EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs I Sarfo	**v**	**Marks & Spencer plc**

Heard at: London Central
On: 12 - 18 November 2019

Before: Employment Judge Hodgson
Ms L Jones
Ms C Ihnatowicz

Representation

For the Claimant: in person
For the Respondent: Mr C Kelly

JUDGMENT

1. **The claim of failure to make reasonable adjustments fails and is dismissed.**
2. **The claim of direct discrimination fails and is dismissed.**
3. **The claim of unlawful harassment fails and is dismissed.**

REASONS

Introduction

1.1 By a claim presented to the London Central employment tribunal on 18 March 2019 the claimant brought claims of disability discrimination and

both direct and indirect discrimination. She relied on the protected characteristic of religion. She is a Pentecostal Christian.

The Issues

2.1 At a case management hearing on 16 July 2019, Employment Judge Tayler considered the issues in this case. He noted the claimant is a litigant in person and recorded there was difficulty identifying the claims. He stated he identified the issues as best he could. It was envisaged the claimant may take legal advice and would clarify the claim. It follows the claims were not finally identified.

2.2 On the first day of the hearing, we discussed with the claimant the nature of her claim. It was difficult to reconcile the list of issues from the case management discussion with the way the claimant described her claim before us.

2.3 We confirmed, it would be necessary to sufficiently identify the claim, before any evidence was heard. Before discussing the matter further, we read the claim form, the response, and all statements.

2.4 We explained to the claimant that our role is to identify the specific legal claims that she is pursuing. It was clear the claimant had general concerns about her employment. However, it does not necessarily follow that because an individual is concerned about particular matters that those concerns constitute discernible legal claims.

2.5 When considering the claims, it is necessary to identify the claims that are within the claim form. If a claim is not in the claim form, it is necessary to amend. It is appropriate to read the claim form in a purposive manner. Tribunals should not be unduly pedantic. Nevertheless, it should be possible to ascertain the essence of a claim. It is not enough for the claimant to simply give a history of events then for a tribunal to try and speculate as to what sort of claims could be brought. The claim form should identify the claims, albeit there is no need to use any specific language.

2.6 The claimant alleges she is disabled by reason of arthritis in her knee. Disability is not conceded.

2.7 Her concerns revolve around three main issues. First, is the requirement to work in a cold environment. Second, is the requirement to work on Saturdays. Third, concerns, in some manner, Sunday working.

2.8 The claim of disability discrimination is a claim of failure to make reasonable adjustments. It is the claimant's case that she moved to the Finsbury Pavement store on 13 August 2017 as a café manager. She states that she was required, on Saturdays only, to work in a cold section, stacking shelves with items to be purchased. It is her case that the cold air adversely affected her arthritis causing her additional symptoms. It is

not part of the claimant's case that the premises themselves could, or should, be altered in any manner. It is her case that she should not have been required to work in the cold area.

2.9 The claimant alleged the provision criterion or practice is the requirement for her to stack shelves in the retail area where chilled food is sold to customers from open refrigerated shelves.

2.10 She did not rely on the characterisation of any provision criterion or practice as recorded by EJ Tayler.[1]

2.11 It is less clear what the claimant says, if anything, was the required adjustment but her case is that the respondent, in some manner, failed to make reasonable adjustments.

2.12 The claim is disputed. Disability is not admitted. Substantial disadvantage is not admitted. In any event it is the respondent's case the claimant was moved at her request and hence it complied with any duty that arose.

2.13 There is no other ascertainable claim of disability discrimination contained within the claim form, either referred to by Employment Judge Tayler, or identified by the claimant during our discussions.

2.14 It is less clear how the claim of religious discrimination is put. The claimant is a Pentecostal Christian. Before us, it was the claimant's case that requiring her to work on Saturdays was an act of discrimination. This appeared, at first, to be an indirect discrimination case. The provision criterion or practice would be the requirement to work one in four Saturdays. The disadvantage to the claimant was that she could not attend to her duties as a trustee of her church on Saturdays. Such duties include preparation for the Sunday service, and providing charitable relief to homeless people, by distributing food clothes and blankets.

2.15 The issues as recorded by Employment Judge Tayler state that the provision criterion or practice relied on for the purpose of religious discrimination was as follows: "In order to remain as a manager (if she was not to work on in the cold area) the claimant will be required to work on Sundays." His issues did not identify any complaint about Saturday work and religion.

2.16 As regards working on Saturdays, during our discussion, the claimant stated that there was no difficulty working one in four Saturdays. She was

[1] At paragraph 2 of his order of 16 July 2019, EH Tayler stated the provision criterion or practice was "a practice of requiring the claimant to work one Saturday in four that required her to work in the cold area in the afternoon." At paragraph 5 he stated "Alternatively, was a physical feature of the area that the claimant worked in on Wednesday and Saturday afternoons that placed the claimant at a substantial disadvantage (the cold)." It is clear that the claimant's concern revolved around working in a cold environment, and it is that alleged requirement that form the basis of any provision criterion or practice.

able to, and could, make arrangements for her church duties to be covered, and she could accommodate the working pattern. Therefore, the claimant did not allege any disadvantage was caused to her by working one in four Saturdays

2.17 We explored with the claimant the reference to Sunday work. We are satisfied that the claimant does not put her case as recorded by Employment Judge Tayler. The provision criterion or practice as recorded by Employment Judge Tayler was not repeated, directly or indirectly, during the discussion, not did it appear in the claim form, whether expressly or by implication. We do not accept that there is any claim of indirect discrimination contained in the claim form relating to Sunday working.

