



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss N Thompson

**Respondent:** The Pheasant Inn (Bassenthwaite Lake) Limited

**HELD AT:** Carlisle

**ON:** 24, 25 and 26 June  
2019

**BEFORE:** Employment Judge B Hodgson  
Mrs J Pennie  
Dr B Tirohl

## REPRESENTATION

**Claimant:** Mr K Ross, Counsel

**Respondent:** Mr B Frew, Counsel

# RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claim of discrimination arising from disability contrary to the provisions of section 15 Equality Act 2010 is well founded
2. The claim of failure to make reasonable adjustments contrary to the provisions of sections 20 and 21 Equality Act 2010 is not well founded and is dismissed
3. The claim of victimisation contrary to the provisions of section 27 Equality Act 2010 is not well founded and is dismissed

4. The claim of indirect disability discrimination contrary to the provisions of section 19 Equality Act 2010 is not well founded and is dismissed
5. The claim of automatic unfair dismissal contrary to the provisions of section 104 Employment Rights Act 1996 is well founded
6. The claim of breach of contract and unauthorised deduction from wages is not well founded and is dismissed
7. The matter is further listed for a Remedy Hearing on 15 November 2019 at Carlisle Combined Courts, Earl St, Carlisle CA1 1DJ starting at 10am

## REASONS

### Background

1. These claims were presented on 1 August 2018 with the claim form setting out the following claims:
  - 1.1. Discrimination arising from disability contrary to section 15 Equality Act 2010
  - 1.2. Failure to make reasonable adjustments contrary to the provisions of section 20 and 21 Equality Act 2010
  - 1.3. Unlawful victimisation contrary to the provisions of section 27 Equality Act 2010
  - 1.4. Automatic unfair dismissal contrary to the provisions of section 104 Employment Rights Act 1996
  - 1.5. Breach of contract in failing to pay entitlement to tips.
2. In their response, the respondent denied all claims.
3. The matter came before the Employment Tribunal at a Preliminary Hearing on 12 November 2018. The parties agreed a list of issues in advance of the hearing and Case Management Orders were made. At that stage, disability was not admitted, the disability claimed being mental impairment, namely a bipolar condition.
4. At that Preliminary Hearing, the claimant was given leave to amend the claim to add in also a claim of indirect discrimination.
5. The parties were ordered to take account of the discussion and Orders at the Preliminary Hearing to produce an amended list of issues which they did dated 7 January 2019 (pages 38 – 40 and set out below, as amended).

6. The respondent has subsequently conceded disability (page 42).

Issues

7. At the outset of the Hearing, the issues as previously prepared were discussed and agreed as follows:

*Disability Discrimination – General*

8. It is conceded that the claimant was a disabled person in accordance with section 6 Equality Act 2010 ("EqA") at the relevant time by reference to her bi-polar condition.
9. Did the respondent know or, if it did not know, could it reasonably have been expected to know, that the claimant was disabled at the relevant time?

*Disability Discrimination – Section 15 EqA – Arising from Disability*

10. Did the respondent treat the claimant unfavourably by:
- 10.1. dismissing her;
  - 10.2. dismissing her without following any dismissal process;
  - 10.3. not paying her tips?
11. Was the unfavourable treatment referred to in paragraph 10 above because of something arising in consequence of the claimant's disability in the form of:
- 11.1. the claimant's sensitivity to reduced and/or disrupted sleep;
  - 11.2. the claimant's inability/reduced ability to work back to back shifts and/or other shifts that disrupted her sleep;
  - 11.3. the claimant's reduced flexibility to work particular shifts and/or shifts that suited the respondent;
  - 11.4. the claimant's resulting request for her shifts to be adjusted;
  - 11.5. if it is found that the claimant was dismissed due to her alleged unacceptable behaviour on 1 April 2018 as per paragraphs 9-10 of the respondent's amended grounds of resistance, the claimant's irritability due to her exacerbated bi-polar condition?
12. Can the respondent show that the unfavourable treatment set out in paragraph 10 above was a proportionate means of achieving a legitimate aim?

*Disability Discrimination – Sections 20/21 EqA – Reasonable Adjustments*

13. Did the respondent have the following PCPs:
  - 13.1. The requirement to work the allocated shifts on the relevant rotas;
  - 13.2. The requirement to work back to back shifts;
  - 13.3. Required standards of conduct towards customers/staff?
14. Did any such PCPs put the claimant at a substantial disadvantage in comparison with persons who are not disabled at the relevant time, in that:
  - 14.1. The reduction/disruption to her sleep exacerbated her bi-polar condition and worsened her symptoms including her overall mood;
  - 14.2. The claimant was unable (without a further deterioration in her health) to work the relevant shifts?
15. If so, were there reasonable adjustments that could have been made by the respondent to avoid any such disadvantage by:
  - 15.1. Reducing the number or intensity of back to back shifts;
  - 15.2. Not requiring the claimant to work back to back shifts;
  - 15.3. Ensuring that the shifts allocated to her did not disrupt/reduce her sleep;
  - 15.4. In relation to the respondent's allegation at paragraphs 9 and 10 of the amended grounds of resistance, taking reasonable account of her condition and its effects when judging the alleged conduct and determining any sanction applied accordingly?

