



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4101986/2020

**Hearing held in Glasgow on 4 and 5 October 2021
and remotely 22 October 2021 and 3 November 2021**

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**Employment Judge S MacLean
Tribunal Member L Taylor
Tribunal Member P McCall**

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Mr S Burnett

**Claimant
In Person**

Malcolm Allan Limited

**Respondent
Represented by:
Mr M O'Carroll, Advocate
Instructed by:
Mr R White, Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claimant's discrimination claims against the respondent under sections 15 and 20 of the Equality Act 2010 are dismissed.

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REASONS

Introduction

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1. This claim is combined with case number 4101988/2020 which is a disability discrimination claim by the claimant against DC Recruitment Limited trading as Connect Appointments. Case number 4101988/2020 is sisted pending an appeal to the Employment Appeal Tribunal.

2. At a Preliminary Hearing on 22 June 2021 Employment Judge Whitcombe ordered that the claims against each respondent would proceed at separate hearings. Although the Combining Order was not revoked as either respondent may have an interest in the proceedings against the other, DC Recruitment Limited was not present or represented at the final hearing. This judgment relates to the final hearing to determine all of the claims between the claimant and the respondent, Allan Malcolm Limited and, if appropriate, remedy.
3. In the claim form the claimant asserts that he has a disability in terms of section 6 of the Equality Act 2010 (the EqA). On 30 September 2019 the claimant started with the respondent working through an agency (Connect Appointments). While working for the respondent the claimant had various absences. Due to the claimant's poor attendance his work assignment was terminated on 10 December 2019. The claimant complains that he was treated unfavourably when his assignment with the respondent was terminated. The claimant says that this arose from his disability. The claimant also says that the respondent failed in its duty to make reasonable adjustments. He seeks compensation.
4. In the response the respondent concedes that the claimant was a disabled person between 13 September 2019 and 10 December 2019. The respondent admits that the termination of the claimant's assignment was unfavourable treatment, and that absence was the reason for termination. It disputes that all of that absence arose from disability. The respondent maintains that the treatment was a proportionate means of achieving a legitimate aim: the successful manufacturing of their product in order to meet customer demand and the respondent did not and could not reasonably have been expected to know that the claimant had a disability. In relation to the reasonable adjustments claim the respondent accepts that there was a provision, criterion or practice (PCP) that agency workers would require to work on all aspects of the production line. The respondent also accepts that the requirement to be on shift at 6:30am was a PCP which could place the claimant at a substantial

disadvantage. The claimant also asserted that there was PCP regarding shifts running Monday to Friday and this was shift to which the claimant was specifically assigned.

5. At the final hearing which was conducted in person the witnesses provided witness statements which were treated as their evidence in chief. The witnesses were cross-examined and re-examined in the usual way. The claimant gave evidence on his own account. For the respondent the Tribunal heard evidence from Nicola Morrison, Bakery Supervisor and Gordon Watson, formally Bakery Supervisor now Bakery Assistant. The Tribunal was also referred to a joint set of productions provided by the parties.
6. Two days were allocated for the final hearing. Unfortunately, it was not possible in the time allocated to hear submissions. Given that the claimant was scheduled to commence new employment the following week it was agreed that the final hearing would be reconvened on 22 October 2021 to be conducted remotely by Cloud Video Platform (CVP). The claimant expressed some reservations about this but advised that he would ask his daughter to assist him with the technology. It was also agreed that Mr O'Carroll's submissions for the respondent would be sent to the claimant by 13 October 2021. The claimant indicated that he would provide his response in writing but also wished to address the Tribunal.
7. On 22 October 2021 the Tribunal was advised that the claimant's daughter had been unwell, and he had been unable to set up the necessary equipment for a remote hearing by CVP. Following discussion with the respondent it was agreed that the matter would be continued until 3 November 2021.
8. In the meantime, the claimant provided his written submissions to the respondent and the Tribunal on 1 November 2021 and advised that he preferred not to address the Tribunal orally. In the circumstances the respondent replied to the claimant's submissions in writing on 2 November 2021. The Tribunal met privately on 3 November 2021 to read and consider the submissions and reach a decision.