2.18 It is common ground that the claimant moved from her position as a café manager to be a customer assistant, from September 2018. This occurred, in part, because the claimant made an application for flexible working. There is dispute as to the exact circumstances which we do not need to detail here. After she had accepted her position as a customer assistant working in womenswear, the claimant then raised a grievance. As part of the grievance process, three managerial positions were identified. One position required the claimant to make an application and undergo an interview. She attended for the interview but was unsuccessful.

2.19 In addition, she was offered two other positions the first at Hammersmith clothing and home, and the second Marble Arch hospitality (café management). She was free to take both positions, but when she made further enquiries, she was told that both required Saturday and Sunday work, and she chose not to accept them.

2.20 We considered her complaints in the claim form carefully. Thereafter we discussed the complaint with the claimant and agreed the complaint was one of direct discrimination because of religion.

2.21 It is the claimant's case that she was offered jobs with Saturday and Sunday work because the respondent knew that she would not be able to accept them, as she would wish to attend church. She puts the claim as follows: “I [am] being discriminated on because my religious belief means I cannot work Sunday so they are intentionally backing me into a corner that Sundays are my only way out.” This reference to “intention” is a clear reference to her being targeted. That is inconsistent with, and incompatible, with an indirect discrimination claim.

2.22 It follows that we can summarise the issues as follows:

2.23 Is the claimant disabled by reason of arthritis in her knee?

2.24 Did the respondent fail in its duty to make reasonable adjustments? The claimant alleges the provision criterion or practice was requiring her to

work stacking shelves in the retail area where cooled food is sold to customers from open refrigerated shelves. The disadvantages is that it exacerbated her symptoms caused by the arthritis. The adjustment requested is that she should not have been required to work there and/or she should have been moved.

2.25 Did the respondent directly discriminate against the claimant because of religion by offering her three positions which each required Saturday and Sunday work. The three positions are as follows:

2.25.1 Position 1: Hammersmith, commercial operations section manager.
2.25.2 Position 2: Hammersmith, clothing and home.
2.25.3 Position 3: Marble Arch in hospitality (as a café manager) that would require work on Saturday and Sundays and wrote and late nights on Saturday.

2.26 The allegations of direct discrimination are put, in the alternative, as allegations of harassment related to religion.

Evidence

3.1 The claimant and her daughter Miss Abigail Sarfo gave evidence. In addition, the claimant relied on a written statement of Mr Rex Arthur.

3.2 For the respondent Mr Paul Bowman and Ms Liljana Gajetic gave evidence.

3.3 We received a bundle of document which was added to by consent.

3.4 The respondent produced a chronology.

3.5 Both parties gave written submissions.

Concessions/Applications

4.1 There were not specific applications of concessions that we need to record. As noted, some further documents were provided and placed in the bundle, by consent.

The Facts

5.1 The respondent employed the claimant on 3 November 2014, in the Fenchurch Street store, as a hospitality (hot food) section manager. The parties have referred to this role as café manager; we will do the same. She worked Monday to Friday.

5.2 On 13 August 2017, the claimant transferred to the Finsbury Pavement store and continued to work in the café as a section manager. She was required to work one in four Saturdays. During Wednesday evenings and

Saturdays, her duties included overseeing the open fridge areas which hold chilled food for sale to customers.

5.3 On 10 September 2018, the claimant voluntarily accepted a demotion to customer assistant and began working in the womenswear department at Finsbury Pavement. She returned to working only Monday to Friday.

5.4 The claimant has arthritis in her left knee. On 1 March 2016, she was referred to occupational health. A report was prepared following a telephone assessment on 24 March 2016. The claimant reported many years of pain, swelling, and weakness in her left knee; a recent MRI diagnosis in June/July 2015 showed arthritis. She believed she would have a steroid injection. She reported use of ibuprofen and stated walking, standing, and climbing stairs could be difficult because it increased her symptoms of pain, swelling, and clicking. She reported that sometimes her knee was largely improved. The report opined that the claimant was fit for normal duties (she worked at Fenchurch Street as a café manager at the time). It stated her symptoms would become more manageable with further investigation by the NHS, but the condition was said to be "chronic." As to adjustments, it was recommended the claimant should be able to sit and rest between walking and standing tasks and there should be rotation of work every 30 minutes. (Her café role was largely seated with occasional walking and standing.)

5.5 The claimant has produced GP notes, but neither party has referred to them specifically. Her impact statement states the arthritis affects both knees and leads to limited flexibility and loss of strength. The symptoms can cause her trouble sleeping. The effect is variable: somedays are better than others. Cold conditions tend to worsen the symptoms. The joints tend to be stiffer and more painful in the mornings. Cooking, laundry, and cleaning can be challenging, and it can affect her activities in church. The symptoms cause her to sit a lot more and rest; her husband and daughter do some of the household chores. She states she asks "other people to take over [her] responsibilities in church." She states that working near cold fridges and lifting things triggers pain. Pain causes her walking to slow and she struggles to climb stairs because of the pain. On trains she needs to sit.

