EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107268/2019

Final Hearing Held in Dundee on 6 September 2019

Employment Judge A Kemp

Mrs E Ferguson	**Claimant** **Represented by:** **Mr R Russell** **Solicitor**
Braid Ltd t/a Burns Bar	**First respondent** **No appearance**
Maggidog Ltd t/a Burns Bar	**Second respondent** **No appearance**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that

(1) the claimant was unfairly dismissed by the first respondent under section 94 of the Employment Rights Act 1996 ("the 1996 Act");

(2) the first respondent directly discriminated against the claimant on grounds arising out of her disability under section 15 of the Equality Act 2010 ("the 2010 Act");

(3) the first respondent failed to make reasonable adjustments for the claimant under section 20 of the 2010 Act;

(4) the first respondent victimised the claimant under section 27 of the 2010 Act;

(5) There was a relevant transfer between the first respondent as transferor and second respondent as transferee on 10 March 2019 of the business of Burns Bar, to which the claimant had been assigned, and her dismissal was automatically unfair under the Regulations;

(6) the first respondent failed to consult the claimant in relation to a relevant transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("the Regulations"), and the second respondent as transferee is jointly and severally liable therefor under Regulation 15;

(7) all liabilities of the first respondent to the claimant transferred from the first respondent to the second respondent under Regulation 4 of the Regulations;

(8) the claimant is awarded the sum of Eleven Thousand and Eighty One Pounds and Thirty Three Pence (£11,081.33) as compensation for unfair dismissal under the 1996 Act, and disability discrimination under sections 15, 20, 21 and 27 of the 2010 Act;

(9) the said sum of Eleven Thousand and Eighty One Pounds and Thirty Three Pence (£11,081.33) is payable by the second respondent as a result of the said transfer;

(10) the Tribunal makes a declaration that the first respondent failed to comply with the requirements of Regulation 13 of the Regulations in respect of its

failure relating to the election of employee representatives and further its failure to consult with such representatives under that Regulation; and

(11) the claimant is awarded the sum of One Thousand, Four Hundred and Eighty Two Pounds (£1,482) for the failure to consult under the Regulations, the award of that sum being made jointly and severally against the first and second respondent.

REASONS

1. This claim is made by the claimant for unfair dismissal, disability discrimination and in respect of a relevant transfer under the Transfer of Undertaking (Protection of Employment) Regulations 2006.

2. The claim was directed to two respondents, but neither has entered a Response Form, nor did either appear at the Final Hearing.

Evidence

3. A bundle of documents was produced by the claimant. Evidence was given orally by the claimant, and by Mr Ryan Russell her solicitor. I accepted the evidence of both as credible and reliable.

The facts

4. I found the following facts to have been established:

5. The claimant was employed by the first respondent from 4 January 2016 as a barmaid. Her employment terms were set out in a document dated 18 February 2016.

6. The first respondent then operated a Public House in Forfar called Burns Bar. Ms Iris Edgar was the Managing Director of the first respondent. She was the sole director.

7. The first respondent operated the said bar under a lease from the owner of the premises. The lease commenced in 2016 and was due to terminate in 2021. There were five other members of staff employed by the first respondent to work at the bar. There were items of stock, including alcohol and other drinks for sale, and fittings and fixtures such as chairs and tables, and the bar with optics, beer pumps, and other means of selling alcohol.

8. The claimant was diagnosed with cancer in July 2016.

9. She was absent from work from 19 July 2016 when she underwent emergency treatment. The claimant had 326 hours of intense chemotherapy. This was unsuccessful and at one point she was in palliative care. She was then given a new form of chemotherapy. This treatment was successful, she is now in remission but under very regular review.

10. The first respondent was aware of the claimant's disability and was provided with correspondence from the claimant's Consultant during her employment about her treatment and reasonable adjustments that were sought.

11. Prior to the claimant being absent from work for treatment on 19 July 2016, she worked 21 hours per week over three shifts. This was comprised of two day shifts and one night shift. The claimant returned to work on 25 July 2017 on a phased return doing 5 hours per week. From 1 September 2017, the claimant worked 14 hours over two day shifts. The claimant received a new contract dated 20 September 2017 stating that she would work two shifts per week. The claimant worked two day shifts until 9 July 2018.