9. The Tribunal has set out its findings in fact as found that are essential to its reasons or to its understanding of the important parts of the evidence. The Tribunal has carefully considered its deliberations during its submissions and has dealt with the points made while setting out the facts, the law and the application of the law to those facts. It should not be taken that any point is overlooked or facts ignored because the fact or submission is not part of the reasons in the way it was presented to the Tribunal by a party.

The Issues

10. The issues for the Tribunal were as follows:

10 *Duty to make reasonable adjustments (section 20)*

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

12. The respondent accepts that it had the following PCPs.

- 15 a. Requiring agency workers to work on all aspects of the production line.
b. Having a specified shift start time.
c. Having a specified shift pattern (Monday to Friday).

- 20 13. Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability in that the claimant was unable to undertake the roles on the production line; the claimant's medication did not have time to take affect and he needed to get up early to avoid the use of public transport; and the claimant was unable to attend the medical appointments.

- 25 14. Did the respondent know, or could it reasonably have expected to know that the claimant was likely to be placed at a disadvantage?

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

- a. Removing him from certain tasks on the production line.
 - b. Allowing him to start his shift later.
 - c. Allowing him to work a Tuesday to Saturday shift.
16. Was it reasonable for the respondent to have taken those steps and when?
- 5 17. Did the respondent fail to take those steps?

Discrimination arising from disability (section 15)

18. Disability having been conceded by the respondent and the respondent admitting that termination of the assignment was unfavourable treatment did that arise in consequence of the claimant's disability?
- 10 19. Were the claimant's absences between 30 September 2019 and 10 December 2019 in consequence of his disability? Was the termination of the assignment because of that sickness absence?
20. Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aim was the successful manufacturing of their product in order to meet customer demand. The Tribunal will decide in particular:
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- a. Was the treatment an appropriate and reasonably necessary way to achieve those aims.
 - b. Could something less discriminatory have been done instead.
 - 20 c. How should the needs of the claimant and the respondent be balanced?
21. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

Remedy

- 25 22. What financial losses has the discrimination caused the claimant?

23. Has the claimant taken the reasonable steps replace loss of earnings? If not for what period of loss should the claimant be compensated?

The Law

24. Under section 15(1) of the EqA, a person discriminates against a disabled person if (a) they treat the disabled person unfavourably because of something arising in consequence of their disability, (b) the person cannot show that the treatment is a proportionate means of achieving a legitimate aim.
25. Section 15(2) provides that subsection (1) does not apply if the person shows that they did not know, and could not reasonably have been expected to know, that the disabled person had the disability.
26. Section 20 of EqA imposes the duty to make reasonable adjustments. The duty comprises three requirements. Only the first under section 20(3) is relevant in this case: where a provision, criterion or practice of the respondent 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.
27. Section 21 EqA provides: (1) A failure to comply with the requirement is a failure to comply with a duty to make reasonable adjustments; (2) A person discriminates against a disabled person if they fail to comply with that duty in relation to that person.
28. Section 41(4) EqA provides that a duty to make reasonable adjustments applies to a principal as well as to the employer of a contract worker.
29. Paragraph 20 of Schedule 8 EqA provides that a person is not subject to a duty to make reasonable adjustments if they not know, and could not reasonably be expected to know that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.”

Findings and Fact

30. The Tribunal found the followings facts material to the issues established.
31. On 7 June 2019 the claimant signed a contract for services with Connect Appointments in terms of which Connect Appointments would endeavour to obtain suitable assignment services for the claimant to perform. In a questionnaire completed at that time the claimant ticked “no” to the question, “Do you have any health issues of disability relevant to the position or role you seek?”. The claimant also indicated that he could travel to Larbert for a 6am start but not a 1pm start.
32. Around 30 September 2019 the claimant was assigned along with other agency staff to work for the respondent. The shift pattern was Monday to Friday 6:30am to 3:30 pm on all aspects of the packing line. Work was guaranteed until 13 December 2019 with the possibility of the assignment being extended.
33. The claimant has a mental impairment. He has a depressive disorder for a number of years and takes medication. The respondent conceded that he is a disabled person at the relevant time.
34. The claimant completed the respondent’s pre-employment health questionnaire on 27 September 2019. The claimant did not disclose that he had a disability. During the induction the claimant received an induction manual. He was told that the respondent should be informed of any medical condition that may affect his work on site.
35. All agency workers assigned to the respondent normally work the Monday to Friday shift 6:30am to 3:30 pm. Employees of the respondent normally work the Tuesday to Friday shift 6:30am to 4:00pm and half day shift on a Saturday.
36. The claimant worked on the production line. He reported to two supervisors: Gordon Watson and Nicola Morrison. The supervisors’ main roles and responsibilities include making sure that orders are made up and the staff are

doing their job properly. They are also work on the production line with the employees that they supervise. Allan Buchanan was the bakery manager to whom the supervisors reported.