5.6 The occupational health report in 2016 led to no specific adjustments that we need to record. There was a meeting on 6 July 2016, and the claimant's concerns were addressed.

5.7 There were concerns about the claimant's work and there was a performance review meeting on 8 August 2016. This led to a written warning for poor performance. We do not need to record the detail of this.

5.8 In April 2017, the claimant asked the store manager, Ms Angela Barker, if she could move from hot food to general merchandise (clothing), as she had been on hot food for 2.5 years. She was told she could not move because it required weekend work.

5.9 Following a request from Ms Parker, the claimant transferred to Finsbury Pavement, as a café manager, on 13 August 2017. The claimant understood that she was to replace or cover for an underperforming manager. It is the claimant's case that she performed well, and improved significantly the environmental health officer's rating, as well as increasing sales. The café, on Saturdays, was open from 09:30 to 15:00. On Saturdays, and on her late shift, which we understand to be Wednesdays, the claimant was also required to oversee the food department. This included overseeing the refrigerated shelves, including replenishment of stock and rotation. It was never part of the claimant's duties to stack shelves or rotate stock. We accept that she did, of her own volition, occasionally stack shelves and rotate stock, albeit she had no obligation to, and could have instructed other members of staff to undertake the work.

5.10 The claimant was absent from 6 – 28 November 2017. On 28 November 2017, her manager, Mr Paul Bowman, conducted a return to work interview. The claimant stated she was off work as a result of work-related stress, which she believed had been caused by the environment and the amount of work expected. The claimant requested an occupational health referral concerning the work-related stress triggered by the absence. That occupational health referral did not proceed because the underlying staffing issues were addressed to the claimant's satisfaction. There followed an informal discussion between the claimant and Mr Bowman, during which she withdrew her request

5.11 On 22 February 2018, the claimant had an informal meeting with the manager, Ms Jo Douglas. It is apparent the claimant was unhappy with Saturday work and she stated ACAS had said this was a "second job." She requested a copy of her contract and it became apparent she had not previously signed a contract. The claimant requested relocation to a different store, within hospitality. The claimant stated she would be happy to work one in four Saturdays, but that would be a last resort. It concludes by saying the claimant would review matters and would put forward a flexible working request. She also referred to the arthritis in her knees and the report concludes the claimant stated, "working on foods in the cold causes great pain." It referred to the previous OH report; the claimant stated she could provide notes.

5.12 The claimant had a number of further absences during 2018 which resulted in return to work interviews, all of which were undertaken by her then manager, Mr Paul Bowman.

5.13 She was absent from 12 – 14 March 2018. The return to work interview proceeded on 15 March 2018. She confirmed she had been diagnosed with arthritis in her left knee and that occupational health had previously prepared a report on that condition. On 10 March 2018, her knee had started to swell at work. This had led to three days off. Whilst

occupational health was considered, neither the claimant nor Mr Bowman proposed the need for a further report.

5.14 There were a further two absences, the first from 21 – 26 May 2018, and the second from 30 May – 4 June 2018, both of which were considered at the same interview on 5 June 2018. The claimant reported the reason for absence was arthritis in her knee, causing severe pain. She recorded she was on no medication, other than pain relief, and that she was awaiting a consultant's appointment. She reported her medical advice was she should manage the situation to the best of her ability, by having breaks and resting, as far as practicable, at peak periods. She made no request for an occupational health report.

5.15 On 12 June 2018, the claimant made a request for flexible working. In the section where the form asks for an explanation for the request, the claimant recorded the following:

> **From 1994 when my husband was ordained as a Pastor, I took up a role in the church to support him. This role is around the clock not knowing how sometimes the day will begin and end. So I dedicated Saturdays and as and when an needed not working as a volunteer. I have not made this a secret as am very proud in what I do. Is the first thing I say when I am being interviewed for a job knowing that the current climate we in. When I was interviewed to work with this reputable company which many are proud to work for I highlighted this and the lady who interviewed me Michelle told me they will put in Fenchurch Street to give me the flexibility. Not all working hours are suitable but as I have to work I have to be flexible in the current working conditions. This was taken away from me when Angela Barker threatened to dismiss me for not going to Finsbury Pavement because the section manager there at the time could not cope and wanted a transfer. Like a lamb to the slaughter I did, but this is causing me so much stress because now I have to work Saturdays. I feel that I am being persecuted because of my faith.**

5.16 She requested to work any hour Monday to Thursday any on Friday 07:00 to 15:00. She requested no work on Saturdays and Sundays. At the subsequent flexible work meeting, the claimant stated that she could work every other Saturday finishing at 14:00; this was recorded by Mr Bowman, as a manuscript amendment, to the flexible working request form.

5.17 Question 5 on the respondent's form asks how Marks & Spencer can accommodate the flexible working request; the claimant wrote the following:

> **Because I suffer from arthritis I am not able to do much on Saturdays because the cold from the fridges flare up the pain as Saturdays are mostly for reductions only.**

5.18 The flexible work application coincided with an investigation by the respondent of staff, including the claimant, for unauthorised food consumption. The claimant found the process stressful. It resulted in no action being taken against her.