12. On or around 9 July 2018 Ms Edgar changed the claimant's working pattern to working one day shift and one back shift. This change to the working pattern was imposed upon the claimant without discussion or consultation. The back shift was from 6pm until 1:30am. The claimant protested at this change given the impact upon her health of working late in the evenings. Since her remission the claimant suffered from chronic fatigue and pain symptoms associated with the intensive treatment she had received. She found working in the evenings very difficult as she would experience significant fatigue as the day would wear on. Working to the early hours of the following morning caused her extreme difficulty, exhaustion, pain and suffering. When the claimant was working the back shifts, customers were aware she was struggling and would often raise concerns for her. The claimant enjoyed her role and did her best to get on with matters.

13. Between July 2018 and September 2018 there were a number of conversations between the claimant and Ms Edgar about the difficulties she was experiencing. The claimant hoped that her employer would change her shifts back. The first respondent always refused despite the fact the claimant had worked the 2 day shifts previously.

14. The claimant was under regular review with her Consultant Dr Katie Hands. Following a consultation in September 2018, the claimant discussed the difficulties she was having at work and the symptoms of significant fatigue. Dr Hands produced a report dated 20 September 2018 for the claimant to produce to the first respondent. This confirmed her diagnosis, treatment and symptoms of "significant fatigue" following her treatment, and that she found it difficult to work in the evenings.

15. On or around the 3 October 2018, the claimant had a meeting with Ms Edgar at which she gave her a copy of the report from Dr Hands. She asked her to make a reasonable adjustment and go back to working two day shifts as a result of her fatigue in the evenings. Ms Edgar refused this request stating

she required all staff work the days or nights required. She also remarked to the claimant "should I sack my staff to give you two day shifts?"

16. The claimant received a letter dated 22 October 2018 from Ms Edgar referring to the report from Dr Hands. In the letter she refused the claimant's request for a reasonable adjustment of two days shifts. Further, she offered to reduce her to 1 shift and employ someone else to cover the weekend nights.

17. The claimant sought advice from the Citizens Advice Bureau on 26 October 2018. She lodged a formal grievance in writing the same day asking the first respondent to reconsider her request for reasonable adjustments. She stated that she was being discriminated against under the Equality Act 2010, that Ms Edgar accommodated other staff and that she was treating the claimant differently. She referred to the previous refusal to make reasonable adjustments and once again referred to the report from Dr Hands.

18. The first respondent did not deal with the grievance at all or follow any procedure regarding the grievance. There was a very brief discussion between the claimant and Ms Edgar on 30 October 2018 at which Ms Edgar refused the reasonable adjustments request again. The relationship became very strained and difficult as a result of the grievance being raised and the issues the claimant raised about discrimination and reasonable adjustments. The first respondent refused to implement the reasonable adjustments up to the claimant's subsequent dismissal.

19. The claimant received a letter dated 13 February 2019. The letter was from Ms Edgar on behalf of the first respondent. The claimant was advised that the first respondent was to cease trading on 10 March 2019 and that she was being dismissed by reason of redundancy, as were all staff. There was no right of appeal. The letter is signed off "wishing you every success for the future". The first respondent had not advised the claimant she was at risk of redundancy, did not consult at any time with her or go through any selection

process. The first respondent did not follow any procedure at all. It was a sham redundancy.

20. On 5 March 2019 the second respondent had been incorporated by Ms Edgar, who was its sole director. Its purposes was to carry out the trade of a restaurant or bar, which was the same purpose as for the first respondent.

21. The second respondent was recruiting staff before the claimant's employment was terminated, using social media in particular Facebook. Ms Edgar became the Manager for the second respondent. On 25 and 27 February 2019 the second respondent advertised a bar staff position working two shifts per week. That advertisement was for the post that the claimant had undertaken at the bar.

22. On 24 February 2019 the claimant had gone to Tenerife on holiday, and did not return until 10 March 2019.

23. The claimant was the only employee of the first respondent to be made redundant and not to transfer to the second respondent. All other staff members continued working for the second respondent without any break in service.

24. On or around 10 March 2019 the business that operated the said bar, being the first respondent, ceased to trade. The same business was immediately resumed by the second respondent. The said bar continued to trade from and after 11 March 2019. There was no cessation in its operation. The lease between the owner and first respondent was novated with the second respondent. Ms Edgar continued as the liquor licence holder. The said bar when operated by the second respondent continued to use the same stock and fittings and fixtures as had been the case. The same staff as had been employed by the first respondent were employed at the said bar by the second respondent, save for the claimant.