5 37. The claimant was a good worker and well regarded by his colleagues. His work on the production line involved packing, wrapping, printing labels and occasionally labelling. Workers on the production line rotated tasks and often swap duties between themselves. There is a degree of flexibility provided that all areas are covered.

10 38. On 9 October 2019 the claimant had an authorised absence to attend a family funeral.

39. Mr Watson sent the claimant home on 18 October 2019 as he was unwell with a stomach issue. The claimant remained absent from work on 21 October 2019.

15 40. During the week commencing 4 November 2019 the claimant worked a Tuesday to Saturday shift.

20 41. On 9 November 2019 the claimant's partner was hospitalised. Her condition was serious. The claimant was traumatised as the hospital visit brought back memories of a family tragedy several years earlier. The claimant had an anxiety attack in the hospital car park. His pre-existing depression also worsened.

25 42. The claimant planned to go to work on 11 November 2019 but had not slept well and was anxious about having a panic attack in front of his colleagues. He telephoned the respondent's receptionist but could not explain his condition over the telephone. He said that his partner had been taken into hospital at the weekend. The claimant was absent from work for five days.

43. The claimant decided that on his return to work he would tell his supervisors the real reason for his absence. He returned on 18 November 2019.

44. While working with Ms Morrison on the production line on 18 November 2019 she asked the claimant how his partner was recovering. The claimant said she was better. He explained that the reason he was absent was that he suffered from depression. He talked about his family tragedy and how his depression worsened around the anniversary (December). Ms Morrison shared her experience of family members with depression and how people deal with the condition differently.
45. On 20 November 2019 the claimant left work at around 8am as he received a message at that his partner had accidentally overdosed.
46. The claimant contacted the respondent on 21 November 2019 to report his absence. He indicated that he would return the following day but did not do so.
47. On 24 November 2019 the claimant sent a text message to Connect Appointments advising that he had consulted his doctor as he has suffered from depression for many years, but it had recently got worse. The claimant said that he had explained this to his supervisor as he knew it was a disability. He was on new medication and would not be back at work until 26 November 2019. He asked Connect Appointments to explain the position to the respondent as he did not feel he could discuss it on the telephone with the respondent's receptionist.
48. The claimant tried to arrange a consultation with his doctor. He was informed that he would need to request the appointment a week in advance. The claimant returned to work on 26 November 2019.
49. That week Mr Watson stopped to pick up the claimant on the way to work which was a regular occurrence. Mr Watson asked how things were with the claimant. Mr Watson was already aware of the claimant's family tragedy. The claimant said that he had explained to Ms Morrison that he suffered from depression and anxiety and that was the reason for his absence. He had suffered for years on his last job. He said that it was best to tell his supervisors for legal reasons.

50. The claimant believed that he had informed his supervisors of his depression and disability. He felt relieved having done so. He thought that they would advise human resources. They did not do so.
51. Around 27 November 2019 the claimant asked Mr Watson if he could swap his shift to Tuesday to Saturday. Mr Watson indicated that as he done it before he did not anticipate any problem, but he would speak to his boss. Mr Watson later advised that having spoken to his boss the claimant was to stay on the same shift.
52. The claimant was becoming increasingly concerned about panic attacks and could not get the bus.
53. The claimant was anxious about operating the wrapping machine. It was not working properly so the claimant asked for assistance from one of the respondent's employees. Said she was too busy and asked Mr Watson to assist the clamant. Mr Watson fixed the wrapping machine and started doing the wrapping. Mr Watson was frustrated with the claimant saying that it was not rocket science. Mr Watson said that the claimant only needed to concentrate. The claimant was embarrassed.
54. The respondent need four agency workers from 14 December 2019 to 31 December 2019. On 28 November 2019 the respondent informed Connect Appointments that it wanted to keep four workers including the claimant up to 31 December 2019. Connect Appointments advised the claimant of this.
55. One morning the claimant was having a particular difficulty operating the wrapping machine. Mr Watson said that the production line was falling behind and starting wrapping pies. The claimant indicated that he was not having the best of times and suggested that someone who was better should operate the wrapping machine. Mr Watson indicated that everyone had to have their turn. At lunchtime the claimant went to toilet and was upset. The claimant did not know what to do next.