5.19 The flexible work meeting did not take place within the target date, but there is no specific complaint about this. The claimant was on sick leave from 20 June – 5 July 2018. She was on holiday from 18 July – 8 August 2018. Mr Bowman was on annual leave from 18 July – 8 August 2018. It follows there was difficulty arranging the meeting.

5.20 The meeting was initially scheduled for 30 August 2018 and rearranged for the 6 September 2018. The meeting went ahead on that day. A number of possibilities were identified and following an overnight adjournment, a decision was made on 7 September 2018.

5.21 During the flexible work meeting, the claimant raised a number of issues, including her concerns about her previous relationship with Ms Barker, at Fenchurch Street. During the meeting, the claimant stated that she could work alternate Saturdays until 14:00. Mr Bowman asked the claimant to explain who would provide managerial cover for the food department after 14:00 on Saturdays. He believed the claimant was dismissive of his concerns and did not recognise the impact of not having a manager at the store. The claimant's general position is that she was not willing to work on Saturday or Sunday or after 15:00 on Fridays. Mr Bowman noted that the result would be that other managers would need to pick up the extra Saturdays, and they were already working an additional Friday night to accommodate her requests. He noted the business required managers to work on Saturdays in order to fulfil general responsibilities and legal duties.

5.22 The claimant did mention her arthritis in the meeting.

5.23 During the meeting various options were identified. Whilst Mr Bowman referred to these as being options, they are not options in the sense that they were all firm proposals capable of acceptance. They were merely possibilities, which would be subject to further scrutiny, before becoming firm proposals.

5.24 The three possibilities identified were as follows:

5.24.1 The request for flexible work could be declined, and the claimant would be required to continue working one in four Saturdays.

5.24.2 The proposal to work one in two Saturdays could be trialled for a two-month period.

5.24.3 The hours requested could be accommodated, should the claimant choose to step down to a position as a customer adviser.

5.25 In addition, it was stated the claimant could continue to work her current pattern.

5.26 Mr Bowman was very concerned that the claimant’s working until 14:00 on Saturdays would not be feasible because of the need to provide cover. We accept his evidence that this option was never put forward as a firm proposal. In any event, a final decision was not made on it, as the claimant chose to accept a position as a customer adviser. We should

note that when the claimant left her position as a manager, the total number of managers was reviewed, and it was found that the store had too many managers. It is not clear if Mr Bowman knew that at the date of the flexible working meeting. Her leaving led to the store achieving the number of managers targeted by the respondent. Another manager from within the store took over her role.

5.27 Towards the end of the meeting, the claimant stated she wanted to step down to become a customer assistant with immediate effect. Mr Bowman was concerned about the effect of this decision on this claimant, as it would mean a reduction of her pay. He encouraged the claimant to discuss it with her family. The claimant requested an adjournment until the following day. The adjournment was granted.

5.28 The claimant was able to discuss the implications with her family and the meeting resumed at 11:00 on 7 September 2019. At the resumed meeting, the claimant referred to the possible effect on her pension. The notes record the answer as follows: "contribution as % so won't change but money will if you earned less." In her evidence the claimant has alleged that when she signed the notes confirming them as an accurate record, following the conclusion of the hearing, that note did not appear. Instead she suggested it was added later as Mr Bowman had stated there would be no change in her pension at all. It is clear that the note makes it plain that the contribution percentage would be the same, but there would be an effect, if the overall earnings were reduced. We accept the respondent's evidence that the claimant was a manager and would have realised that her overall earnings would be reduced. It is difficult to imagine that such reduction would not have formed part of the discussion with her family. Reduction in her salary was at least part of Mr Bowman's concern, and hence the adjournment. Moreover, the claimant's evidence to us about her understanding of how pensions worked was poor and inconsistent. We are satisfied that the claimant did understand the basic principles. Mr Bowman's answer is entirely neutral and accurate. The claimant asks us to believe that he misled her, and that in some way she relied on his statement that there would be no change to her pension, but that she failed to question why his answer had not been recorded, this allowing him to doctor the notes after the event, in order to cover his untruthful and representation. We take the view, on the balance of probability, that the claimant's recollection is in error. The note is accurate. She was not misled.

5.29 Mr Bowman communicated the outcome by letter of 10 September 2018.

5.30 The claimant started her new role as a customer assistant on 10 September 2018. The claimant had second thoughts. She met with Mr Bowman on 24 September 2018. At that meeting the claimant said she had not given herself enough time to make the decision and she wanted to discuss more options. At that time, Mr Bowman did state that working from 6 AM to 14:00 was not a suitable shift for a manager working in food. He identified that returning to the original role was not an option. Other

options were identified. There was one vacancy at Hammersmith for a manager.

5.31 The conversation continued on 1 October. Mr Bowman confirmed that her role as a café manager had now been filled and was no longer available to her. The only potential position identified was the role of commercial operations section manager at the Hammersmith store. An interview was arranged.

5.32 On 2 October 2018, Mr Bowman was informed that the claimant had applied for the role at Hammersmith and undertaken an interview, but had not succeeded, as she did not have sufficient experience for that role.

5.33 Mr Bowman was not involved in any material manner thereafter, other than by clarifying to Ms Gajetic the discussions concerning alternate Saturday work.