25. The claimant sent a letter dated 12 March 2019 to the first respondent by recorded delivery. She raised concerns about her redundancy and that no procedures had been followed. She raised the fact that on Companies House the first respondent was still trading. She raised the fact the bar was still open and operating and that she should have transferred under the Transfer of Undertakings (Protection of Employment) Regulations 2006, which she referred to as "TUPE".

26. The claimant received a response dated 24 March 2019 from Ms Edgar on behalf of the first respondent. She advised the claimant she could have applied for jobs that were advertised on the internet. She did not tell the claimant the name of the new company. She did not address the point under the 2006 Regulations.

27. The second respondent employed the same number of staff as the first respondent had, carrying out the same roles and in the same shifts. The second respondent advertised the role that the claimant had performed for the first respondent.

28. The first respondent did not seek to inform and consult with the claimant regarding any relevant transfer.

29. The letter of 13 February 2019 gave the claimant three weeks' notice with effect from 17 February 2019. The effective date of termination was 10 March 2019.

30. Prior to her dismissal the claimant was paid £114 per week by the first respondent.

31. After dismissal the claimant was paid her statutory redundancy payment.

32. The claimant suffered worry, stress, anxiety and inconvenience by the failure of the first respondent to change her shifts as she had sought. She required to work until 1.30am when substantially fatigued when working on the shift that ended at that time. She suffered from upset, worry, stress and anxiety as a result of her being dismissed. She had loved her role with the first respondent, and had gone to work for them although ill and suffering fatigue from the effects of her treatment.

33. The claimant obtained new employment at Canmore Bowling Club on 17 April 2019. She is paid the same as she had been paid by the first respondent. She had mitigated her loss. That role is a seasonal one, and terminates at the end of September 2019. She is likely to remain out of work for a period of 13 weeks thereafter.

Claimant's submission

34. Mr Russell invited me to make an award to the claimant in the terms of the schedule of loss. The claimant makes claims under Sections 15, 20 and 21 and 27 of the Equality Act 2010. The claimant asserted that she was unfairly dismissed for a reason connected to her disability. The first respondent refused readable adjustments and embarked upon a sham redundancy to get rid of the claimant. The dismissal was for a reason which is related to the claimant's disability.

35. In terms of the Section 20 and 21 claim, the PCP was the requirement to work at least one back shift in the evenings. This shift was normally from 6pm until 1:30am. The substantial disadvantages were 1) the substantial pain and suffering from when the claimant requested adjustments to her working pattern until her dismissal. The failure to make this adjustment was a continuing act up to the point of dismissal, and 2) the claimant's sham dismissal.

36. In terms of the Section 27 claim, the protected act was when the claimant wrote to the first respondent on 26 October 2018. She requested in writing (having already done so verbally) reasonable adjustments and complained she was being subjected to disability discrimination. The reasonable adjustments were refused. A few months later the claimant was dismissed and the only employee not to transfer to the second respondent in circumstances where Ms Edgar acted wholly unreasonably and in a deceitful manner. The Tribunal was asked to draw the inference that her cancer diagnosis, requests for reasonable adjustments and complaints about discrimination were the real reason she was dismissed in the absence of any other plausible explanation.

37. In relation to the transfer under the 2006 Regulations Mr Russell argued that this was clearly a relevant transfer under the circumstances. The second respondent had taken over the business of the first respondent. All staff bar the claimant were retained. There was no interruption to the business, which used the same assets. There had been no consultation at all. An award under Regulation 15 was therefore appropriate.

38. Regulation 4 had the effect of transferring all rights and liabilities from the first respondent to the second respondent, such that the awards that were to be made against the first respondent transferred to the second respondent.

The law

39. The law relating to discrimination is complex. It is found in statute, case law, and from guidance in a statutory code.

Statute

40. Section 4 of the Equality Act 2010 (“the Act”) provides that disability is a protected characteristic. The definition of disabled person is set out in section

6, and with further provisions in schedule 1. The claimant having been diagnosed with cancer is a disabled person.

41. Section 15 of the Act provides as follows:

"**15 Discrimination arising from disability**

(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."

42. Section 20 of the Act provides as follows:

"**20 Duty to make adjustments**

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

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

43. Section 21 of the Act provides:

"**21 Failure to comply with duty**

(1) A failure to comply with the first, second or third 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."

44. Section 27 of the Act provides:

"**27 Victimisation**

(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.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule."

45. Section 39 of the Act provides:

"**39 Employees and applicants**

…….