56. On 30 Saturday November 2019 the claimant did not attend work. His depression was getting worse and he started taking stronger medication. The side effects were causing his work to suffer as he could not concentrate. He was anxious about having a panic attack and being emotional in front of colleagues. He also felt that he was making mistakes daily particularly when working on the wrapping machine. The claimant was having trouble focusing his mind and his performance was getting worse.
57. By early December 2019 the claimant had reached his lowest ebb. He spoke to the Samaritans and confided in his daughter and sister who lived with him alternative nights to keep an eye on him.
58. The claimant could not go to work on 2 December 2019 the claimant telephoned the GMB Helpline and was advised to contact Connect Appointments and ask for help. This is what he did.
59. There was a large gas leak in the claimant's area and he had been informed to stay at home until the gas supply was cut off. The claimant used this as excuse not to go to work. The claimant could not face anyone and was anxious about what would happen. He contacted Mr Watson on Facebook messenger. The claimant remained absent from work.
60. On 6 December 2019 the claimant contacted Connect Appointments explaining about his disability and that this was his second absence. He asked for confirmation that he was to return to the respondent. He was told to do so.
61. On 8 December 2019 the claimant texted Connect Appointments asking if they could contact the respondent for permission to work a Tuesday to Saturday shift. The claimant did not receive a response.
62. On 8 December 2019 at 21:51 the claimant messaged Mr Watson to explain that he had had a bad week "depression wise"; had been given stronger medication causing quite bad side effects. He said that he had told Connect

Appointments. The claimant asked if could go back on a Tuesday to Saturday shift that week.

63. Connect Appointments responded on 9 December 2019 at 07:39 confirming that the claimant should return on 10 December 2019. At 08:59 on 9
5 December 2019 Mr Watson replied that should be fine. The claimant responded that he would return on 10 December 2019.

64. The claimant knew that he had been taken on to deal with the Christmas orders. On 10 December 2019 the claimant messaged Mr Watson at 7am to say that he was still struggling with anxiety. If he was not at work the following
10 day the claimant would contact Connect Appointments to see if the respondent wanted someone else in his place.

65. On 10 December 2019 the claimant received a telephone call from Connect Appointments advising that the respondent did not want him to return because he had too many absences.

15 66. The claimant's doctor issued a statement of fitness to work dated 12 December 2019 certifying that the claimant was not fit to work between 2 December 2019 and 17 December 2019 because of anxiety. A further fit note extended the period of unfitness to work due to depression and anxiety from 2 December 2019 to 19 January 2020.

20 *Observations on Witness and Conflict of Evidence*

67. In the Tribunal's view the claimant gave his evidence with dignity and honestly based on his recollection of events. The Tribunal considered that his recollection of dates was unreliable. The Tribunal did not feel that the claimant was trying to mislead the Tribunal but rather due to his health at the time his
25 recollection of time was confused. The Tribunal therefore relied on the contemporaneous correspondence when making findings about the timeline. The Tribunal's impression was that the claimant found it easier and was better at expressing himself in writing than orally.

68. The Tribunal considered that Ms Morrison was a credible witness. She did not have any animosity towards the claimant and considered him to be a good worker. Her recall of the fine detail of her conversations with the claimant was not good. The Tribunal considered that this was understandable given that the events took place almost two years ago. When provided with more context she would helpfully provide where she could a fuller explanation. For example, she confirmed that she had the conversation about the temperature of the pies and why this was appropriate. She readily accepted that nonetheless the claimant might have been anxious about this instruction.

69. By contrast the Tribunal considered that Mr Watson was evasive and on some material findings the Tribunal felt that he was unreliable. The Tribunal acknowledged that these events took place some time ago but nonetheless felt that some of Mr Watson's evidence was unconvincing.

