# EMPLOYMENT TRIBUNALS

**Claimant:** **Ms R Tabone**

**Respondent:** **AZ Trading Limited**

**Heard at:** **East London Hearing Centre (by Cloud Video Platform)**

**On:** **11 and 12 February 2021**

**Before:** **Employment Judge Hallen**
**Members:** **Mr. M Wood**
**Mr. J Webb**

**Representation**

Claimant: In person
Respondent: Ms A Mabena (HR Rep)

# JUDGMENT

***This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.***

**The unanimous judgment of the Tribunal is that: -**

1. **The Claimant's claim for direct discrimination in respect of her dismissal due to disability contrary to section 13 of the Equality Act 2010 (EA) fails and is dismissed.**

2. **The Claimant's claim for discrimination in respect of her dismissal arising from her disability pursuant to section 15 of the EA fails and is dismissed.**

3. **The Claimant's claim in respect of reasonable adjustments pursuant to section 20 EA fails and is dismissed.**

4. **The Claimant's claim in respect of harassment pursuant to section 26 EA fails and is dismissed.**

# REASONS

## Background

1. The Claimant was employed as a bubbleologist working for the Respondent in a small franchise catering business which employed less than 20 employees. She asserted in her claim form that her employment which commenced on 17 December 2019 and ended on 20 January 2020 (a period of just over a month) was terminated unlawfully due to her disability and of for reasons related to her disability. The Claimant asserted that her disability was Crohn's disease and Leri Weill dyschondrosteosis (Leri Weill). She also asserted that she was subject to harassment due to her disability and that the Respondent failed to make reasonable adjustments.

2. The claim form and response form were considered at a preliminary hearing on 29 July before Employment Judge Housego at which directions were given for the substantive hearing and the issues were agreed between the parties. This substantive hearing was listed for two days on 11 and 12 February 2021 before a full Tribunal.

3. At the preliminary hearing, the judge stated that the Respondent was a franchise business owned by Mr. A Mehmood. The business is a small catering franchise in Lakeside Shopping Centre called Bubbleology. The concession stand makes specialist teas, coffees and snacks. The dates of employment were from 17 December 2019 to 20 January 2020 when the Claimant was dismissed by Mr. A Mehmood. The Respondent says that the reason for dismissal was poor performance. The Claimant stated at that hearing that she suffered from Crohn's disease and Leri Wiell. Crohns is a well-known digestive condition. The Claimant explained that the effect of Leri Weill was that she was 4 foot 10 inches tall with shorter forearms than usual such that their length is similar to her hands and that her hands have what she described as “nobbly” fingers. The Respondent accepted that the Crohn’s disease amounted to a disability as defined by the EA.

4. The judge defined the claims and issues at the preliminary hearing with which the substantive hearing would have to concern itself with. First, the Claimant asserted that she was subject to harassment due to her disability contrary to section 26 of the EA that due her Crohn's disease she was criticised for the excessive use of the toilet and was subject to general disparagement about her condition and in particular being asked about her sickness absence at her interview for the post, being criticised about the length of her toilet breaks by Courtney Citroni and in particular on 17 January 2020, not being able to prepare tea and tapioca, not being able to increase her hours due to her Crohn’s, the manner of her dismissal in front of staff and customers, being told on the day of her dismissal by Mr. Mehmood that ‘the company told me not to employ anyone with health issues’. With regard to Leri Weill, the Claimant asserted that she was subject to harassment in respect of the statement made in paragraph 21 of her grounds in support which was that she could not make tapioca because of her deformed hands and gloves could not be provided to fit them. Secondly with regard to her claim for failure to make reasonable adjustments for both conditions, the Claimant asserted that the Respondent should have made modest changes to the provision for toilet breaks and in respect of Leri Weill, the Respondent should have provided a stool upon which she could stand to reach high shelves and oven gloves that were non-standard which would enable her to work with hot liquids as set out in paragraph 19 of her grounds in support of her claim form. Thirdly, the Claimant stated that her dismissal was direct discrimination (paragraph 22), stating

that she was dismissed by the owner of the business, Mr. Mehmood in part because she had Crohn's disease and spent too long in the toilet. The Claimant compared herself to a hypothetical comparator. Finally, contrary to section 15 of the EA the Claimant stated that her dismissal and harassment was unfavourable treatment because of her disability and that the Respondent could not show that the treatment was a proportionate means of achieving a legitimate aim. No comparator was required for this head of claim.