5.34 The claimant appealed the flexible work decision on 22 October 2018. She confirmed the options that were identified at the original meeting and stated she was given only 24 hours to make a decision, which she alleged was not sufficient time. She stated that, on 14 September 2018, she communicated her change of mind and alleged she had not been given sufficient time to make a decision but was told that her old job was no longer available, and she should look for vacancies elsewhere. She confirmed that she had applied for the role at Hammersmith but was unsuccessful. She requested to be reinstated to section manager. She noted that her appeal was late.

5.35 The respondent did not take issue with the fact the appeal was late and the matter was fully considered by Ms Gajetic. She heard the appeal on 15 November 2018. During the appeal, the claimant alleged that Mr Bowman had not listened to the claimant’s offer to work every other Saturday. The claimant alleged she felt pressured to make a decision quickly. The claimant alleged that her arthritis condition had not been taken sufficiently into account. Ms Gajetic took advice. She called the claimant on 21 November 2018 to clarify the claimant's position. The claimant said she could do alternate Saturdays, but only as a section manager, not as a customer adviser. Ms Gajetic discussed the matter with Mr Bowman to understand what discussions had occurred in relation to alternate Saturday working.

5.36 On 5 December 2018, Ms Gajetic gave her decision in writing. She confirmed the decision to refuse flexible working should be upheld. She identified the claimant had stated she did not want to work one in four Saturdays because of the effect of the cold fridges on her arthritis but concluded the claimant's role was to oversee the department, rather than carry out the work herself. She accepted Mr Bowman's explanation that working alternate Saturdays was not a request that the business could accommodate. Ms Gajetic was satisfied the claimant had made the decision to step down and was not under pressure to do so.

5.37 Ms Gajetic contacted human resource support for Central London. Two managerial roles were identified and both were offered to the claimant. The first role was in Hammersmith, clothing and home and would require Saturday and Sunday working, including late nights and Saturday. The second role was in Marble Arch in hospitality (as a café manager) that would require work on Saturday and Sundays and late nights on Saturday as part of a rota. The claimant was free to accept those managerial positions, without interview. The claimant was also given the option of working as a customer assistant, on her current working pattern, at the Fenchurch store.

5.38 The claimant declined to accept any of those offers.

The law

6.1 Direct discrimination is defined in section 13 of the Equality Act 2010.

Section 13 - Direct discrimination

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

6.2 **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 is authority for the proposition that the question of whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was. Accordingly:

> **…employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. (para 10)**

6.3 **Anya v University of Oxford** CA 2001 IRLR 377 is authority for the proposition that we must consider whether the act complained of actually occurred (see Sedley LJ at paragraph 9). If the tribunal does not accept there is proof on the balance of probabilities that the act complained of in fact occurred, the case will fail at that point.

6.4 Harassment is defined in section 26 of the Equality Act 2010.

Section 26 - Harassment

(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.

(3) A also harasses B if—

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
(b) the conduct has the purpose or effect referred to in subsection (1)(b), and
(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) 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.

(5) The relevant protected characteristics are--

age; disability; gender reassignment; race; religion or belief; sex; sexual orientation.

6.5 In **Richmond Pharmacology v Dhaliwal [2009] IRLR 336** the EAT (Underhill P presiding), in the context of a race discrimination case, made it clear that the approach to be taken to harassment claims should be broadly the same. The EAT observed that 'harassment' is now defined in a way that focuses on three elements. First, there is the question of unwanted conduct. Second, the tribunal should consider whether the conduct has the purpose or effect of either violating the claimant's dignity or creating an adverse environment for him or her. Third, was the conduct on the prohibited grounds?

6.6 In **Nazir and Aslam v Asim and Nottinghamshire Black Partnership UKEAT/0332/09/RN, [2010] EqLR 142**, the EAT emphasised the importance of the question of whether the conduct related to one of the prohibited grounds. The EAT in **Nazir** found that when a tribunal is considering whether facts have been proved from which a tribunal could conclude that harassment was on a prohibited ground, it was always relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on that ground. That context may in fact point strongly towards or against a conclusion that it was related to any protected characteristic and should not be left for consideration only as part of the explanation at the second stage.

6.7 In **Dhaliwal** the EAT noted harassment does have its boundaries:

> **We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase. We accept that the facts here may have been close to the borderline, as the Tribunal indeed indicated by the size of its award.**

6.8 Harassment may be unlawful if the conduct had either the purpose or the effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

6.9 A claim based on 'purpose' requires an analysis of the alleged harasser's motive or intention. This may, in turn, require the Employment Tribunal to draw inferences as to what that true motive or intent actually was: the person against whom the accusation is made is unlikely to simply admit to an unlawful purpose. In such cases, the burden of proof may shift, as it does in other areas of discrimination law.

6.10 Where the claimant simply relies on the 'effect' of the conduct in question, the perpetrator's motive or intention even if entirely innocent does not in itself afford a defence. The test in this regard has both subjective and objective elements to it. The assessment requires the tribunal to consider the effect of the conduct from the complainant's point of view: the subjective element. It must also ask, however, whether it was reasonable of the complainant to consider that conduct had that effect: the objective element. The fact that the claimant is peculiarly sensitive to the treatment does not necessarily mean that harassment will be shown to exist.