70. Turning to conflicting evidence, the claimant said that on 18 November 2019 he told Ms Morrison that he had suffered from depression and anxiety. Even on the claimant's evidence it was a wide-ranging discussion. Ms Morrison's evidence was that she recalled the claimant telling her that he suffered from depression, explaining about his brother and how the claimant's condition could get bad around the anniversary. The Tribunal had no doubt that this would have been a difficult conversation for the claimant, and he may have been trying to tell Ms Morrison that he had a disability. However, while that might have been his intention the Tribunal considered that it was more likely that he did not do so. Ms Morrison struck the Tribunal as an able and compassionate colleague who would have understood if the conversation was conveying information on which it was expected that she should take action. The Tribunal considered that had the claimant said that he had a disability she would have recalled this.

71. There was disputed evidence about whether the claimant told Mr Watson about his condition. The claimant said that he told Mr Watson that he had spoken to Ms Morrison. He suffered from depression and anxiety and that was why he had been off. He suffered for years in his last job. He thought it

best to let Mr Watson know for legal reasons. Mr Watson said that he did not remember the claimant telling him that he had depression and anxiety. He did recall the claimant mentioning that he got a wee bit down because of the situation involving his brother and it was tough because of the anniversary.
5 Mr Watson said that the claimant did not say that he had a disability.

72. The Tribunal accepted that when making the claim the claimant asserted that this conversation with Mr Watson took place the following day (19 November 2019) when in fact Mr Watson was on annual leave that week. As explained the Tribunal considered that the claimant was genuinely mixed up with the dates. The Tribunal considered that it was highly likely that the claimant
10 confided in Mr Watson during a car journey in around 26 November 2019. In the Tribunal's view the claimant's evidence was genuine and plausible. Mr Watson knew about the situation with the claimant's brother. The claimant had already spoken to Ms Morrison about his absence and informed Connect
15 Appointments of this. The claimant wanted to be frank with Mr Watson with whom he travelled from time to time and liaised about shifts. The Tribunal also considered that the claimant's message to Mr Watson on 8 December 2019 inferred that they had already discussed the claimant having depression and being on medication. The Tribunal did not consider that that the claimant
20 actually said that he was a disabled person.

73. In evidence the claimant conceded that the only reasonable adjustment which he sought was in relation to the wrapping machine and that on one occasion he asked to be removed from the duty. Mr Watson could not remember the request. The Tribunal accepted that Mr Watson had no recollection but
25 considered that it was likely that the claimant did make the request as he found the task challenging and perceived that he was worse than others. The Tribunal felt that the wrapping machine was challenging and needed practice. While the claimant perceived that he was worse than others the Tribunal felt that was not necessarily the case as Ms Morrison and Mr Watson considered
30 that he was a good worker and should be retain until the end of the year.

74. In his written submissions, the claimant claims to have requested to be moved from the wrapping machine on two occasions. That contradicted his evidence. However, the Tribunal accepted that there were two occasion where the Mr Watson intervened while the claimant was working on the wrapping machine but only one occasion where the claimant asked to be removed.
75. The claimant said that if he started later his cousin could give him a lift to work and he would not be so tired. He accepted that he did not request a change of start time. Ms Morrison gave evidence that she had a later start time. Neither supervisor was aware that the claimant had any difficulty attending work for the scheduled start time. The Tribunal believed that the claimant was worried about getting to work on time and having a panic attack on public transport. However, when he attended work he did so on time.
76. With regards to a reasonable adjustment to working patterns the claimant agreed in evidence that on the week commencing 4 November 2020 and the week commencing 9 December 2020 his shifts were changed from a Monday to Friday shift pattern, to a Tuesday to Saturday shift pattern. This was also supported by the production of the claimant's timesheets. On the week commencing 25 November 2020 the claimant did not work Monday 25 November 2020 and Saturday 30 November 2020 is noted by the respondent as reason for absence unknown. The Tribunal noted that the claimant had informed Connect Appointments that he would not return until the Tuesday (26 November 2020). It was not clear from the evidence whether the claimant was absent on 25 November 2020 or it had been agreed that the claimant would work a Tuesday to Saturday shift that week.
77. The claimant claims that it would have been a reasonable adjustment to move his shifts to a Tuesday to Saturday shift pattern. In his submissions the claimant stated that the request for his shifts to move to a Tuesday to Saturday shift pattern was refused by Mr Watson's boss. On the evidence before the Tribunal agency workers usually worked the Monday to Friday shift. The requests to change had mostly been granted. It may have been that the claimant wanted this to be a permanent arrangement but, on the

claimant's evidence he admitted that that he did not request this change as a reasonable adjustment.