5. The Tribunal had before it an agreed bundle of documents and heard first from the Claimant who had not prepared a written witness statement but relied upon her grounds in support of her claim which was at pages 11 to 16 of the bundle. The Respondent attended with four witnesses namely Asad Mehmood, the owner of the business; Lucy Garwood, a team member; Aleksandra Mati, Independent Health and Safety Consultant and Khalid Raja a team member and Bubbleologist. All of these witnesses prepared witness statements and were subject to cross examination and questions from the Tribunal.

## Facts

6. At the outset of this part of the judgment, it should be stated that the Tribunal on balance preferred the evidence of the Respondent's witnesses and resolved most of the conflicts of evidence in the Respondent's favour as shown in this section of the judgment.

7. The Respondent is a small catering franchise business operating a store in the concourse at lakeside shopping centre. It is a bubbleology store making specialist teas and snacks and employs less than 20 staff. It was a relatively new store having commenced trading at the end of November 2019 and was Mr. Asad Mehmood's first business.

8. The Claimant attended an interview and a trial shift at the business on 5 December 2019 where she met with the owner of the business, Mr Mehmood, who interviewed her. The Claimant volunteered that she had Crohn's disease and Mr. Mehmood noted her Leri Weill condition. The Claimant was eager to confirm her abilities despite her disabilities and volunteered that she had previous experience in catering businesses (Costa Coffee) and had little time off sick even though she was disabled. There was some dispute at the Tribunal hearing about whether the Respondent had asked the Claimant about her previous sickness but the Tribunal found that it was the Claimant who volunteered this information as she was eager to obtain employment rather than the Respondent seeking information about her previous sickness record.

9. The job interview was conducted in the store as there was no meeting room or office and the Claimant was content with this. Before the start of the trial shift, she had completed a due diligence document and disclaimers including a health questionnaire where she stated that she had Crohn's disease. The contract of employment signed by the Claimant confirmed that she undertook 24 hours per week minimum and was subject to a probationary period of six months during which time her work would be monitored and her performance and conduct assessed. The commencement date was stated as 17 December 2019 and the pay rate was £7.70 per hour. The contract was signed by the Claimant on 18 December and was at pages 66 to 67 of the bundle of documents. The health questionnaire dated 12 December was at page 68 of the bundle of documents and there was a further health check questionnaire dated 20 December 2019 which was at page 69 of the bundle.

10. The trial shift lasted two hours and the Claimant was able to carry out the relatively simple duties of the role which involved serving customers in a friendly manner, making drinks and waffles, following simple recipes, following hygiene and quality standards, carrying out cleaning tasks and appearing to be cooperative and friendly to staff. As a consequence of the Claimant's success in the trial shift she was offered a job by Mr. Mehmood.

11. On 17 December 2019, the Claimant started her initial employment with the Respondent as stated above on a trial probationary period. During this time, the Respondent through Mr. Mehmood in particular but assisted by other team members monitored the Claimant's performance, conduct and attendance and suitability for continued employment. During this period, the employment could be terminated at any time by either party giving one days' notice during the first month or one week's notice thereafter. The Claimant, who conducted her contracted hours of 24 per week, had on occasion requested further hours which Mr. Mehmood happily offered her as and when he could. Mr. Mehmood gave evidence to the Tribunal which was accepted that he could not offer her more than 24 hours at the time because his was a new business and was just starting out. However, he did offer her more hours as and when the needs of the business demanded it, especially over the Christmas period.