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

……

46. Section 136 of the Act provides:

"**136 Burden of proof**

If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision."

47. Substantial is defined in section 212 as more than minor or trivial.

48. The provisions are construed against the terms of the Equal Treatment Framework Directive 2000/78/EC.

Transfer

49. The provisions as to transfers of undertaking are found in the Transfers of Undertaking (Protection of Employment) Regulations 2006 ("the Regulations").

50. Regulation 3 defines a relevant transfer as follows:

"**3 A relevant transfer**

(1) These Regulations apply to—

(a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity;….

(2) In this regulation 'economic entity' means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.."

51. Regulation 4 provides

"**4 Effect of relevant transfer on contracts of employment**

(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.

(2) Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer—

(a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and

(b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.

(3) Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or

employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1), including, where the transfer is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions."

52. Regulation 7 provides:

"**7 Dismissal of employee because of relevant transfer**

(1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee is to be treated for the purposes of Part 10 of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for the dismissal is the transfer……."

53. Regulation 13 provides:

"**13 Duty to inform and consult representatives**

(1) In this regulation and regulations [13A,] 14 and 15 references to affected employees, in relation to a relevant transfer, are to any employees of the transferor or the transferee (whether or not assigned to the organised grouping of resources or employees that is the subject of a relevant transfer) who may be affected by the transfer or may be affected by measures taken in connection with it; and references to the employer shall be construed accordingly.

(2) Long enough before a relevant transfer to enable the employer of any affected employees to consult the appropriate representatives of any affected employees, the employer shall inform those representatives of—

(a) the fact that the transfer is to take place, the date or proposed date of the transfer and the reasons for it;

(b) the legal, economic and social implications of the transfer for any affected employees;

(c) the measures which he envisages he will, in connection with the transfer, take in relation to any affected employees or, if he envisages that no measures will be so taken, that fact; and

(d) if the employer is the transferor, the measures, in connection with the transfer, which he envisages the transferee will take in relation to any affected employees who will become employees of the transferee after the transfer by virtue of regulation 4 or, if he envisages that no measures will be so taken, that fact

……..

(3) For the purposes of this regulation the appropriate representatives of any affected employees are—

(a) if the employees are of a description in respect of which an independent trade union is recognised by their employer, representatives of the trade union; or

(b) in any other case, whichever of the following employee representatives the employer chooses—

(i) employee representatives appointed or elected by the affected employees otherwise than for the purposes of this regulation, who (having regard to the purposes for, and the method by which they were appointed or elected) have authority from those employees to receive information and to be consulted about the transfer on their behalf;

(ii) employee representatives elected by any affected employees, for the purposes of this regulation, in an election satisfying the requirements of regulation 14(1)

(4) The transferee shall give the transferor such information at such a time as will enable the transferor to perform the duty imposed on him by virtue of paragraph (2)(d).

(5) The information which is to be given to the appropriate representatives shall be given to each of them by being delivered to them,

or sent by post to an address notified by them to the employer, or (in the case of representatives of a trade union) sent by post to the trade union at the address of its head or main office.

(6) An employer of an affected employee who envisages that he will take measures in relation to an affected employee, in connection with the relevant transfer, shall consult the appropriate representatives of that employee with a view to seeking their agreement to the intended measures.

(7) In the course of those consultations the employer shall—

(a) consider any representations made by the appropriate representatives; and

(b) reply to those representations and, if he rejects any of those representations, state his reasons.

(8) The employer shall allow the appropriate representatives access to any affected employees and shall afford to those representatives such accommodation and other facilities as may be appropriate.

(9) If in any case there are special circumstances which render it not reasonably practicable for an employer to perform a duty imposed on him by any of paragraphs (2) to (7), he shall take all such steps towards performing that duty as are reasonably practicable in the circumstances……

(12) The duties imposed on an employer by this regulation shall apply irrespective of whether the decision resulting in the relevant transfer is taken by the employer or a person controlling the employer."

54. Regulation 15 provides for a remedy in the event that the duty under Regulation 13 is not complied with, and includes the following provisions:

"(8) Where the tribunal finds a complaint against a transferor under paragraph (1) well-founded it shall make a declaration to that effect and may—

(a) order the transferor, subject to paragraph (9), to pay appropriate compensation to such descriptions of affected employees as may be specified in the award; or

(b) if the complaint is that the transferor did not perform the duty mentioned in paragraph (5) and the transferor (after giving due notice) shows the facts so mentioned, order the transferee to pay appropriate compensation to such descriptions of affected employees as may be specified in the award.

