of fact whether something can properly be said to arise in consequence of disability. 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.

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51. There is no need for the alleged discriminator to know that the ‘something’ that causes the treatment arises in consequence of disability. The requirement for knowledge is of the disability only (***City of York Council v Grosset*** [2018] ICR 1492, CA).

25 52. The EAT held in ***Sheikholeslami v University of Edinburgh*** [2018] IRLR 1090 that:

‘the approach to s 15 Equality Act 2010 is now well established and not in dispute on this appeal. In short, this provision requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of

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B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence.'

53. The burden is on the respondent to prove objective justification. To be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so (**Homer v Chief Constable of West Yorkshire Police** [2012] IRLR 601).

Discussion & Decision

Observations on Evidence

54. The claimant gave two differing accounts for the cause of her shoulder injury during her evidence, accepting that the first was not correct. Whilst this was clearly inappropriate, the claimant candidly explained why she did not wish to provide the real reason initially. The Tribunal concluded that cause of the injury was irrelevant and had no reason to otherwise doubt the veracity of the claimant's evidence.

Disability Status

55. The Tribunal considered each of the questions posed in **Goodwin v Patent Office**, when considering whether the claimant was a disabled person as a result of a physical impairment and reached the following conclusions:

a. **Did the claimant have a physical impairment?** From 29 June 2021, when the claimant injured her shoulder, the claimant experienced persistent pain and restricted movement, particularly in moving her arms above shoulder height. The Tribunal accepted that this amounted to a physical impairment, from the date of the accident.

b. **Was there a substantial, adverse effect on the claimant's ability to carry out day-to-day activities?** From the date of her shoulder

injury until after her operation, the claimant experienced considerable pain. She was prescribed painkillers as a result. Even when taking this medication, her ability to undertake certain day-to-day activities was adversely impacted. The pain impacted her sleep. She struggled to carry heavy items, such as washing baskets or shopping bags, and required assistance to do so. She struggled to lift anything above her shoulder height. Therefore, getting items off shelves and washing and drying her hair was difficult. She required assistance cleaning her home, as hoovering and mopping were difficult with the repetitive strain. She also, on occasion, experienced difficulties when cooking and getting dressed. All of these day-to-day activities would have been significantly more difficult had the claimant not been taking prescription painkillers. The Tribunal concluded, as a result, that the claimant's physical impairment had an adverse effect on her ability to carry out normal day to day activities. The Tribunal also concluded that that effect was substantial, i.e. it was more than minor or trivial.

c. **Was that effect long term?** The claimant injured her shoulder on 29 June 2021. By 28 June 2022, the substantial adverse effects of the claimant's physical impairment had lasted for 12 months. The effect was accordingly, by 28 June 2022, long term.

56. For these reasons the Tribunal concluded that the claimant was a disabled person, as a result of a physical impairment, from 28 June 2022 onwards.

57. Given the information available to them, the Tribunal concluded that the respondent knew, or at very least ought to have known, that the claimant had a disability from that date. They were aware that the claimant had broken her shoulder and would require surgery. They were aware that she had ongoing pain such that she was unable to work on occasion. They were aware that she had injured her shoulder in June 2021 and her surgery was to be over a year later, in August 2022. Even if they were not aware of the precise impact on the claimant's ability to undertake day to day activities, this information could have been gleaned from minimal discussion with the claimant. The

respondent ought reasonably to have taken this step, given the other information available to them.

Discrimination Arising from Disability

58. In relation to the complaint of discrimination arising from disability, the Tribunal started by referring to section 15 EqA.
59. Section 15(2) states that section 15(1) will not apply if it the respondent shows that they did not know, and could not reasonably have been expected to know, the claimant had the disability.
60. The Tribunal found that the claimant was a disabled person at the material time. As set out in paragraph 57 above, the Tribunal concluded that the respondent, at very least, ought to have been aware of this. In light of the fact that the respondent has not demonstrated that they did not know, and could not reasonably have been expected to know, that the claimant had a disability, the Tribunal proceeded on the basis that the provisions of section 15(1) applied.
61. The Tribunal considered the guidance in *Pnaiser*. The first question is whether the claimant was treated unfavourably. In determining this, no question of comparison arises. The EHRC Employment Code indicates that unfavourable treatment is treated synonymously with disadvantage. It is something about which a reasonable person would complain. Taking those into account, the Tribunal found that the claimant was dismissed and that this amounted to unfavourable treatment.
62. The next questions concern the reason for the alleged treatment. The Tribunal firstly require to determine what caused the treatment, focusing on the respondent's conscious or unconscious thought process. If there is more than one reason, then the reason allegedly arising from disability need only be a significant (in the sense of more than trivial) influence on the unfavourable treatment, it need not be the main or sole reason. The Tribunal must then determine whether the reason for any unfavourable treatment established was something 'arising in consequence of' the claimant's disability. It was held in *Pnaiser* that the expression 'arising in consequence

of' could describe a range of causal links. More than one relevant consequence of the disability may require consideration and whether something can properly be said to arise in consequence of disability is a question of fact in each case. It is an objective question, unrelated to the subjective thought processes of the respondent, and there is no requirement that the respondent should be aware that the reason for treatment arose in consequence of disability.