12. The Claimant completed a further health questionnaire on 20 December which was at page 69 which confirmed that the Claimant had Crohn's disease. Mr. Mahmood asked the Claimant if she needed anything in respect of her disability or any other reasonable adjustments and the Claimant responded that she did not as her disability did not affect her ability to undertake her duties or her ability to do the job she was employed to do. The Respondent's evidence was that the Claimant had not asked the Respondent to make any reasonable adjustments to her job role. During the course of the proceedings, the Claimant confirmed that she did not ask the Respondent for any reasonable adjustments as on her own evidence, despite her disabilities, it never impacted upon her ability to undertake her role of bubbleologist. The Respondent gave evidence to the Tribunal that the Claimant could not undertake additional tasks until she obtained further training beyond the initial limited amount of training that she had undertaken whilst employed. Mr. Mehmood had stated that at the beginning of his business he was concerned about health and safety of his staff and only he and Mr. Raja made hot tea, handled urns and made tapioca. In particular, Ms. Mati, the Health and Safety consultant gave evidence confirming that to protect the staff from the risk of injury, certain heavy lifting tasks including lifting tea urns onto high shelves and cooking involving heated utensils could not be undertaken until after manual handling training had been undertaken. Ms Mati confirmed that such training did not occur during the first month of employment and the Claimant also confirmed that she had not completed such training. Therefore, she could not undertake lifting duties or cooking duties such as making tapioca. In such circumstances, the Respondent would not have needed to offer the Claimant a stool to stand on to undertake lifting or to provide her with gloves to conduct such lifting or the cooking of tapioca as she complained about in her claim form. She had not undertaken training to be able to do such tasks.

13. The Claimant like her colleagues was entitled to a 20-minute break during her shifts which were typically for six hours. The Claimant complained that she was not given adequate toilet breaks and that she was criticised for taking lengthy toilet breaks due to her Crohn's disease. The Tribunal did not accept this evidence. The Respondents store did not have a toilet facility so all staff had to use the shopping centres toilet facility which

was two or three minutes away. The owner of the business, Mr. Mehmood did not have a problem with staff taking toilet breaks and was not concerned about the Claimant taking toilet breaks. He gave evidence that this did not bother him which the Tribunal accepted. The Claimant complained that on one occasion on Friday 17 January 2020, a colleague, Courtney Citroni complained about the time length of time that she took on a toilet break stating “it's ridiculous how ******* long she takes”. However, Mr. Mehmood gave evidence that there was no such complaint. Ms Lucy Garwood, who was also present, did not recollect this incident occurring in the way described by the Claimant nor indeed was she or anyone else warned about the length of time they took for toilet breaks. Therefore, the Tribunal did not accept that the Claimant was subject to any criticism with respect to the length or timing of her toilet breaks.

14. A number of incidents occurred during January 2020 with respect to the Claimant’s work performance. On 10 January Mr. Mehmood had reason to offer the Claimant support as she was falling behind with orders at the store during a busy period. However, the Claimant completely ignored Mr. Mehmood which resulted in a customer complaint about a wrong drink being served to the customer. When Mr. Mehmood raised the issue with the Claimant, she became defensive stating that she knew what she was doing. On 11 January, the Claimant failed to deal with a loyalty card properly even though she had previously been trained on the procedure. Mr. Mehmood requested that the Claimant observe him so that she could learn how to do it correctly. Instead, the Claimant argued that she could undertake the loyalty card procedure properly in front of customers. On Sunday 12 January at approximately 5:00 PM the Claimant failed to follow a reasonable request made by Mr. Mehmood and refused to serve a customer. The Claimant was concerned was that she was serving the customer after the closing time for the shopping centre which was 5:00 PM on a Sunday. The Respondent’s position was that all customers should be served if they were in the queue prior to 5:00 PM and on this occasion this customer was in the queue prior to closing time. As a consequence, the Claimant should have served the customer. The Claimant was given a verbal warning for refusing to follow a legitimate management instruction. Following this transgression, Mr. Mehmood decided that he would closely monitor the Claimant’s performance more closely during the following week.

15. On 15 January, Mr. Kibria Khan who was a senior operations manager of the franchise business attended the Respondents store to ascertain its performance as it was a new franchise. He asked the Claimant to make a drink and waffles as part of the assessment of the store and its new staff. The Claimant failed to follow the correct recipe cards for the drink and the waffle was slightly burnt. The Claimant maintained that she was permitted to make drinks and had done so in accordance with the Respondents’ instructions. Her evidence was that she could vary the ingredients for drinks and that on this occasion she made the drink correctly. She also gave evidence that the waffle although burnt was also made in accordance with the recipe. The Respondent’s witnesses (Mr... Mehmood and Ms Garwood) confirmed that the Respondents recipe cards should be followed and that variations could be made only upon the customer's instructions. This was not the case on this occasion. The Tribunal believed the evidence of the Respondent and noted that on this occasion the Claimant failed to correctly undertake the tasks given to her by the representative of the franchise. This caused the Respondents owner to be further concerned about the Claimant’s performance.