*Victimisation – Section 27 EqA*

16. Did the claimant undertake a protected act by requesting adjusted shifts/hours?
17. Did the respondent subject the claimant to any detriment by dismissing her and dismissing her with no procedure?
18. Was there any detriment because the claimant had undertaken a protected act?

*Indirect Disability Discrimination – Section 19 EqA*

19. Did the respondent have the following PCPs:
  - 19.1. The requirement to work the allocated shifts on the relevant rotas;
  - 19.2. The requirement to work back to back shifts;

- 19.3. Required standards of conduct towards customers/staff?
20. Did (or would) the respondent apply the PCP(s) to persons with whom the claimant does not share the claimant's disability?
21. Did (or would) the PCP(s) put persons who share the claimant's disability at a particular disadvantage when compared with persons who do not share it?
22. Did (or would) the PCP(s) put the claimant at that disadvantage?
23. Can the respondent show the PCP(s) to be a proportion means of achieving a legitimate aim?

*Unfair Dismissal – Section 104 Employment Rights Act 1996 ("ERA")*

24. Did the claimant allege that the respondent had infringed a relevant statutory right (within the meaning of section 104(1)(b) and (2) ERA) in the form of the right to a daily rest break pursuant to Regulation 10 Working Time Regulations 1998?
25. Was the reason or the principal reason for the claimant's dismissal because she had asserted this statutory right?

*Breach of Contract and Unauthorised Deduction from Wages – Section 13 ERA*

26. Was the claimant entitled to tips?
27. If so, was she paid the tips to which she was entitled?
28. If not, did the failure to make payment amount to a breach of contract and/or an unauthorised deduction from wages?

Facts

29. The parties agreed a bundle of documents and references to numbered pages in this Judgment are to pages as numbered within such bundle.
30. The claimant gave evidence on her own behalf. She also submitted witness statements from Andrew Johnston, Jamie Loryman, Carly Drakes, Emma Carruthers and Lyndsay Thompson. The respondent's representative confirmed that he was not disputing the content of any of the witness statements (other than that of the claimant), there was accordingly no need to call the witnesses to confirm their evidence on oath, and the Tribunal accepted their evidence on this basis. This position was subject to the specific proviso on the part of the respondent's representative that this concession was made solely in respect of the issue of liability and not insofar as any content of the statements may go to remedy (if a remedy hearing proved to be necessary). The Tribunal confirmed with the agreement of the parties that it would initially

hear evidence confined to the question of liability and would then consider remedy if necessary at a further hearing.

31. The respondent called as witnesses Mr Harry Oxley (Assistant Manager), Mrs Allison Wilson (Deputy Manager) and Mr Matthew Wylie (Managing Director).
32. The Tribunal came to its conclusions on the following facts on the balance of probabilities having considered all of the evidence before it, both oral and documentary.
33. Credibility was a significant issue in the course of the Hearing and in the context of the Tribunal's deliberations and conclusions. The Tribunal therefore considers it appropriate to set out its general conclusions with regard to the credibility of the various witnesses from whom it heard.
34. The claimant gave her evidence in a very cohesive, consistent and credible manner throughout. This was however not the case with the respondent's witnesses and in particular Mrs Wilson and Mr Wylie. Aside from factual contradictions, the Tribunal found also the manner in which Mrs Wilson and Mr Wylie gave their evidence often to be evasive and, in the case of Mr Wylie, dismissive.
35. Specific issues of credibility will be covered further within this Judgment and, notwithstanding its general overview as to credibility, the Tribunal looked at the evidence surrounding each aspect of the claims before reaching its conclusions and did not automatically assume that in every respect the claimant was to be believed in preference to the respondent's witnesses.
36. The respondent company runs the Pheasant Inn which is a hotel and restaurant, together with bar and bistro, in the Lake District. It employs approximately thirty members of staff.
37. In early 2018, the respondent advertised a vacancy for a General Assistant (pages 63 and 68) and the claimant applied, submitting her CV (pages 64 – 67).
38. Mr Oxley invited the claimant to an interview (page 69) and the interview went ahead on 8 March 2018. The claimant successfully performed a trial shift on that day and was offered the job on 10 March (page 70). The agreed start date was 19 March (page 70).
39. There were no notes taken by Mr Oxley of the content of the interview. The claimant's recollection is clear that there was no mention of 'back to back' shifts (namely, shifts that end late one night to be followed by an early start the following day). Mr Oxley's evidence in cross-examination was that he had no specific recollection but it was "likely they were not discussed". The respondent's wider evidence is that such shifts were not regular but rather just to address sporadic shortfalls in staffing and it is therefore unlikely they would

have been specifically mentioned as opposed to shifts generally including 'split shifts' (namely, shifts split into separate periods of work within a working day). The Tribunal accordingly accepts the claimant's evidence in this regard.