(9) The transferee shall be jointly and severally liable with the transferor in respect of compensation payable under sub-paragraph (8)(a) or paragraph (11).

(10) An employee may present a complaint to an employment tribunal on the ground that he is an employee of a description to which an order under paragraph (7) or (8) relates and that—

(a) in respect of an order under paragraph (7), the transferee has failed, wholly or in part, to pay him compensation in pursuance of the order

(b) in respect of an order under paragraph (8), the transferor or transferee, as applicable, has failed, wholly or in part, to pay him compensation in pursuance of the order.

(11) Where the tribunal finds a complaint under paragraph (10) well-founded it shall order the transferor or transferee as applicable to pay the complainant the amount of compensation which it finds is due to him."

55. The remedy is limited under Regulation 16(3) to a maximum of thirteen weeks' pay.

56. The Regulations are construed purposively in accordance with the terms of the Acquired Rights Directive of the European Union EC 2001/23.

Case law

Discrimination

Discrimination arising from disability

57. The process applicable under a section 15 claim was explained by the EAT in ***Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305***:

> "The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words 'because of something', and therefore has to identify 'something' – and second upon the fact that that 'something' must be 'something arising in consequence of B's disability', which constitutes a second causative (consequential) link. These are two separate stages."

58. In ***City of York Council v Grosset [2018] IRLR 746***, Lord Justice Sales held that

> "it is not possible to spell out of section 15(1)(a) a … requirement, that A must be shown to have been aware when choosing to subject B to the unfavourable treatment in question that the relevant 'something' arose in consequence of B's disability".

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

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

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

Unfavourable treatment

60. In ***Williams v Trustees of Swansea University Pension and Assurance Scheme [2017] IRLR 882*** the Court of Appeal did not disturb the EAT's analysis, in that case, that the word "unfavourable" was to be contrasted with less favourable, the former implying no comparison, the latter requiring it. The Equality and Human Right's Commission Code of Practice on Employment states at paragraph 5.7 that the phrase means that the disabled person "must have been put at a disadvantage."

61. That analysis was supported by the Supreme Court decision, reported at ***[2019] IRLR 306***, in which the decision of the court was given by Lord Carnwarth, whose speech included the following:

> "Since I am substantially in agreement with the reasoning of the Court of Appeal, I can express my conclusions shortly, without I hope disrespect to Ms Crasnow's carefully developed submissions. I agree with her that in most cases (including the present) little is likely to be gained by seeking to draw narrow distinctions between the word 'unfavourably' in s 15 and analogous concepts such as 'disadvantage' or 'detriment' found in other provisions, nor between an objective and a 'subjective/objective' approach. While the passages in the Code of Practice to which she draws attention cannot replace the statutory words, they do in my view provide

helpful advice as to the relatively low threshold of disadvantage which is sufficient to trigger the requirement to justify under this section…….”

Justification

62. There is a potential defence of objective justification under section 15(1)(b) of the Act. In ***Hardys & Hansons plc v Lax [2005] IRLR 726***, heard in the Court of Appeal, it was held that the test of justification requires the employer to show that a provision, criterion or practice is justified objectively notwithstanding its discriminatory effect.

Reasonable adjustments

63. Guidance on the claim as to reasonable adjustments was provided by the EAT in ***Royal Bank of Scotland v Ashton [2011] ICR 632***, in ***Newham Sixth Form College v Sanders [2014] EWCA Civ 734,*** and ***Smith v Churchill’s Stair Lifts plc [2005] EWCA Civ 1220*** both at the Court of Appeal, and all in relation to the former statutory provision. The application to the Act was confirmed by the EAT in ***Muzi-Mabaso v HMRC UKEAT/0353/14.*** The guidance given in ***Environment Agency v Rowan [2008] IRLR 20*** remains valid, being that in order to make a finding of failure to make reasonable adjustments there must be identification of:

(a) the provision, criteria or practice applied by or on behalf of an employer; or
(b) the physical feature of premises occupied by the employer;
(c) the identity of non-disabled comparators (where appropriate); and
(d) the nature and extent of the substantial disadvantage suffered by the claimant.

64. Mr Justice Laws in Saunders added:

> "the nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustment necessarily run together. An employer cannot … make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and extent of the substantial disadvantage imposed upon the employee by the PCP."