16. On 19 January 2020, which again was Sunday, the Claimant was on the till at 5:00 PM and had refused to serve a customer after the closing time for the shopping centre. The Claimant stated that she did not serve the customer because it was after closing time at 5:05 PM and that was when her shift had ended. Mr. Mehmood instructed the Claimant to serve the customer as the customer was in the queue prior to 5:00 pm and she ignored his instructions and told the customer 'I'm not serving you because we are closed". The customer was upset and walked off at which stage Ms Garwood called the customer back saying 'don't worry I will serve you'. The customer was very disappointed with the Claimant's behaviour and refused to be served.

17. As a consequence of the Claimants conduct on this occasion and given the fact that she had previously been given a verbal warning for similar performance only a week earlier, Mr. Mehmood had a meeting with the Claimant on 20 January in the store in the presence of Mr. Raja as the witness. There were no customers present and the Claimant's employment was terminated due to her poor performance during her probationary period. The reasons given by Mr. Mehmood was that the Claimant did not pay attention to details which included using wrong quantities for making products, refusing to follow reasonable requests from her manager which included refusing to serve customers and willful lack of progress in her customer service skills which included her being argumentative at times in front of customers and argumentative towards her line manager and finally failing to follow a reasonable management instruction. The Claimant complained that the dismissal occurred in front of her fellow work colleagues and customers. The Tribunal did not accept this evidence. The dismissal occurred with Mr. Mehmood present and Mr. Raja as witness. Ms Courtney Citroni was at the till serving customers and was not involved in the dismissal. The Tribunal noted that the store was large enough for the dismissal to occur at the rear end of it in a loud shopping centre where nobody could have heard what was going on. The Claimant also complained that Mr. Mehmood told her that the company warned him not to employ anyone with health issues but he thought she seemed nice enough. Mr. Mehmood denied making this statement and Mr. Raja who was present as a witness did not recollect this statement being made. The Tribunal found that it was not probable that Mr. Mehmood would have made this statement. If such a statement was made the Tribunal would have expected Mr. Raja the witness to remember it. Furthermore, it was improbable that Mr. Mehmood would have appointed the Claimant in the first place to the post if he held this opinion or knew that was the view of the franchisor.

18. The termination of the Claimant's employment was confirmed in the letter of dismissal dated 24 January 2020 which was at page 78 of the bundle. This letter confirmed the reasons that were given to the Claimant at the meeting by Mr. Mehmood above specifying the six reasons above and stating that her employment was terminated with her last working day being the 20th of January 2020. The Claimant chose not to work out any of her notice period and was paid all of her contractual entitlements.

## Law

### Direct Disability Discrimination

19. It is unlawful for an employer to discriminate against a worker by dismissing him or her (section 39 (2) of the EA).

20. The burden of proof in discrimination cases, dealt with in section 136 of the EA, is a two stage process. Firstly, the Tribunal must consider whether there are facts from which the Tribunal could conclude in the absence of an adequate explanation, that the Respondent had committed an unlawful act of discrimination against the Claimant. If the Tribunal could not reach such a conclusion on the facts found the claim must fail. Where the Tribunal could conclude that the Respondent had committed an unlawful act of discrimination against the Claimant, it is then for the Respondent to prove that it did not commit, or as the case may be, it is not to be treated as having committed that act. The Tribunal makes further observations on the burden of proof below.

21. Section 13 of the EA provides that it is direct discrimination for an employer to treat an employee less favourably because of disability than it treats or would treat others. In determining whether there is direct discrimination it is necessary to compare like with like. This is provided for by section 23 of the Act which says that in a comparison for the purposes of section 13 there must be no material difference between the circumstances relating to each case.