6.11 The requirement to take into account the complainant's perception in deciding whether what has taken place could reasonably be considered to have caused offence reflects guidance given by the EAT in **Driskel v Peninsula Business Services Ltd [2000] IRLR 151**, which concerned the approach to be taken by employment tribunals in determining whether alleged harassment constituted discrimination on grounds of sex. In **Driskel** the EAT held that although the ultimate judgment as to whether conduct amounts to unlawful harassment involves an objective assessment by the tribunal of all the facts, the claimant's subjective perception of the conduct in question must also be considered.

6.12 Section 23 refers to comparators in the case of direct discrimination.

Section 23 Equality Act 2010 - Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

6.13 Section 136 Equality Act 2010 refers to the reverse burden of proof.

Section 136 - Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to--

(a) an employment tribunal;
(b) …

6.14 In considering the burden of proof the suggested approach to this shifting burden is set out initially in **Barton v Investec Securities Ltd [2003] IRLR 323** which was approved and slightly modified by the Court of Appeal in **Igen Ltd & Others v Wong [2005] IRLR 258.** We have particular regard to the amended guidance which is set out at the Appendix of **Igen**. We also have regard to the Court of Appeal decision in **Madarassy v Nomura International plc [2007] IRLR 246.** The approach in **Igen** has been affirmed in **Hewage v Grampian Health Board 2012 UKSC 37**

Appendix
(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves.

In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) 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 will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). 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 is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) 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.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

6.15 The law relating to reasonable adjustments is set out at section 20 of the Equality Act 2010.

Section 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.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with per-sons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.

…

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) …

6.16 In considering the reverse burden of proof, as it relates to duty to make reasonable adjustments, we have specific regard to **Project Management Institute v Latif 2007 IRLR 579** we note the following:

> **… the Claimant must not only establish that the duty has arisen, but there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred, that there is a breach of that duty. There must be evidence of some apparently reasonable adjustments which could be made.**

Conclusions

7.1 Was the claimant disabled? There is clear evidence that the claimant had arthritis affecting her left knee. That is a clear physical condition, well supported by medical evidence and constitutes an impairment. We have considered carefully all of the evidence. The effect on day-to-day activity

is variable. When the condition is at its most severe, the claimant's day-to-day activity is seriously affected. Her walking speed and distance is dramatically reduced. It leads to pain when undertaking normal household chores, such as washing and cleaning ironing and cooking because her knee swells and becomes painful. It requires her to rest. It follows that there are detrimental effects on her mobility and her ability to perform normal day-to-day tasks. We have concluded that the effect on day-to-day activity is substantial and adverse, albeit that the intensity of the symptoms varies.

7.2 We are satisfied that the condition is long-term. The occupational health evidence describes the condition as chronic. There is no suggestion that the symptoms would neither recur nor would diminish without treatment. There is no suggestion that the arthritis will reverse. The reality is the arthritis will last the rest of the claimant's life and therefore it was long-term no later than the point of diagnosis. The claimant was disabled at least from then.

7.3 The respondent knew of the condition from no later than 24 March 2016, when the report was produced. The exact date when the claimant became disabled is not relevant for the purposes of this decision. It is clear that she was disabled by 24 March 2016, and the respondent knew of the disability no later than 24 March 2016.

7.4 We next consider whether the respondent has failed in any duty to make reasonable adjustments. It is important to have in mind that we must first of all consider whether the duty arose, and thereafter we must consider whether it was breached.

7.5 In order to decide whether the duty arose, there must be a provision criterion or practice, or some physical feature, which causes substantial disadvantage when compared to those who are not disabled.

7.6 The first question is whether there was a provision criterion or practice. The claimant alleges the provision criterion or practice is the requirement for her to stack shelves in the retail area where chilled food is sold to customers from open refrigerated shelves.

7.7 There is difficulty with this. Whilst we accept that the claimant sometimes stacked shelves and assisted with the rotation of food, including reducing food approaching its sell by date, it was not a requirement of the respondent. The claimant was a manager. Her duty was to oversee the task. This may have involved her overseeing others doing the work. It did not require her to do the work yourself. At all times, the claim was free not to do the work and she was free to instruct others to do it. The provision criterion or practice is not established. It follows that the claim must fail.

7.8 The claimant has not pursued this case as being one of a physical feature causing her a disadvantage. We would observe, the claimant does not suggest that the fridges were problematic to her as a manager. Her claim

is that the cold affected her if she had to work stacking the shelves for a long period. There is no basis for finding that physical features caused her a substantial disadvantage when compared to non-disabled people. It is not the feature itself, but her alleged engagement with it via the provision criterion or practice.

7.9 Lest we be wrong about this, we will consider the other elements. The next question is whether it puts the disabled person at a substantial disadvantage when compared with those who are not disabled. The claimant's case is that the cold exacerbated her symptoms. We have reservations about this element of the claimant's case. It is surprising that she did not raise the matter at an earlier stage. Moreover, the flexible work application does not rely on the cold fridge as exacerbating her symptoms of arthritis. The reason advanced relates to her religious beliefs and duties. The effect of the arthritis is referred to in the flexible work application. However, this does not say the claimant is required to undertake shelf stacking for prolonged periods on Saturdays, thus leading to an exacerbation of symptoms. The claimant's position is that she undertakes *little* work on Saturdays. This is entirely inconsistent with her claim before us that she was required to work for long periods replenishing the cold shelves. In the flexible work application, the reference to arthritis is in a section which asks about the impact on the respondent's business. It would appear that the claimant is saying there would be little impact on the business, because she does little on Saturdays in any event. We did discuss this with the claimant during her evidence. She appeared to suggest that the reference to doing little work was in fact a supporting reason for the flexible work application and was not included in the relevant reason section because of a limitation in space. We found her explanation unconvincing.