40. Subsequent to the claimant starting her employment, a Contract of Employment was prepared by the respondent (pages 43 - 62) but it is accepted by the respondent that this document was not actually issued to the claimant prior to the termination of her employment.
41. The claimant's first shift rota was issued on 16 March (page 71). This included 'back to back' shifts on Friday/Saturday 24/25 March for which the claimant would be working from 6pm until closing time on 24 March and then starting again at 7.30am on 25 March until 2.30 pm, due back to work from 6pm until closing time that same day.
42. As indicated, it is conceded by the respondent that at the relevant time (in effect, throughout her employment with the respondent) the claimant was a disabled person as defined by reference to her bi-polar condition. The claimant knows from her own experience that disruption to her sleep patterns, or too little sleep, exacerbates the symptoms of her condition. She needs a minimum of 7-8 hours' sleep. Such a position is also confirmed by medical evidence produced to the Tribunal (see for example the claimant's GP's letter of 18 January 2019 at pages 226 – 227).
43. The following week the claimant received her rota for the week commencing 26 March (page 95). This indicated a number of back to back shifts.
44. The claimant was concerned by the shifts she was being asked to work. The respondent's representative contends that this concern was limited to the impact such shifts may have on matters such as her studies and social life (referring to texts she exchanged with her friends – see pages 96 – 99 and 103 – 104). These exchanges, in the Tribunal's assessment, are to be seen in the wider context of the claimant's direct discussions with the respondent's managers.
45. There is conflicting evidence about the discussions that took place between the claimant and Mrs Wilson and the claimant and Mr Wylie as to the claimant's concern over her shift rotas and potentially the impact they may have, given her disability, upon which the Tribunal needs to make findings of fact.
46. Mrs Wilson's evidence is that there were two material discussions with the claimant. At the first ("believed to be in the first week into her role"), Mrs Wilson's evidence is that "...Nadine mentioned she was worried about her next working rota even though this was yet to be prepared. I asked her why she was worried. She said that it was because of the back to back shifts which troubled her. She mentioned that employees were entitled to a rest break of 11 hours between shifts, and that she had got advice from ACAS. I explained that we all did back

to back shifts, particularly when we have to cover for sickness and holidays. I told her not to worry and that I would have a word with Matthew [Mr Wylie]" (see paragraph 4 of Mrs Wilson's witness statement). She also states that "...I cannot recall when, but there was a conversation when Nadine mentioned she had bipolar which affected her mood swings and her sleep. I did not know what bi-polar was and neither did I give this any further consideration. I did assure her not to be worried" (see paragraph 6 of Mrs Wilson's witness statement).

47. Neither the claimant nor Mrs Wilson are clear about the actual date of their discussion or discussions
48. The claimant's evidence does not materially differ from that of Mrs Wilson save that she says there was only one discussion at which both her concerns over the shifts and also the fact that she had a bi-polar condition were raised. The Tribunal considers it more plausible that the matters were raised together rather than on separate and unconnected occasions – on Mrs Wilson's own evidence, both the reference to concerns over the shifts and the claimant's bi-polar condition were linked to the question of the impact caused by the lack of sleep.
49. The claimant also suggests that Mrs Wilson warned her off from speaking to Mr Wylie about her concerns, which Mrs Wilson denies, but the fact is that the claimant did follow up to raise these matters with Mr Wylie.
50. The claimant's evidence is that she spoke to Mr Wylie on 26 March (Mr Wylie believes the discussion to have taken place on 1 April. The Tribunal concludes that the likelihood is that the discussion did occur on 26 March given the claimants' text exchange on that date confirming she had "spoken to boss"—see page 100 - but it appears to the Tribunal that the exact date is not material).
51. The claimant's evidence in this regard is at paragraph 3.4 of her witness statement:

"... I said that I needed to speak to him about my hours. I told him up front that I had bipolar and that I was struggling with the back to back shifts as I was not getting enough sleep. I told him that if I didn't get enough sleep that because of having bi-polar that I would get ill as I needed 7 – 8 hours sleep a night. I told him that I needed the 11 hour break between the shifts so I could get enough sleep with the short turnarounds with the back to back shifts. I ended up crying as I was stressed, tired and upset ..."
52. Mr Wylie's version of events differs. In his witness statement (paragraph 7), Mr Wylie says that "she did not say that her sleep was being affected or anything about her sleep issues or that she had a medical condition which required adequate rest". In particular, he goes on to say that the only mention of the claimant's bi-polar condition was as a 'throw away remark' at the conclusion of the discussion. The Tribunal finds such a suggestion utterly improbable, particularly given the fact that the claimant's condition had been disclosed to



Mrs Wilson. Mr Wylie's assessment of the making of this remark (at paragraph 8) that "I did not think much of this remark. It was said flippantly", surprises the Tribunal.