78. The Tribunal considered that as his assignment had been extended the claimant was well aware that the respondent required agency workers up to 31 December 2019 and his continued absence would result in the respondent asking for another worker to attend.

Submissions

The respondent's submissions

79. Mr O'Carroll referred the Tribunal to *A Ltd v Z [2020] ICR 199* in relation to the issue of knowledge of the respondent. He referred to the first medical fit note which disclosed a mental illness was issued after the claimant's assignment was terminated. All the previous absences did not reveal anything that might indicate a mental illness as a cause of the claimant's absence. Further there was an element of concealment as the claimant used the gas leak as the reason for his absence although he said the real reason was his mental health. There was no duty for the respondent to investigate further.

80. If the Tribunal did not agree that the respondent benefited from the defence of no knowledge Mr O'Carroll said that on the evidence the claimant considered that his job was at an end on 10 December 2019 as he was suggesting to Mr Watson that he should find a permanent replacement for him until the end of his placement (31 December 2019). He had decided to give up at that point. It was submitted that it had to be questioned whether the claimant had received any unfavourable treatment. Mr O'Carroll submitted that he had not.

81. If the Tribunal did not agree that it had to decide whether the respondent's treatment of the claimant was a proportionate means of achieving a legitimate aim. Agency staff are taken on every year to cover the Christmas period. The respondent had a legitimate aim of getting their products out of the factory

and delivered to customers to meet the demand. When faced with the claimant's frequent and sometimes prolonged absence the respondent was unable to meet this aim. It therefore requested that he did not return so that he could be replace by another worker. The claimant candidly accepted this in evidence. Mr O'Carroll invited the Tribunal to find that the justification defence had been made out on the evidence.

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82. In relation to the reasonable adjustment claim, Mr O'Carroll refer to his earlier submissions on knowledge of the disability, taking it at its highest the respondent did not have any actual or constructive knowledge of the claimant's disability before 25 November 2019 and his last day at work was 29 November 2019. The knowledge exemption for reasonable adjustments is broader because it in addition to having knowledge or constructive knowledge of the claimant's disability it must also have knowledge or constructive knowledge of the alleged substantial disadvantage. The Tribunal was referred to *Wilcox v Birmingham CAB Services* UKEAT/0293/10. The second part only comes onto play if the first part is satisfied. Mr O'Carroll argued that both or the second part were not satisfied.

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83. If the Tribunal did not agree, the claimant did not request any reasonable adjustments.

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84. Wrapping was a tricky job. The claimant was no worse at the wrapping machine than anyone else. The supervisors were unaware that the claimant required to be moved from the wrapping machine. He was not disadvantaged in relation to a non-disabled worker. Accordingly, the adjustment was not necessary in relation to preventing any substantial disadvantage.

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85. In relation to start time, the claimant accepted in evidence that he did not request a change to his start time to allow his medication to take effect or to obtain a lift to work from a family member. The respondent was flexible but there was no request. Mr Watson gave a lift to the claimant on a number of occasions even in the absence of this request.

86. Turning to the shift pattern, there was no request for a permanent shift pattern be instituted for the claimant to overcome any disadvantage arising from disability. The reasonable adjustment was not necessary to avoid any disadvantage put forward by the claimant. The claimant's shift normally ended at 3.30pm each day. In addition, he had early finish time. There was no disadvantage caused by the claimant's shift patterns. Even if unchanged he could make appointments with doctors. The shift pattern was applied flexibly and could work Tuesday to Friday shifts when requested.

87. The claimant's wage loss is for the period 10 to 31 December 2019. The claimant was unfit for work during this period. He accepted that he was not entitled to any wage loss. He would only have been provided with SSP had he remained at work from 10 December 2019 until the end of the assignment on 31 December 2019.

88. If the Tribunal upholds the discrimination claim, Mr O'Carroll suggested that case would properly be classed in the lower band of Vento (£900 to £9,100). The claimant has not provided medical evidence about the effect of any alleged discrimination on him.