22. The court of appeal in Igen Ltd v Wong (203 2005) EWCA Civ142 made the following points in relation to the application of the burden of proof and claims of direct discrimination: –

> 'It is important to bear in mind in deciding whether the Claimant has proved facts from which the Tribunal could conclude that there has been discrimination that it is unusual to find direct evidence of… discrimination: few employers would be prepared to admit such discrimination, even to themselves and in some cases the discrimination may not be an intention but merely based on the assumption that "he or she would not have fitted in'.

23. In deciding whether the Claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the Tribunal therefore usually depends on what inferences it is proper to draw from the primary facts found by the Tribunal. It is important to note the word "could" in the legislation. At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a Tribunal was looking at the primary facts before it to see what inferences of secondary fact could be drawn from them. In considering what inferences or conclusions can be drawn from the primary facts, the Tribunal must assume that there is no adequate explanation for those facts.

24. According to the Court of Appeal in the case of Madarassy v Nomura International Plc (2007) IRLR 246, a difference of status and a difference of treatment will not usually be sufficient to reverse the burden of proof automatically. Nor will simply showing that the conduct is unreasonable or unfair usually, by itself, be enough to trigger the transfer of the burden of proof: Bahl-v- The Law Society (2003) IRLR 640, EAT approved by the Court of Appeal at (2004) IRLR 799.

25. Where the Claimant has proved facts from which the Tribunal could conclude that the Respondent had treated the Claimant less favourably because of disability, it is then for the Respondent to prove that it did not commit that act, or as the case may be, is not to be treated as having committed that act. As Igen made clear, to discharge that burden in the case of alleged direct discrimination it is necessary for the Respondent to prove on the balance of probabilities the treatment was in no sense whatsoever on the grounds of the

protected characteristic. Where there is more than one reason for an employer's act, the question is whether the protected characteristic was an effective cause.

**Discrimination arising from disability**

26. An employer discriminates against a disabled employee if it treats that person unfavourably because of something arising in consequence of that disability and the employer cannot show that the treatment is a proportionate means of achieving a legitimate aim (Section 15 EA).

27. Simler P in Pnaiser v NHS England (2016) IRLR 170 EAT gave the following guidance as to the correct approach to a claim under section 15: –

> "A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respect of B's disability."

28. The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for the impugned treatment in a direct discrimination context, so too, there may be more than one reason in section 15. The "something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason or cause of it.

29. The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability'. That expression "arising in consequence of' could describe a range of causal links. The causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

30. For an employer to show the treatment in question is justified as a proportionate means of achieving a legitimate aim, the legitimate aim being relied upon must in fact be pursued by the treatment. The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and reasonable needs of the undertaking. The Tribunal must weigh the reasonable seeds of the undertaking against the discriminatory effect of the employer's measure or treatment and make its own assessment as to whether the former outweigh the latter: Hardys and Hansens plc v Lax (2005) IRLR 726 CA.

**Failure to make reasonable adjustments**

31. Under section 39 (5) of the EA, a duty to make reasonable adjustments applies to an employer. A failure to comply with that duty constitutes discrimination (section 21 EA).

32. Section 20 of the EA provides that the duty to make reasonable adjustments comprises three requirements set out in that section. This case is concerned with the first

of those requirements which provides that where a provision, criterion a practice of an employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the employer must take such steps as is reasonable to have to take to avoid that disadvantage. Section 21 (1) provides that a failure to comply with this requirement is a failure to comply with the duty to make reasonable adjustments.

33. In considering whether the duty to make reasonable adjustments arose, a Tribunal must consider: –

1. Whether there was a provision, criterion or practice (PCP) applied by way or on behalf of an employer;

2. The identity of the non-disabled comparators (where appropriate); and

3. The nature and extent of the substantial disadvantage in relation to a relevant matter suffered by the employee.

34. The EAT has held that a "practice connotes something which occurs more than on a one-off occasion and which has an element of repetition". Nottingham City Transport Ltd v Harvey (2013) EAT. There will not have been a breach of the duty to make reasonable adjustments unless the PCP in question placed a disabled person concerned not simply at some disadvantage generally, but at a disadvantage which is substantial and which is not to be viewed generally but to be viewed in comparison with persons who are not disabled: Royal Bank of Scotland v Ashton (2011) ICR 632 EAT.