53. The Tribunal took note of the following contradictions within the respondent's evidence and documentation:
  - 53.1. Mrs Wilson's evidence in cross-examination was that she did not mention the claimant's references to ACAS or rest breaks to Mr Wylie. Yet Mr Wylie's own witness statement flatly contradicts this (at paragraph 6)
  - 53.2. In his reply to the claimant's solicitors of 9 July (page 88), Mr Wylie states that "at no other point [other than the 'throw away remark'] had she mentioned [her bipolar condition] to me or any other member of staff." This contradicts Mrs Wilson's own oral evidence
  - 53.3. Similarly, in contradiction of Mrs Wilson's oral evidence, in its Amended Grounds of Resistance (at page 28, paragraph 7), the respondent states that "it is denied that the claimant informed or had discussions with Harry Oxley or Allison Wilson about her bi-polar or that she was unable to do her shifts due to the impact these would have on her health".
  - 53.4. In his witness statement (paragraph 9), Mr Wylie states that "she [the claimant] gave no indication that she was upset at this meeting" . The claimant's evidence was that she was distressed throughout that meeting. Mr Wylie in cross-examination confirmed that the claimant, in the course of the meeting, "had cried considerably".
54. Given the consistency of the claimant's evidence and the contradictions within the evidence of both Mrs Wilson and Mr Wylie, the Tribunal accepts the evidence of the claimant as to the content of these meetings.
55. The new staff rota came out on 31 March for week commencing 2 April with no back to back shifts allocated to the claimant. The claimant in her evidence confirmed that she was comfortable with those shifts which addressed the issue she had raised, with regard to the impact of the shift rota upon her sleep patterns and therefore her disability.
56. The claimant's evidence however was that other members of staff – all of whom have sight of the rotas for all staff – were clearly unhappy that they had extra split shifts and back to back shifts, and reacted adversely to the extent of making the claimant "uncomfortable". This reaction is said by the claimant to have taken place in front of Mrs Wilson and the claimant was not challenged on this evidence.
57. On 4 April, a date upon which she was not at work, the claimant, with no prior warning, received an email from Mr Wylie advising her that her employment

was being terminated (page 75). The e-mail reads: "... I much regret to inform you that we will no longer be able to employ you. As you know all our staff are taken on a 3 month trial basis , and unfortunately we do not feel that The Pheasant is the right place for you." After reference to her final pay, the e-mail concludes: "I am really sorry that this has not worked out and I wish you well for the future".

58. The claimant replied on the same day asking for more detail as to what had "let [her] down" so she "could work on this in order to be successful in future employment" (page 75).
59. Mr Wylie responded that "I was very conscious of your concerns about the hours that we do. There is no doubt that some weeks there may be 48 hours and others when it would only be 35. It is the nature of the hotel business and therefore made it difficult as lived quite far away and split shifts obviously bothered you. Hotel business is a bit unique and we just felt that going forward this would become a major issue. I did fully understand your concerns however I would not be able to 'favour' your Rotas and thought it best to call it a day. As I said I wish you all the best, maybe hotels and their strange hours are not for you" (page 75).
60. Still on the same day, the claimant replied: "Thank you Mr Wylie. I fully understand your concerns but I am happy to do split shifts and long hours the only problem I had were the shifts where I did not have enough time to sleep and needed the legal amount of rest between my shifts these were only the shifts where I had a split shift that meant I started at 7.30am and never finished until 11.30 pm several days consecutively. I only ask for respectful hours to sleep but doing split shifts was fine, if you do change your mind I really enjoyed the job and would come back in a heartbeat". The email ends: "Thank you for responding so fast" (page 75).
61. Other than a brief exchange over outstanding pay, matters were left at this until solicitors acting for the claimant wrote to the respondent on 12 June with a letter before action setting out the basis of a number of claims the claimant was potentially to pursue (pages 78 – 82).
62. The letter was followed up in writing and on the telephone and ultimately Mr Wylie wrote a response, albeit not until 9 July (page 88). In this reply he states that "She was 'let go' as she was unsuitable for the position she was employed for ie General Assistant. This due to the use of foul language and behaviour unbecoming of an employee of The Pheasant. To this end I can produce several statements confirming her unsuitability form senior members of staff". In fact there was attached to the letter statements dated 6 July 2018 from Mrs Wilson (page 89) and Mr Oxley (page 90). The letter referenced a meeting said to have taken place with the claimant on 26 March concerning her shift pattern which Mr Wylie said he would review and "she seemed happy with this and as she was departing as a throw away remark mentioned that she was 'bi-polar'".