65. The distinction between claims under sections 15 and 20 was explained by the EAT in ***Carranza v General Dynamics Information Technology Ltd [2015] IRLR 43*** as follows:

> "The Equality Act 2010 now defines two forms of prohibited conduct which are unique to the protected characteristic of disability. The first is discrimination arising out of disability: section 15 of the Act. The second is the duty to make adjustments: sections 20–21 of the Act. The focus of these provisions is different. Section 15 is focused on making allowances for disability: unfavourable treatment because of something arising in consequence of disability is prohibited conduct unless the treatment is a proportionate means of achieving a legitimate aim. Sections 20–21 are focused on affirmative action: if it is reasonable for the employer to have to do so, it will be required to take a step or steps to avoid substantial disadvantage."

Victimisation

66. The definition of victimisation in section 27 of the 2010 Act requires a claimant to establish firstly that she was subject to a detriment, and secondly that that was because of a protected act, which includes the making of an allegation that a person has contravened the Act. It is sufficient that the person making the allegation believes that it is true, subject to what follows, not that it is proved to be true.

67. Further guidance on what constitutes a detriment is given at paragraphs 9.8 and 9.9 of the EHRC Code:

> "Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage. …..There is no need to demonstrate physical or economic circumstances. However, an unjustified sense of grievance alone would not be enough to establish detriment."

68. In ***Derbyshire and others v St Helens Metropolitan Borough Council [2007] ICR 841*** Lord Neuberger stated that it was not sufficient for a claimant to prove mental distress, that would have to be objectively reasonable in all the circumstances. He expressed some concerns with a defence of what is honest and reasonable as referred to in case law and at the Court of Appeal, and preferred to focus on the word "detriment" (see paragraph 68).

Burden of proof

69. There is a two-stage process in applying the burden of proof provisions in discrimination cases, explained in the authorities of ***Igen v Wong [2005] IRLR 258,*** and ***Madarassy v Nomura International Plc [2007] IRLR 246***, both from the Court of Appeal. The claimant must first establish a first base or prima facie case of direct discrimination or harassment by reference to the facts made out. If she does so, the burden of proof shifts to the respondents at the second stage to prove that they did not commit those unlawful acts. If the second stage is reached and the respondents' explanation is inadequate, it is necessary for the tribunal to conclude that the complaint should be upheld. If the explanation is adequate, that conclusion is not reached. In Madarassy, it was held that the burden of proof does not shift to the employer simply by a claimant establishing a difference (here as to age or race) and a difference in treatment. Those facts only indicate the possibility of discrimination. They are not of themselves sufficient material on which the

tribunal "could conclude" that on a balance of probabilities the respondents had committed an unlawful act of discrimination. The tribunal has, at the first stage, no regard to evidence as to the respondents' explanation for its conduct, but the tribunal must have regard to all other evidence relevant to the question of whether the alleged unlawful act occurred, it being immaterial whether the evidence is adduced by the claimant or the respondent, or whether it supports or contradicts the claimant's case, as explained in ***Laing v Manchester City Council [2006] IRLR 748***, an EAT authority approved by the Court of Appeal in Madarassy.

70. The two stage approach was endorsed in ***Hewage v Grampian Health Board [2012] IRLR 870***. More recently, in ***Ayodele v Citylink Ltd [2018] ICR 748,*** the Court of Appeal rejected an argument that the Igen and Madarassy authorities could no longer apply as a matter of European law, and that the onus did remain with the claimant at the first stage. As the Court of Appeal very recently confirmed in ***Efobi v Royal Mail Group [2019] EWCA Civ 19*** unless the Supreme Court reverses that decision the law remains as stated in Ayodele. Lord Justice Elias also explained the nature of the onus as follows, at paragraph 44:

> "The onus of proof at stage one was upon the claimant so it was for the claimant to adduce the information which he was alleging supported his case. In so far as this was in the hands of the employer, the claimant could have identified the information required and requested that it be provided voluntarily or, if that was refused, by obtaining an order from the Tribunal."

71. He added later on in that paragraph the following:

> "If the employer fails to call the actual decision makers, he is at risk of failing to discharge the burden which arises at the second stage, but no adverse inference can be drawn at the first stage from the fact that he

has not provided an explanation as Lord Justice Mummery said in terms in para. 58 of Madarassy."

Transfer

72. In ***Cheesman v R Brewer Contracts Ltd [2001] IRLR 144***, the EAT summarised the law then applicable to a transfer under the then regulations, now within Regulation 3(1)(a), and that remains guidance for the factors to consider in determining whether or not there was a transfer of undertaking.