7.10 Taken at its height, there may have been some discomfort caused by the cold shelves on occasions. However, the evidence for this is limited and we do find the claimant has not produced evidence to demonstrate a substantial adverse effect when compared to those who were not disabled. The claimant was able to undertake the work. Whilst there may been some discomfort, that in our view is not sufficient.

7.11 For the reasons we have given, we find the duty did not arise.

7.12 Finally, we turn to the question of adjustment. Whilst the respondent knew of the claimant's arthritis, adjustments had already been put in place which allowed her to monitor her own condition and to manage it by taking breaks and sitting and standing when necessary. The respondent had no reason to believe that the cold shelves were causing the claimant any specific difficulty. She had simply not raised it adequately with the respondent. The first indication of a problem occurred in the meeting in February 2018. However, she did not explain or pursue the matter. She did not make the flexible work request at that time. It was then further referred to during the course the flexible working meeting. However, the central issue revolved around the claimant’s wish not to work Saturdays

because of her religious commitments. It would have been difficult for Mr Bowman to understand the claimant had any specific concerns about working in the areas with the open fridges.

7.13 Her explanation to us, that most of the work in the cold fridge area happened after 14:00, was unconvincing. The reality is that the claimant did not bring to the respondent's attention any serious concerns about working in the area and it was not the focus of the discussion.

7.14 Whatever the position, the result of the flexible working application was that the claimant was moved to working in womenswear. She was moved away from the fridges. Any disadvantage caused by the cold fridges was therefore removed and any possibility of a breach ceased on 10 September 2018. This was the resolution requested by the claimant. The respondent could have done other things to alleviate any difficulty caused by stacking the shelves. Not least, she could have been reminded that she did not have to do it, but failure to do this cannot be any breach in this case, as it was superseded by granting the claimant's request.

7.15 It follows the claim is out time, as the claim was presented on?? And given the reference to ACAS, the final date would have been??

7.16 We do not have to consider whether time would be extended because the claim fails, in any event, substantively.

7.17 We next consider the allegations of direct discrimination.

7.18 It is the claimant's case that there were three jobs which she was offered because of her religion. It is her case that the job offers were advanced either as an act of direct discrimination or an act of harassment. It is the claimant's case that the respondent knew that, because of her religion, she would not work on Sundays and therefore, in some manner, it was an act of discrimination or harassment to offer her the three roles.

7.19 We will consider the offer of the first positions as a claim of direct discrimination.

7.20 This is not a case where we need to engage in detail with the reverse burden of proof. If the respondent has produced an explanation which, on the balance of probabilities, is in no sense whatsoever because of religion, that is a defence and the claim must fail.

7.21 The claimant invites us to consider the matter largely from her perspective. It may be that the claimant felt insulted that this respondent would be so insensitive as to offer her managerial roles which require Sunday working. However, for claims of direct discrimination, we must consider the mental processes of the individuals who made the decisions.

7.22 For position 1, Mr Bowman identified the only managerial position which was available. He brought it to the claimant's attention. The claimant then

applied for the role but was unsuccessful. It is difficult to see why the claimant would have applied for that role if she would never contemplate Sunday working. It may be that she would prefer not to work Sundays. It may be on reflection that she felt she could not work Sundays. Mr Bowman identified the job because the claimant expressed dissatisfaction with her own decision. He considered whether she could return to working in her original managerial position, as a café manager. That option was no longer available. He wished to assist her to secure a managerial position. He identified the only position available at the time and invited her to apply. All he did was identify what was available. The job required weekend working because the respondent is a retail outlet that requires managers to work 7 days a week. The respondent cannot operate without managers. Therefore, many managerial jobs require Saturday and/or Sunday working. In no sense whatsoever did he identify the job because of the claimant's religion. He identified the job because the claimant wanted to identify managerial positions, and he assisted her. He identified this job in October 2018.

7.23 We have to be cautious about comparators in this case. Viewed one way it can be seen the claimant is suggesting that a comparator would have been treated more favourably by not being offered the position. This may be seen as logically challenging, but that is not how the case is pursued. Here it is implicit that she accepts the comparator would have been told of the available postings. Here the complaint is it caused her distress and perhaps this is better viewed as a harassment claim and not a direct discrimination claim.

7.24 The comparator would be someone who was in the claimant’s position but did not have her religious beliefs. Mr Bowman would have done the same and identified the vacancy. The explanation is established. The defence is made out. This claim would be out of time, but we need not consider the time point further, as the claim fails on its merits.