At no other point had she mentioned this to me or any other member of staff". It goes on to say "On Easter Sunday, she was overheard by several members of staff using foul language in our Bistro, with customers present, and intimidating threatening behaviour towards 2 of our guests. This was reported to me that evening by the duty manager and I decided I would dismiss her from her position". Mr Wylie explains the content of his emails of 4 April by saying that "I was trying to let her down gently and not accuse her of inappropriate behaviour. It was **absolutely nothing** to do with her medical disability, purely that she was not suited to working at The Pheasant". The letter closes with the statement that "Nadine was interviewed by my assistant Harry Oxley who clearly told her what the hours would be and that there would be split shifts. At **no point** did she mention any disability or that she required any consideration on the rota for her shifts" (*the highlighted parts being Mr Wylie's emphases*).

63. The incident in question ("the incident") concerns matters which occurred on 25 March (the Tribunal will return to the question of the date itself) over which the Tribunal heard totally conflicting evidence and upon which the Tribunal needs to make findings of fact. This was the first occasion on which the incident was said to be the reason for dismissal.

64. The claimant describes her version of events on the day in question at paragraphs 5.11 – 5.17 of her witness statement as follows:

"Allison [Mrs Wilson] in her statement dated 6 July (page 89) goes into detail about the alleged incident. I remember the situation that Allison is talking about but it was not at all how she and Mr Wylie say it was.

It was not on 1 April 2018 as they all have repeatedly said it was. It was on 25 March 2018 (see Andrew Johnston's statement and his bank statement at page 316). Andrew Johnston and his girlfriend (Lisa) came into the Pheasant for food. I have known Andrew on and off for a number of years but until he and his girlfriend came in for food, I had not seen him for years although I occasionally spoke to him. As Allison says in her statement at page 89, I told her that I knew Andrew and I asked her how long Andrew had been with his girlfriend. Allison knew them as they were regulars.

I did not take their initial order but I did serve their food and clear their plates and did also bring over the dessert menu. I cannot be 100% but I think that I also took their dessert order.

At the end of their meal, they asked for the bill and I brought it through. Lisa queried the bill as they thought they were on the £17.99 offer that the Pheasant had going at the time and so were questioning why the meal had come to more than that. I had not taken the order, was still very new and so I just said that I would go and check with my manager – which was Allison.

Allison said to me that Lisa had said that I had given them the wrong menu. Allison asked me which menu I had given them and I showed her. Allison could see that I had given them the right menu. I was a bit stressed by what had happened and was worried that if something had gone wrong that I could get the blame even though it was not down to me.

I also thought that perhaps Lisa was trying to blame me unfairly to get a discount. I said to Allison that it really annoys me when people try to say that there is something wrong to get a cheaper meal.

Allison told me that it was sorted and later on told me that Andrew and Lisa were given the wrong menu in the bar. I may have been a bit agitated and unsettled by what had happened but I did not behave in the way that Allison and Mr Wylie say I did. Getting worried by this sort of thing is just the way I am and part of my bipolar is that I can get worried about things unnecessarily but I did not swear and did not behave aggressively".

65. Mrs Wilson gives a very different version. At paragraph 9 of her witness statement, she describes the incident as follows:

"On Sunday 1 April 2018 I was working in the Bistro. Nadine was on shift also. A young couple came for lunch who Nadine told me she know personally. She served the customers and returned distracted and angry. I asked her. She said the girl was being awkward. I then decided to take over and serve the customer whilst she calmed down. After they finished their meal Nadine dealt with their bill. Nadine stormed in and complained that they were querying the bill. Nadine was angry and aggressive to me, threatening to take the girl outside and "f\*\*\*ing rag her head off" and punching her hand whilst talking to me. This was witnessed by customers. I told Nadine to calm down and go into the kitchen. I was shocked by her aggressive manner".

66. Both versions were tested thoroughly in cross-examination and the Tribunal took note of the following matters in reaching its findings.
67. As stated, the claimant gave her evidence in a consistent and credible manner. Whilst her evidence was challenged, it remained constant in accordance with the content of her witness statement.
68. As indicated, the witness statement of Mr Andrew Johnson was accepted without challenge by the respondent. He was the customer involved in the incident. In his statement, Mr Johnson states that he and his companion were surprised at the bill which they queried with the claimant who was not sure but said that she would check the position with her manager - "Nadine was polite, calm and professional to us and just explained that she would speak to her manager". There followed discussion with "the manager" (Mrs Wilson) which resulted in them accepting their bill – "the whole situation was no big deal and at no time was there any problem with Nadine. She was not in any way rude,

difficult or unprofessional all through the meal. We did not see or hear anything out of the ordinary". Mrs Wilson's evidence was that the alleged conduct of the claimant took place behind a screen but Mr Johnson was still present in the Bistro at the time and the alleged outburst would have been audible to customers within the Bistro.