73. In circumstances where there is a transfer, a dismissal where that is the sole or principal reason is unlawful - ***Harrison Bowden Ltd v Bowden [1994] ICR 186.*** The effect of that under Regulation 4 is to transfer all liabilities of the transferor to the transferee. That was held to apply to the transfer of an equal pay claim (***Sodexo Ltd v EA Gutridge [2008] IRLR 752***). Likewise, reinstatement of a dismissed employee by the transferor employer was held to be into the employment of the transferee, where that was the logical result of the timing of the appeal and the transfer: ***G4S Justice Services (UK) Ltd v Anstey [2006] IRLR 588, EAT***.

74. Where there was a failure to consult in a collective redundancy, an analogous situation to that under the Regulations, advice was given in ***GMB v Susie Radin Ltd, [2004] IRLR 400*** that if there was a complete failure to comply, consideration started with the maximum award, and was reduced if circumstances so justified.

Discussion

75. I was satisfied that both witnesses were credible and reliable. I accepted what was said, and that the matters alleged in the Claim Form were accurately stated. They were supported for example by letters sent to the first respondent, and the terms of a reply which were lacking in candour at the

very best. There was a very strong inference that the alleged cessation of trading of the first respondent had been engineered to remove the claimant from employment. I have set out the law in some detail above notwithstanding that the respondents did not appear. The position is not straightforward.

76. I deal with each issue in turn. Firstly, I am satisfied that there was no consultation whatsoever, and that there was an unfair dismissal for the purposes of section 98(4) of the Employment Rights Act 1996.

77. Secondly, I am satisfied that the claimant is a disabled person, and that she was dismissed for matters arising out of that for the purposes of section 15 of the 2010 Act. The factual circumstances create a strong prima facie case of that. The burden of proof shifts to the first respondent under section 136. No evidence has been tendered. I consider that that claim has therefore been established.

78. I am also satisfied that the claim in respect of reasonable adjustments has been established. It was I consider a reasonable adjustment not to have the claimant, suffering from substantial fatigue after treatment for cancer, to work to 1.30am. Guidance is given in the Code of Practice: Employment issued by the Equality and Human Rights Commission which supports that assessment. There was no evidence to establish the contrary. There were other bar staff, and making appropriate arrangements was I consider obvious and reasonable. The PCP was the requirement to work shifts both day and night, and to 1.30am. That put the claimant given the circumstances at a substantial disadvantage, because of the substantial fatigue caused by her disability. Her request for day shifts ought to have been granted. The failure to do so was I consider a detriment, and that continued up to the point of dismissal. There was a breach of sections 20 and 21 of the Act in such circumstances.

79. The dismissal itself arose against that background. The claimant had made a grievance about the issue of the failure to make the adjustment, as she was

entitled to. That was not engaged with at all. There was no hearing, no decision, and no right of appeal. The raising of a grievance in such circumstances was a protected act, and there is a very strong inference from the circumstances that there was a dismissal in the absence of any consultation, with an allegation that all staff were to be dismissed, where all others were then employed by the second respondent which continued the business of the first respondent without interruption, where Ms Edgar was the sole director of each of those two companies, that the grievance was a significant factor in the dismissal, and there is no evidence tendered to the contrary. The burden of proof provisions are therefore again engaged, and the claim of victimisation succeeds.

80. In respect of the issue of transfer, it is I consider entirely clear that there was a transfer under Regulation 3(1)\(a), which is often referred to as an old-style transfer, and a relevant transfer under that Regulation. The circumstances do not admit of any sensible construction other than that. The business operated by the first respondent, including its staff and resources such as fittings, fixtures and stock, was an economic entity. It continued its operation with the second respondent. It retained its identity. Save for the claimant, the same staff worked the same shifts in the same public house. The job of the claimant was advertised by the second respondent. The claimant had been assigned to the economic entity operated by the first respondent. There is, as I indicated above, a very strong presumption that the circumstances were engineered, or taken advantage of at the very least, to secure the removal of the claimant. The purported redundancy was a sham. There was no such redundancy. Rather there was a relevant transfer.

81. The claimant's employment would have transferred to the second respondent but for that unlawful and unfair dismissal. The terms of Regulation 4(3) are I consider engaged.