7.25 It is put in the alternative as a claim of harassment. There is no basis on which we could find that it was Mr Bowman's purpose to harass the claimant. His explanation is a defence to any claim that it was his purpose to harass. We have considered whether it had that effect of violating her dignity or creating an environment that was intimidating, hostile, degrading, humiliating, or offensive. There is no credible evidence that the claimant believed it had the effect at the time, as she applied for the position. Moreover, there is an objective element to be considered. He did no more than bring the availability of the position to her attention. She was free to apply or not to apply. There is no basis on which this can be seen as an act of harassment. It did not create any form of hostile or intimidating environment. In fact, the effect, viewed objectively, was quite the opposite. This is the respondent seeking to assist the claimant to limit the adverse effect of a decision she freely made about which she then changed her mind.

7.26 The remaining two positions can be considered together. The claimant, having changed her mind about being a customer assistant, appealed the flexible work decision. There was no basis for appealing that decision, as the claimant had freely and voluntarily accepted a resolution. Nevertheless, Ms Gajetic, whilst rejecting the appeal for rational reasons, sought to help the claimant. Not only did she identify two available positions, she made it clear the claimant was free to accept those positions without any interview.

7.27 We accept that Ms Gajetic identified those positions because they were the only available positions which feasibly could be open to the claimant. It was open to the claimant to do her own research. However, Ms Gajetic, sought to assist the claimant by not only identifying the position, but also making it clear that she could accept them.

7.28 If we could identify other managerial positions which did not require Saturday and Sunday work, but which could have been offered to her, the claimant's case would be stronger. If there was some evidence to that effect, it would be possible to ask why those positions were not identified. It then may be possible to infer that the claim was offered positions which the respondent knew she would not accept, but there has been no suggestion that that is he basis of this claim.

7.29 It may be that Ms Gajetic either thought the claimant would not accept them or wondered whether she would. However, if she had failed to offer those jobs, because she assumed the claimant would reject them, because of the claimant's religious beliefs, that would have been an act of direct discrimination. She would have been withholding potential managerial positions from the claimant, which otherwise would have been offered to her, by making an assumption as to the claimant's reaction, based upon her perception of the claimant's religious belief. The only safe thing for Ms Gajetic to do was to offer the jobs.

7.30 We do not need to consider the detail of a hypothetical comparator. The respondent has established an explanation which in no sense whatsoever is because of the claimant's religion or belief. The two jobs were offered because the claimant wanted to return to management, and they were the only jobs available to her. The fact that they required Saturday and Sunday working was simply a product of the job. It would have been discriminatory not to offer them.

7.31 The alternative claim is harassment. The respondent's explanation is an answer to any argument that it was the purpose of Ms Gajetic to harass the claimant. As regards effect, we doubt that the claimant truly considered that the offer of those positions was an act of harassment, in the sense that it was a violation of her dignity or created some form of hostile and intimidating environment. The fact that she had previously applied for a role which contained weekend work would suggest that she did not take such a serious view of the respondent's actions. In any event,

viewed objectively we do not accept that this could be seen as an act of harassment.

7.32 This respondent recognises that individuals do not necessarily wish to work on Sundays. Indeed, we were told that it has a policy whereby individuals, when working in a position, may make a request not to work Sundays, and that request is honoured. It follows that this respondent has a degree of sensitivity concerning Sunday working. Nevertheless, the commercial reality is that the respondent is constrained to have managers on Sundays. Therefore, it is not surprising that many jobs require Saturday and/or Sunday working. The fact that the respondent then will seek to accommodate a request not to work on Sundays demonstrates a sensitivity.

7.33 When passing on information about available positions, it is not for individual manager to start questioning the policy. The manager simply indicates what jobs are available. It is then for the individual to decide whether to apply. All Ms Gajetic did was pass on the information and secure the offers of those positions. In no sense whatsoever could that be seen as an act of harassment.

7.34 We do not need to consider whether these claims are or are not in time. They fail substantively.

7.35 We should note that the issues tentatively recorded by Employment Judge Tayler would suggest that the claimant's concern was that she could not do certain work because of the requirement to work Sundays. It would have been open to the claimant to bring such an indirect discrimination claim. However, that is not the claim she has brought. We have considered carefully if any part of the claim as advanced before us has sought to suggest that there was a challenge to the respondent's assertion that managers should reasonably be required to work on Sundays. At no time has the claimant sought to challenge the assertion that Sunday work is reasonably necessary. Instead she accepts it is necessary. There is no suggestion Sunday work in not proportionate means of achieving a legitimate aim. Had there been such a challenge we would have reviewed the issues again. Moreover, the evidence concerning requests to not work Sundays would have been explored further. There was no need to consider this as there is no claim of indirect discrimination.

7.36 We should also note that to the extent it was suggest that working on Saturdays was indirectly discriminatory, that was never pursued. Such a claim would have no reasonable prospect of success on the evidence before us in any event. First, there was not basis for establishing group disadvantage. There is no basis for saying Pentecostal Christians are adversely affected as a group by working on Saturdays. The effect was peculiar to the claimant. Second, the claimant's evidence was that she could accommodate Saturday work, by seeking assistance in her church. She could work one in four Saturdays. She could work alternate Saturday

until 14:00, so it is difficult to see how she could show any adverse effect; a preference not to work may not be sufficient to show any adverse effect.

7.37 No claim succeeds; all claims are dismissed.

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Employment Judge Hodgson

Dated: 10 January 2020

Sent to the parties on:

13 January 2020

For the Tribunal Office