69. The evidence as to the incident presented by the respondent was in contrast to the consistency of the claimant. The Tribunal noted as follows:
- 69.1. It was accepted by the respondent that the incident did in fact occur on 25 March. Both Mr Wylie and Mrs Wilson identified the date in their witness statements as being Sunday 1 April but conceded this was incorrect. This was explained by Mr Wylie and Mrs Wilson as a simple error in their recollection but the timing is not wholly without significance given the timescale between the incident and the date of the claimant's dismissal
  - 69.2. In his e-mail of 9 July to the claimant's solicitors (page 88), Mr Wylie states that the incident "was reported to me on that evening by the duty manager and I decided that I would dismiss her from her position". Mr Wylie had to concede that this was not in fact correct. The date itself would not appear to be material to Mr Wylie's stated recollection that it was reported to him on the same day and can be interpreted as an attempt to more closely align the decision to dismiss with the date of the incident
  - 69.3. The incident was not in fact reported to Mr Wylie (on the respondent's own evidence) until 4 April. Mrs Wilson retrospectively explains this by saying that this was the next date upon which both she and Mr Wylie were physically present at the Pheasant. Mrs Wilson had no explanation for why, if the incident was as serious as she maintained, she did not consider it appropriate to advise Mr Wylie as a matter of urgency (whether by telephone or email)
  - 69.4. Whilst Mrs Wilson did not consider it necessary to advise Mr Wylie of the incident as a matter of urgency, she did report it on the day itself to Mr Oxley, the Deputy Manager. Mrs Wilson's evidence was that she had described the entire incident to Mr Oxley. Mr Oxley's evidence was that having had the incident described to him he felt that Mrs Wilson had adequately dealt with it by having a quiet word with the claimant. It is difficult for the Tribunal to accept that, if the incident had been described fully to Mr Oxley in the terms set out in Mrs Wilson's witness statement, he would have allowed the matter to pass as a minor incident requiring

nothing further than a quiet word. This reaction would however be consistent with an incident having occurred as described by the claimant.

- 69.5. A similar analysis arises from the fact that the claimant was permitted to carry on working for a number of days after the incident occurred – this is an unlikely reaction if the claimant had conducted herself in the manner alleged
- 69.6. When she does report the incident to Mr Wylie, Mrs Wilson's evidence is that she had only mentioned it because Mr Wylie had asked her how the claimant was getting on – in other words she had not felt it of sufficient seriousness to seek to raise it proactively herself.
- 69.7. Mrs Wilson, for the first time in the course of cross-examination, stated that she knew the true reason why the claimant had reacted badly towards the customers this being that the claimant and Mr Johnson had recently, prior to him coming into the Bistro with a companion, been engaged in exchanging texts of an intimate nature with him. Such matters were not put to the claimant in cross-examination. When Mrs Wilson was asked why she had not seen fit to include such evidence in either her witness statement or her internal statement (page 89), her reply was that she had just been asked to give a general picture and in hindsight regretted omitting such relevant information. The Tribunal does not accept this as an adequate explanation for such apparently important details being totally omitted.
- 69.8. Mrs Wilson went on to say that she had informed Mr Wylie of this text exchange when advising him of the incident. In cross-examination, Mr Wylie contradicted that evidence of Mrs Wilson, stating that he had no knowledge at all of any such text exchange. The matter was picked up in re-examination when Mr Wylie's evidence changed to him perhaps in fact having earlier been made aware of the texts
- 69.9. The Tribunal would consider Mr Wylie's initial explanation for his decision to dismiss in the wider context of the claims but, just in terms of what occurred on 25 March, the Tribunal notes that Mr Wylie makes no reference to the incident when advising the claimant of her dismissal. He explains this by indicating that he wished to "let her down gently" but did accept in cross-examination that he would not generally hesitate to advise an employee of the reason for their dismissal if it were a serious matter, for example theft. It is difficult for the Tribunal to reconcile this statement with the respondent's position that their decision to dismiss was taken because of the seriousness of the incident as alleged.
70. In weighing up the evidence, the Tribunal was satisfied, particularly given the contrast in terms of consistency between the claimant's evidence and that of the respondent, together with the inherent improbability of the respondent's

contentions, that the evidence of the claimant was to be preferred and such incident as had occurred on 25 March is found as a fact as having occurred as described by the claimant. Further, the Tribunal concludes that, given the complicit nature of the evidence of both Mrs Wilson and Mr Wylie, and the contradictions that run through both, not only did the incident not occur as described by them but also it did not form the true reason for the respondent's decision to dismiss.

### Statutory Framework

71. Section 15 EqA states that:

(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.

72. Section 19 EqA states that:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice ("PCP") which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purpose of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons which whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

[The relevant "protected characteristics" include "disability"]

73. Section 20 (1) EqA states that:

... (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

74. Section 21 EqA states that:

(1) A failure to comply with the first ... requirement is a failure to comply with a duty to make reasonable adjustments

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

75. Section 27 EqA states that:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because-

(a) B does a protected Act, or

(b) A believes that B has done, or may do, a protected act

(2) Each of the following is a protected act –

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

76. Section 104 of the Employment Rights Act 1996 states:

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee:

...