The claimant's submissions

89. The claimant thought he was following the EqA. He understood that he could approach his line managers informally to explain the situation. That was why when speaking to them he referred to telling them about his depression for legal reasons.

90. The claimant accepted that he was wrong about the date as he could not have spoken to Mr Watson the following day, as he was on holiday. The conversation took place. In his mind he still thought it was the next day. And had he not done so he could easily have made up a different time.

91. The claimant expected that the supervisors would inform Human Resources. And there would be a meeting to discuss the way forward. This did not happen. The claimant believed he had been ignored. It had an adverse effect

on his state of mind. The claimant also contacted Connect Appointments, referring to his discussion with his supervisors in the hope that they would intervene. Neither supervisor knew the law. They did not contact Human Resources.

5 92. The claimant asked to be removed from the wrapping machine because he was having difficulty. This was refused. Mr Watson was agitated as the claimant was not going fast enough and it was his responsibility.

93. The claimant asked to change his shift to Tuesday to Saturday. Mr Watson claimed this did not happen. It was Mr Watson's manager who made this
10 decision. The claimant believed that Mr Watson would have agreed but the manager refused. The claimant believed that this was because he spent a long time making up the schedule and was under pressure. The claimant was denied this adjustment.

94. When the claimant told Mr Watson that he was on new medication for
15 depression which made him tired in the morning, the claimant submitted that he could get a lift from his cousin, but it would mean starting and finishing a bit later. The claimant said he did not ask outright as he feared making demands because he was a temporary worker.

95. Had the respondent made these reasonable adjustments the claimant
20 believed that he would have finished his assignment.

96. The claimant concealed the severity of his depression which was part of his condition. After receiving advice, the claimant explained to Mr Watson that he had a bad week depression wise and about his anxiety. In Mr Watson's reply the does not suggest that this is a surprise because he knew about it.

25 97. The claimant believed and expected that if he did not turn up on 10 December 2020 he would be told not to return. The claimant also believed that had he been a permanent employee and not an agency worker he would have received the help he needed at the time.

98. The respondent questions the claimant's recollection of dates. As his condition worsened, he was not thinking about dates. He did not expect that he would need to remember them for a tribunal almost two years later. The claimant accepted that the dates were wrong have but he remembered the incidents. They are still vivid in his mind.

99. The claimant says that his injury to feeling are in the middle Vento band (£11,500) given what he had been through. All the claimant wanted was a chance to have his case heard at tribunal in the hope it may help other vulnerable people in the future who suffer discrimination due to their mental health.

Deliberations

Duty to make reasonable adjustments

100. The Tribunal decided first to consider the reasonable adjustment claim. The respondent conceded that the claimant had a disability at the relevant time. The Tribunal therefore asked whether the respondent knew, or could it reasonably have been expected to know that the claimant had the disability?

101. Referring to its findings the Tribunal considered that on or around 26 November 2019 the claimant disclosed to Mr Watson that he suffered from depression and anxiety and that was the reason for his absence. He had suffered from this for years and felt that he should tell his supervisors for legal reasons. Mr Watson was already aware of the claimant's family tragedy. The Tribunal felt that having shared this information with Mr Watson and having also explained to Ms Morrison the real reason for his absence from around 26 November 2019 the respondent could reasonably be expected to know that the claimant had a disability.

102. The respondent accepted that it had the following PCPs: (1) requiring agency workers to work on all aspects of the production line; (2) having a specified shift start time; and (3) having a specified shift pattern (Monday to Friday).