**Harassment due to disability**

35. s26 Eq A provides " (1) A person (A) harasses another (B) if— (a) A engages in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of— (i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B'.

36. In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account— (a) the perception of B; (b) the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect."

37. In Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336 the EAT held that there are three elements of liability under the old provisions of s.3A RRA 1976: (i) whether the employer engaged in unwanted conduct; (ii) whether the conduct either had (a) the purpose or (b) the effect of either violating the Claimant's dignity or creating an adverse environment for her; and (iii) whether the conduct was on the grounds of the Claimant's race.

38. Element (iii) involves an inquiry into perpetrator's grounds for acting as he did. It is logically distinct from any issue which may arise for the purpose of element (ii) about whether he intended to produce the proscribed consequences. This guidance is instructive in respect of harassment claims under s26 EA, albeit under the EA, the conduct must be for a reason which relates to a relevant protected characteristic, rather than on the grounds of race or sex. There is no requirement that harassment be "on the grounds of"

the protected characteristic – R(EOC) v Secretary of State for Trade and Industry [2007] ICR 1234. The shifting burden of proof applies to claims under the EA.

**Tribunals Conclusions**

39. With regard to the Claimants claim for direct disability discrimination and discrimination arising from disability contrary to section 13 and 15 of the EA respectively, it is for the Claimant to show that there were facts from which the Tribunal could conclude in the absence of an adequate explanation that the Respondent had committed an unlawful act of discrimination against the Claimant and to identify whether there was unfavourable treatment of her due to her disability by the Respondent.

40. Based upon the facts of this case, the Tribunal has come to the conclusion that the Claimant had not proven that there are facts from which the Tribunal could conclude that the Respondent had committed unlawful acts of discrimination against the Claimant nor had she shown that there was unfavourable treatment of her due to her disability. Therefore, the Tribunal could not find that these two claims were proven.

41. The Claimant cited that she was subject to direct discrimination and discrimination arising from disability when she was initially asked at the interview for the post by Mr. Mehmood about her previous sickness absence after she told him that she had Crohn's. However, the Tribunal found no evidence of this and indeed it was the Claimant who volunteered that she was disabled and that she did not have a previous sickness record that would prevent her from being employed by the Respondent. Indeed, the Respondent was keen to take the Claimant on in the knowledge that the Claimant was disabled and offered her a trial shift on 5 December and thereafter permanent employment on 17 December 2019 subject to a six-month probation period during which time her work performance would be monitored.

42. The Claimant cited that she had been subject to direct discrimination and discrimination arising from her disability and that she was criticised for her toilet breaks generally and in particular by Courtney Citroni and in particular on 17 January 2020. The Tribunal did not accept that this was the case. Mr. Mehmood gave evidence that he had no concerns about the Claimant or anyone else taking toilet breaks nor was he concerned about the duration of such breaks. With regard to the incident on 17 January, both Mr. Mehmood and Ms. Garwood gave evidence that Ms. Citroni did not make the comment attributed to her and furthermore, Ms. Garwood who was a team member of the Claimant confirmed that Mr. Mehmood had no concerns about the length or duration of her toilet breaks. The Tribunal noted that the toilet facility was the facility for the shopping centre and was one or two minutes walk away. It seemed improbable to the Tribunal that, given the evidence of Mr. Mehmood and Ms. Garwood, the Claimant would have been criticised for her toilet breaks especially given the fact that Mr. Mehmood knew about her Crohn's from the outset and was unlikely to have made comments about this.

43. The Claimant indicated that she was subject to discrimination in respect of not being able to prepare tea and tapioca, that she needed a stool to do tasks at higher levels and that she needed non standard gloves to make hot items such as tapioca. The Tribunal found as a matter of fact that the Claimant would not be in a position to undertake these tasks as she had not been given manual handling training and such training would not have been given in the first month of the Claimant's employment. Indeed, the Claimant

gave evidence that she had not received such training and Ms. Garwood also confirmed that at this time no training had been given to her either. Therefore, the Tribunal could not find that the Claimants had been subject to discrimination due to her disability or unfavorable treatment due to her disability.