(b) alleged that the employer had infringed a right of his which is a relevant statutory right

(2) It is immaterial for the purposes of subsection 1

(a) whether or not the employee has the right, or



(b) whether or not the right has been infringed;

but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith

(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

[The "relevant statutory rights" include those conferred by the Working Time Regulations 1998].

### Submissions

77. Both parties were professionally represented by Counsel, both of whom prepared and spoke to written submissions which the Tribunal does not propose to repeat in this Judgment but full account was taken of all that was put forward by both representatives.
78. On one point of clarification arising from the written submissions, the claimant's representative made reference to a claim for outstanding holiday pay but accepted and conceded that this was not a claim that had previously been made and such claim could not now be pursued.

### Conclusions

#### *Disability Discrimination – General*

79. As indicated, it was conceded by the respondent that the claimant was a disabled person by reference to her medical condition, namely a bi-polar condition.
80. The Tribunal deals with the issue of knowledge as relevant in the following analysis.

#### *.Disability Discrimination – Section 15 EqA – Arising from Disability*

81. The claimant was dismissed and dismissal is an example of unfavourable treatment, whether with or without following a formal process.
82. The Tribunal rejects the claimant's submission that unfavourable treatment by not paying tips can properly be said to arise in consequence of the claimant's disability. The Tribunal refers to its analysis which follows as to the stand alone

claim for payment of tips and the evidence does not support in any way such a contention.

83. Was this unfavourable treatment "because of something arising in consequence of the claimant's disability"?
84. The "something arising" relied upon by the claimant concerns the impact of the potential for what may be termed an irregular shift pattern that the claimant raised with the respondent as having an adverse effect upon her ability to sleep and therefore her disability. The Tribunal concludes that the connection is clearly made out in this regard.
85. Was the dismissal "because of" that? The Tribunal has found as a fact that the true reason for dismissal was not that relied upon by the respondent, namely an allegation of gross misconduct. The Tribunal refers to its analysis of the claim under section 104 of the ERA which follows and the conclusion reached.
86. The "something arising" need not be the main or sole reason but must have at least a significant (namely more than trivial) influence on the unfavourable treatment and so amount to an effective reason for or cause of it (see *Praiser v NHS England and another* [2016] IRLR 170 EAT). The Tribunal's conclusion on the evidence is that the overall position as to the claimant's concerns over the shift patterns and the impact of them upon her health must be said to have had such an influence.
87. The Tribunal rejects the claimant's submission that "something arising" may also encompass the claimant's behaviour. The claimant's own clear evidence in this regard was that her disability would have played no part in her conducting herself in the manner alleged on 25 March (accepting that she has maintained a denial of any such conduct).
88. In terms of knowledge, the evidence is that both Mrs Wilson and Mr Wylie were advised by the claimant of her disability prior to the decision to dismiss. The question of knowledge under this section requires only knowledge of the disability itself (see *York Council v Grosset* [2018] ICR 1492). In any event the Tribunal's findings indicate that the respondent was fully aware not only of the disability itself but also the impact on her mental condition of a lack of sleep occasioned by the shift pattern on the part of the claimant.
89. The respondent's argument that dismissal is a proportionate means of achieving a legitimate aim is predicated on a finding that the reason for dismissal is the claimant's conduct – this argument has been rejected by the Tribunal.
90. The Tribunal noted the burden of proof provisions. No argument was pursued on the part of the respondent that the burden of proof had not shifted to the respondent. The Tribunal on the basis of its above findings is satisfied that the

burden of proof has shifted to the respondent to show that the act in question, the dismissal, was not unlawful. The Tribunal concludes that the respondent has not met this.

91. The claim under section 15 is accordingly well-founded.

*Disability Discrimination – Sections 20/21 EqA – Reasonable Adjustments*

92. The Tribunal accepts the PCPs put forward as being relied upon by the respondent. They are not controversial as stand-alone provisions.
93. The Tribunal accepts that the "requirement to work the allocated shifts on the relevant rotas" and "the requirement to work back to back shifts" would put the claimant at a substantial disadvantage in comparison to person who are not disabled for the reasons stated in the issues - the claimant is effectively prevented from working such rotas as a consequence of the impact they would have upon her mental health.
94. The Tribunal does not accept that this applies also to the imposition of "required standards of conduct towards customers/staff". The claimant gave evidence that her condition had nothing whatsoever to do with her conduct and was accordingly not put to any disadvantage in that regard..
95. The claimant's own evidence however was that she was entirely satisfied with the new shift pattern she was given for the week following her meeting with Mr Wylie and prior to her being dismissed. It can only be pure speculation whether this arrangement would have been continued or not but on the face of matters a reasonable adjustment had been requested and made, within a reasonable time period, and which specifically avoided the disadvantage otherwise arising.
96. The reasonable adjustments claim accordingly fails.