82. There was no consultation of any kind with the claimant, or by taking steps to elect representatives, by the first respondent. Instead the first respondent wrote to say that it was to cease trading and dismiss all staff. The duties under Regulation 15 were breached entirely. I am satisfied that the appropriate award for that is the maximum of 13 weeks' pay. There is nothing to suggest that it should be reduced. I have also made a declaration as the Regulations refer to.

83. The effect of Regulation 4 is to transfer all rights and liabilities of the first respondent to the second respondent. The awards I make for unfair dismissal, and discrimination, are therefore transferred to the second respondent under that provision. I note that neither respondent appeared to oppose the claims made. The award for failure to consult under the Regulations is made against both of them jointly and severally.

Remedy

84. Whilst the claimant sought a basic award, she accepted that she had been paid a statutory redundancy payment, and no basic award is therefore due.

85. The compensatory award for unfair dismissal is determined under section 123 of the Employment Rights Act 1996, and is based on loss sustained as a result of the dismissal.

86. I am satisfied that the claimant mitigated her loss by seeking new employment, and that that continues for the summer season only. In so far as past loss is concerned, I accept the figure put forward for the period from dismissal to the new role commencing. There is then no loss of earnings for the period to the end of September 2019 whilst the current position continues. I consider that the schedule of loss seeking six months' future loss for the period after the end of that position is excessive. Whilst it is more difficult to obtain new employment over the autumn and winter, I consider that the

experience of obtaining new employment previously is evidence that the claimant is likely to obtain new employment earlier than six months, and I consider in all the circumstances that an award for three months, or 13 weeks, is appropriate.

87. I consider that an award for loss of statutory rights is appropriately quantified at £400.

88. I turn to the award for injury to feelings. Compensation for that is considered under section 124, which refers to section 119, of the 2010 Act. There is no further award for loss of earnings under this provision as that has been dealt with under the terms above for unfair dismissal. There are two factors to consider. The first is the failure to make reasonable adjustments, despite that being requested a number of times, and having the support of the consultant. That caused the claimant to continue working to 1.30am, at a time when she was still suffering from both the effects of her condition and treatment for it. Her distress from that was prolonged, and substantial. She spoke movingly of the fact that the loss of her job, which she loved, caused her further and serious distress. She was visibly upset when giving that evidence. That is the second factor.

89. The leading authority is that of ***Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102*** in which the Court of Appeal gave guidance on the level of award that may be made. Three bands were referred to in that authority being lower, middle and upper.

90. In ***Da'Bell v NSPCC [2010] IRLR 19***, the EAT held that the levels of award needed to be increased to reflect inflation. The lower band would go up to £6,000; the middle to £18,000; and the upper band to £30,000.

91. In ***De Souza v Vinci Construction (UK) Ltd [2017] IRLR 844,*** the Court of Appeal suggested that it might be helpful for guidance to be provided by the

President of Employment Tribunals (England and Wales) and/or the President of the Employment Appeal Tribunal as to how any inflationary uplift should be calculated in future cases. The Presidents of the Employment Tribunals in England and Wales and in Scotland thereafter issued joint Presidential Guidance updating the Vento bands for awards for injury to feelings. In respect of claims presented on or after 6 April 2018, the ***Vento*** bands include a lower band up to £8,600.

92. I consider that having regard to the ***Vento*** guidelines, as uprated, that the appropriate award is the very top of the lower band, not within the middle band as Mr Russell had argued for, and I therefore award the sum of £8,600 under that head. I consider that it is appropriate to award interest on the past element of that at 4% per annum, being one half of the juridical rate, for the period from dismissal to date, which I calculate to be the sum of £143.33, being five months from date of dismissal to date of this Judgment.

Awards

93. The claimant was paid £114 per week. I calculate the heads of loss to be as follows:

(i) Compensatory award for unfair dismissal

(a)	Past loss	£456.00
(b)	Future loss	£1,482.00
(c)	Loss of statutory rights	£400.00
	Total compensatory award =	£2,338.00

(ii) Injury to feelings for discriminatory conduct

(a)	Injury to feelings	£8,600.00
(b)	Interest	£143.33
	Total award under 2010 Act =	£8,743.33

(iii) Total awards against second respondent following transfer under 2006 Regulations = £11,081.33

(iv) Regulation 15 award regarding failure to consult in transfer (£114 x 13) = £1,482

Conclusion

94. I make the Judgment and awards set out above.

Employment Judge: **Alexander Kemp**
Date of Judgment: **12 September 2019**
Date sent to parties: **12 September 2019**