103. The Tribunal then asked in respect of each PCP whether it put the claimant at a substantial disadvantage compared to someone without the claimant's disability.
- 5 104. The Tribunal considered that in relation to the PCP requiring workers to work on all aspects of the production line the claimant was at a substantial disadvantage compared to someone without the claimant's disability. The wrapping machine was a tricky job and required concentration. The claimant lacked concentration and confidence when using the wrapping machine and believed that he made more mistakes.
- 10 105. In relation to the specified shift start time, the Tribunal was not satisfied that the claimant was put to a substantial disadvantage compared to someone without his disability. There was no evidence to suggest that the claimant was absent because of the start time or when he was at work he was late or was struggling to performing his duties at 6.30am.
- 15 106. The Tribunal also considered that there was no evidence of the claimant being it put the claimant at a substantial disadvantage compared to someone without his disability in relation to the shift pattern. The claimant referred to a difficulty with doctor's appointments. However he was absent (or not scheduled to work on 25 November 2019) when there was reference to him having an appointment and he was not at work on 9 December 2019. He was also finished at 3.30pm and often earlier if it was quiet. It appeared that the difficulty the claimant had was that he was not living at the address at which he was registered for general practitioner.
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- 25 107. In relation to the PCP requiring workers to work on all aspects of the production line the Tribunal asked whether the respondent know, or could it reasonably have expected to know that the claimant was likely to be placed at a disadvantage. The claimant accepted that he did not tell the respondent that he was placed at a substantial disadvantage because of his disability. While the Tribunal considered that Mr Watson could reasonably be expected to know that the claimant had a disability it was not convinced on the evidence
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before it that Mr Watson could reasonably have expected to know that the claimant was likely to be placed at a disadvantage when working on the wrapping machine. On one occasion the wrapping machine was not working. The claimant was not the only worker who found this challenging and needed assistance. There was a rotation of duties on the production line. Ms Morrison was not aware of the claimant having particular difficulties.

108. The Tribunal therefore concluded that the respondent did not fail to make reasonable adjustments.

Discrimination arising from disability (section 15)

109. The Tribunal then turned to the claim of discrimination arising from disability. Disability was conceded by the respondent. At the start of the final hearing the respondent conceded that termination of the assignment was unfavourable treatment. However Mr O'Carroll seemed to depart from that in his submissions as he said that on the evidence the claimant was suggesting to Mr Watson that he should find a permanent replacement for him until the end of his placement (31 December 2019). He had decided to give up at that point. The claimant considered that his job was at an end.

110. The Tribunal considered that the claimant's position was that if he did not return on 11 December 2020 he knew that the respondent would want someone else to do the work and he would not be asked to go back. The respondent did not wait to see if the claimant returned. The respondent terminated the claimant's assignment on 10 December 2020. The Tribunal then asked whether the unfavourable treatment arose in consequence of the claimant's disability.

111. It was accepted by the respondent that the assignment was terminated because of the claimant's absences. The Tribunal again considered the issue of the respondent's knowledge. The Tribunal considered that following the discussion with Mr Watson and having also explained to Ms Morrison the real reason for his absence from around 26 November 2019 the respondent could

reasonably be expected to know that the claimant had a disability and that the absence during the week commencing 11 November 2019 was related to his depression. The Tribunal accepted that the claimant concealed the real reason for his absence during the week commencing 2 December 2019 but that was clarified in the message sent to Mr Watson on 8 December 2019.

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112. The Tribunal accepted that not all the claimant's absences related to his disability and that there were no medical certificates to that effect before the assignment was terminated. The respondent extended his assignment on 28 November 2019. The real reasons for the claimant's absences on the weeks commencing 11 November 2019 and 2 December 2019 were revealed to Mr Watson around 26 November 2019 and 8 December 2019 respectively before the claimant's assignment was terminated. The Tribunal therefore concluded that the respondent did not benefit from the no knowledge defence.

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113. The Tribunal then considered whether the respondent's treatment of the claimant was a proportionate means of achieving a legitimate aim. The Tribunal was satisfied that the respondent had established that its aim was the successful manufacturing of their product in order to meet customer demand. Agency staff are taken on every year to cover the Christmas period. There was a particular demand in 2019 as the agency staff assignments were extended from 13 December 2019 to 31 December 2019.

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114. The claimant was a good worker. He had frequent and sometimes prolonged absences since the start of the assignment in September 2019. The respondent had accommodated changes in the claimant's shift pattern. In his last week the respondent again changed the shift pattern so that the claimant could return on the Tuesday. The claimant did not do so and inferred that he might not return the Wednesday. The claimant wanted to return but his condition at that time was such that he was not fit to do so. He needed time for his condition to improve. The respondent was operating with three agency staff when it required four. The claimant accepted that the respondent needed someone else to do the work if he could not return. The Tribunal concluded that the justification defence had been made out on the evidence.

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115. In the circumstances the Tribunal concluded that the discrimination claims did not succeed. There was no need to consider remedy and the claims were dismissed.

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Employment Judge: Shona MacLean
Date of Judgment: 23 November 2021
Entered in register: 24 November 2021
and copied to parties

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