*Victimisation – Section 27 EqA*

97. This claim is predicated on a "protected act" said to be the request for adjusted hours.
98. The Tribunal notes the statutory definition of a "protected act".
99. The claimant relies on the request for reasonable adjustments being made but it is not clear how it is claimed this constitutes a "protected act". The Tribunal does not accept that such a request of itself constitutes an allegation that there has been a contravention of the Equality Act. As referred to above, the Tribunal has found no breach of the respondent's obligation to make reasonable adjustments – once requested, the adjustments were actioned within a reasonable time. Further, it is not, in the Tribunal's view, the request itself that led to the decision to dismiss.

100. In the circumstances, the Tribunal's conclusion is that this claim also fails.

*Indirect Disability Discrimination – Section 19 EqA*

101. Although the law is not stated in identical terms, this claim overlaps substantially with the claim for breach of the duty to make reasonable adjustments.

102. For the same reasons, and on the same analysis, this claim also fails. The respondent, in making the adjustments to the claimant's shift pattern it did, has not applied the relevant PCPs to the claimant and she accordingly was not put to any disadvantage.

*Unfair Dismissal – Section 104 Employment Rights Act 1996 ("ERA")*

103. In this claim, given her length of service, it is for the claimant to prove that the reason for dismissal is as claimed.

104. On the evidence and the Tribunal's findings, an alleged infringement of a statutory right – namely the right to an eleven hour break under the Working Time Regulations 1998 - was raised by the claimant. The respondent contends that there was no "assertion" but rather an indication of a potential future breach. Such a contention is rejected – it is not supported at all by the timing set out within the Tribunal's findings of both Mrs Wilson and Mr Wylie being advised of the allegation that back to back shifts had been imposed which breached the Working Time Regulations.

105. Further, the Tribunal is satisfied on the evidence that these assertions were raised in good faith in that they arose from genuine concerns on the part of the claimant as to the potential impact of such an alleged breach on her health.

106. The essential question is whether this was the sole or principal reason for her dismissal. The Tribunal has rejected the respondent's stated reason but this does not automatically mean this claim must succeed. The Tribunal must reach its conclusions as to the actual reason for dismissal.

107. The Tribunal has already outlined its concerns over the contradictory evidence of the respondent as to the content of the meetings between the claimant and the managers which leads the Tribunal to an inference that the respondent is attempting to cover up the true reason. Such contradictions go to the issue of the shift patterns. The Tribunal has considered the original reasons given by the respondent for its decision to dismiss. These clearly reference the claimant's concerns over the shift patterns (page 75). The Tribunal finds the explanation for the 'wrong' reason being given for dismissing the claimant – "to let her down gently" - to be unconvincing. There would appear to be no reason why Mr Wylie should put forward reasons connected with shifts if this element played no part in his decision. Specifically, Mr Wylie refers to the fact that he would "not be able to favour" the claimant's rotas and therefore "thought it best

to call it a day". It is clear from the unchallenged evidence of the claimant that the other staff were very unhappy with the fact that it appeared on the claimant's last rota that she was indeed being 'favoured' and that Mrs Wilson was witness to this. The claimant had raised the prospect of referring the matter to ACAS. Whilst the respondent may have been prepared to accept the possibility of the claimant herself not working back to back shifts as a consequence of her personal circumstances, it would undoubtedly present greater problems to the respondent if the rights available to all staff under the Working Time Regulations were enforced. The only logical and proper conclusion the Tribunal can draw from this set of circumstances is that whilst the impact of the claimant's disability upon her availability was a material part of the ultimate decision, the principal reason was the threat of the application of the Working Time Regulations, the statutory right asserted by the claimant.

108. The claim under section 104 of the ERA is accordingly well-founded

*Breach of Contract and Unauthorised Deduction from Wages – Section 13 ERA*

109. These are claims argued in the alternative but based upon a contractual right to payment of tips.

110. The respondent has explained that the calculation of tips and their division is based upon working for a full month and divided accordingly. The claimant's own evidence was that she accepted she was not contractually entitled to tips and, on the evidence, no such contractual right arose either in writing or verbally.

111. Given, in particular, the claimant's own evidence, the Tribunal concludes that there is no outstanding contractual entitlement due to the claimant as claimed.

Remedy

112. At the end of the hearing, the parties agreed with the Tribunal a provisional date for a Remedy Hearing in the event that such a hearing was necessary. In the light of the Tribunal's judgment, such a hearing is needed and the Remedy Hearing will proceed on 15 November 2019 at Carlisle Combined Courts, Earl St, Carlisle CA1 1DJ starting at 10am.

Employment Judge B Hodgson

Date: 26 September 2019

JUDGMENT SENT TO THE PARTIES ON

26 September 2019

FOR THE TRIBUNAL OFFICE

**Public access to employment tribunal decisions**

Judgments and reasons for the judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.