44. The Claimant stated that her hours were not increased due to her Crohn's. Mr. Mehmood gave evidence that the Claimants contractual hours were 24 per week and that on occasion he did give her additional hours if the store was busy. In addition, the Claimant's contract of employment which was on the pages 66 to 67 confirmed that the Claimant's contractual hours were 24 per week. The Tribunal did not find that the Claimant was discriminated against with regard to her hours due to her disability as she was undertaking her contractual hours during her short length of service with the Respondent.

45. Finally, the Claimant asserted that she had been dismissed due to her disability or treated unfavourably as a consequence of her disability. The Tribunal found that as a matter of fact, the Claimant was dismissed for poor work performance. The Respondent had legitimate concerns about ability to take instructions, interact with colleagues correctly and deal with members of the public in accordance to the company's expectations in a service industry. This first manifested itself on 10 January when Mr. Mehmood attempted to assist the Claimant during a busy time and the Claimant acted defensively and a customer was served the wrong drink. On 11 January, the Claimant failed to deal with a loyalty card properly even though she had been previously trained in the procedure and again became defensive when Mr. Mehmood tried to show her the correct manner of dealing with loyalty cards. On 12 January which was a Sunday, the Claimant refused to follow a legitimate management instruction to serve a customer leading to a verbal warning. On 15 January, the Claimant failed to follow the correct recipe for making a drink and burning a waffle in the presence of a senior operations manager from the franchisor who was there to monitor this new franchise business. The Claimant did not follow the correct procedure for making drinks upon which she had been trained and this caused Mr. Mehmood to monitor performance the following week more closely. On 19 January, the Claimant again refused to serve a customer for the same reasons that she had a week before, and for which she been given a verbal warning. As a consequence of these performance issues, the Respondent was justified in taking the decision to terminate the Claimant's employment. The action taken by the Respondent was not related to the Claimant's disability. The Tribunal found that the Claimant was not discriminated against on the basis of her disability or treated unfavourably due to it and the Respondent, through Mr Mehmood, did not make the comment that she attributed to him that he was instructed not to employ anyone with health issues.

46. In considering whether a duty to make reasonable adjustments arose in the first place, the Tribunal considered whether there was a provision, criterion or practice applied by the Respondent in this case that placed the Claimant at a substantial disadvantage in relation to a relevant matter suffered by the employee. The Claimant was not in a position to prove that there was a provision criterion or practice applied by the employer in this case. Therefore, her claim did not go beyond stage one of the required analysis to be made by the Tribunal. Even on her own evidence, it was clear that she did not perceive her disability as having any impact upon her ability to undertake the duties of a Bubbleologist having previous experience working at Costa Coffee in a similar position. She was asked whether she needed any adjustments after completing the health questionnaire and confirmed that she did not need adjustments. She was asserting at the Tribunal a hypothetical scenario which was not in fact requested at the time by her with

regard to her employment with the Respondent. This hypothetical requirement related to not being able to work at height, carry heavy tea urns or make tapioca. It seemed to the Tribunal that these issues may have been concerns for the Claimant only after her employment had been terminated. Nevertheless, the Tribunal accepted the evidence of Ms. Mati and Mr. Mehmood that the Claimant had not been given manual handling training and therefore would not have been expected to undertake these tasks in any event. Ms. Garwood also confirmed that she had no such manual handling training and was not expected to work at height, make tea or tapioca. Therefore, the Tribunal did not find that the Respondent had failed to make reasonable adjustments in this case.

47. Finally, with regard to the Claimant's assertions that she had been harassed by the Respondent and this was related to a protected characteristic namely her disability. As stated above, the Tribunal did not find that the Claimant had been harassed due to her disability. The Tribunal did not find that the Claimant had been criticised with regard to her toilet breaks by Ms. Citroni or anyone else, that she had not being harassed in respect of work duties such as making tea and tapioca, or with regard to her hours not being increased due to her Crohn's or to the assertion that Mr. Mehmood made a comment when he dismissed her that he was instructed by the company not to employ anyone with health issues. Furthermore, the dismissal itself was not an act of harassment and was justified for performance reasons.

48. As new business, the Tribunal would suggest that the Respondent may wish in future to take further specialist advice in respect of disability and conduct further awareness training in the form of equal opportunities training.

**Employment Judge Hallen**
**Date: 22 February 2021**