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63. In evidence the respondent's position was that the principal reason the claimant was dismissed was her conduct during the call on the evening of 2 August 2022. The Tribunal did not accept this and preferred the evidence of the claimant in relation to what occurred during the call on the evening of 2 August 2022. LB accepted that she was angry when she called the claimant on 2 August 2022. She stated that the reason she was angry was that she had heard that the claimant was intending to go off sick to isolate prior to her operation and understood that the claimant calling in sick on 1 & 2 August 2022 was her taking action to achieve that. She stated that she opened the call by stating that she had heard that the claimant was about to go off sick and that the claimant was immediately abusive and aggressive towards her. She stated that it was this that caused her to terminate the claimant's employment, as she could no longer employ someone who had spoken to her in that manner. She was not asked about what the claimant had said to her, but stated that on a scale of 1-5 (with 1 being nothing and 5 being a fist fight), she would rank the claimant's conduct during the call as 4 or 5. LB did not however give any evidence as to what the claimant said to her during the call, how the claimant was abusive to her or precisely why she felt the claimant was aggressive.

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64. The Tribunal also felt that it was particularly significant that, while the claimant stated her position in relation to the 2 August 2022 call in her ET1, the respondent did not dispute that in their ET3. Further, they did not reference the call at all as a reason for the claimant's dismissal in either their ET3 or in the agenda document completed in advance of the preliminary hearing. In those documents, the respondent stated that the claimant was dismissed for lying. The first reference to the claimant being dismissed for her conduct during

the call appears to have been in evidence at the final hearing. If the claimant had been aggressive and abusive, to the extent that LB felt that the claimant required to be immediately dismissed as a result, then the Tribunal felt LB would have given evidence in relation to precisely what was said by the claimant, and this would have been mentioned in the ET3 and agenda as a reason for dismissal.

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65. For the avoidance of doubt, the Tribunal did not accept LB's assertion that the conduct of the call was not referenced in the ET3 or agenda due to the fact that LB has dyslexia and finds it difficult to express herself in writing, given KF's subsequent evidence that he prepared both the ET3 and agenda.

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66. As a result, the Tribunal concluded that the claimant was not dismissed by the respondent for her conduct during the call.

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67. The respondent asserted in their ET3 and agenda that the claimant was dismissed because she had lied. While not relied upon as the principal reason for dismissal at the final hearing, and indeed was only referenced in passing, it was not accepted by the Tribunal that the claimant was dismissed for lying. There was no evidence that the claimant had lied, and no basis upon which the respondent could believe that she had done so. The claimant had been unable to work and there was a medical certificate to support that fact.

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68. The Tribunal accepted the claimant's unchallenged evidence that after she informed LB of the date of her surgery, LB told her that LB and KF had decided it was better for everyone if the claimant was paid off, before her surgery. This was also supported by the text messages subsequently sent by LB, as referenced in paragraphs 21 & 22 above. The Tribunal found the text messages to be compelling evidence that the respondent's intention was that the claimant should not remain in employment when she was unable to work due to her shoulder surgery. The Tribunal accepted the claimant's evidence as to what occurred during the telephone call on the evening of 2 August 2022. The Tribunal concluded that, when LB made the call to the claimant on 2 August 2022, she was angry that the claimant had gone off sick and the fact that it was clear she would not be returning before her surgery.

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69. Taking into account the content of the call on 2 August 2022, the fact that LB had informed the claimant that it would be better for everyone if her employment terminated when she had her surgery and the terms of the text messages, the Tribunal concluded that the claimant was dismissed by LB as
5 a result of the fact that she required to have a lengthy period of absence and LB did not want her to remain in employment during that period. The absence arose as a result of the requirement to have surgery, which arose as a result of the claimant's disability.

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70. The Tribunal accordingly accepted that the claimant was dismissed as a result of something which arose in consequence of her disability.

71. The respondent did not argue or assert that dismissal of the claimant, if it was
15 found to be because of something arising in consequence of disability, was justified. The Tribunal accordingly did not require to consider whether the unfavourable treatment complained of, namely the claimant's dismissal, was a proportionate means of achieving a legitimate aim, for the purposes of section 15(1)(b) EqA.

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72. The claimant's dismissal accordingly amounted to discrimination arising from disability.

Direct Discrimination

73. The Tribunal considered the allegation of direct discrimination, considering
25 whether the alleged treatment occurred, whether it amounted to less favourable treatment and if so, what was the reason for that treatment: was it because of disability?

74. The claimant relied solely on her dismissal as an act of less favourable
30 treatment amounting to direct disability discrimination. The Tribunal noted that it was accepted that the claimant was dismissed. The alleged treatment was accordingly established.

75. The Tribunal then considered the reason why the respondent dismissed the claimant. As set out above, the Tribunal concluded that the reason for dismissal was a result of something arising from that disability, namely the claimant's absence. The reason for her dismissal was accordingly not because of the disability itself.

76. Given that the Tribunal were able to make clear findings in relation to why the claimant was dismissed, it was not necessary to determine the remaining question of whether the treatment amounted to less favourable treatment. The complaint of direct discrimination accordingly does not succeed.

Remedy

77. Having found that the claimant's dismissal amounted to discrimination arising from disability, the Tribunal moved on to consider remedy.

Financial Loss

78. The claimant's employment terminated on 3 August 2022. Had she remained in employment, she would have been entitled to statutory sick pay only, for a maximum of 28 weeks. At that time, the relevant rate for statutory sick pay was £99.35 per week. The claimant has received more than that since the termination of her employment, in respect of increased universal credit payments and Adult Disability Payments. Given this, the Tribunal concluded that the claimant had not demonstrated a financial loss as a result of the termination of her employment and it was not therefore just and equitable to make any award for financial loss.

Injury to Feelings

79. The Claimant gave oral evidence in relation to injury to feelings. The Tribunal's findings in relation to this are set out at paragraph 28 above.

80. In the circumstances, the Tribunal was satisfied that an award at the lower of the middle Vento band was appropriate, namely £10,000. Interest of £727.67, from 2 August 2022 to date (332 days @ 8%) is also payable.

5 **Employment Judge: M Sangster**
Date of Judgment: 30 June 2023
Date sent to parties: 30 June 2023