



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs Janet Cable

**Respondent:** Princess Alexandra Hospital NHS Trust

**Heard at:** East London Hearing Centre

**On:** 7, 8 and 9 June 2023

**Before:** Employment Judge Russell

**Lay Members:** Ms J Clark  
Professor J Ukemenam

**Representation**

**Claimant:** Mr McMillan (Counsel)

**Respondent:** Mr Patel (Counsel)

## JUDGMENT

**The claim of failure to make reasonable adjustments fails and is dismissed.**

## REASONS

1. By a claim form presented to the Employment Tribunal on 3 December 2021 the Claimant brought complaints of unfair dismissal, disability discrimination, sex discrimination and ticked the box for another type of claim saying, "salary affected". The Respondent resisted all claims.
2. At a Preliminary Hearing before Regional Employment Judge Taylor on 18 August 2022, the Claimant confirmed that there was no separate sex discrimination claim and that the claim for salary was the difference in salary between her normal pay and sick pay as part of the loss arising from disability discrimination. The issues for this hearing were agreed.
3. Since the Preliminary Hearing, the unfair dismissal claim was dismissed upon withdrawal by the Claimant and the Respondent has conceded that from 25 November 2020 the Claimant met the statutory definition of disability in regard to the physical impairment to her left shoulder. At the outset of this final hearing, the Respondent conceded that it had knowledge of the disability during the material period but did not concede that it had knowledge of any substantial adverse effect upon the Claimant.

4. The issues to be decided at this final hearing are therefore:

**Reasonable Adjustments (Equality Act 2010 sections 20 & 21)**

- 1.1 Did the respondent have the following provision, criterion or practice?
  - 1.1.1 Require the claimant to work in the housekeeper role on 4 January 2021;
- 1.2 Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that she could not carry out the full duties of that role?
  - 1.2.1 The claimant will say she was required to work in the housekeeper role without the respondent first assessing her capabilities. The majority of this role involved serving food to patients on the wards. For this she was expected to lift and carry heavy items and hot items and to dish up food.
- 1.3 Did a physical feature, namely the weight of kitchen equipment and oven doors put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that she could not lift kitchen equipment; she could not reach into the ovens and she could not push the ovens (which were on wheels) onto the ward?
- 1.4 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?
- 1.5 What steps could have been taken to avoid the disadvantage? The claimant suggests:
  - 1.5.1 She should have had a workplace assessment conducted by health and safety (the respondent will say a workplace assessment was done in 11 May 2021) and a physical assessment conducted by a workplace manager or that.
  - 1.5.2 If an adequate workplace assessment was carried out the management should have had regard to the guidance in the work place assessment.
  - 1.5.3 Produce an accurate the job description for the Housekeeper post. The claimant will say the job description was inaccurate in that it did not include the requirement to lift heavy items.
- 1.6 Was it reasonable for the respondent to have to take those steps and when?
- 1.7 Did the respondent fail to take those steps?
- 1.8 The respondent submitted that it may be there is a limitation time limit point it would need a full hearing to consider when and whether any adjustments should have been made.

2. **Remedy for discrimination**

- 2.1 What financial losses has the discrimination caused the claimant?

- 2.2 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?
- 2.3 If not, for what period of loss should the claimant be compensated?
- 2.4 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

5. At the outset of the hearing, Mr McMillan confirmed that the Claimant was not pursuing the adjustments of workplace assessments or production of an accurate job description. The sole adjustment relied upon was implementation of the recommendations in the workplace inspection assessment conducted on 11 May 2021, namely that the Claimant did not complete tasks relating to the handling of hot food, for example removing trays from the oven, carrying plates, loading the dishwasher, lifting food trays and reaching for plates on the trolley, and that she not be required to move heavy ovens or open/close the heavy dishwasher or lift any loads over 2.5 kilograms.

6. The Tribunal also discussed with the parties the formulation of the provision, criteria or practice relied upon. At the outset of the hearing, Mr McMillan agreed that it should be discharging the full duties of the role of housekeeper. Mr Patel did not object to the reformulation of the PCP in these terms. In submission, Mr McMillan referred to the PCP as the requirement that the Claimant discharge the duties of a housekeeper.

7. We heard evidence from the Claimant on her own behalf and were provided with a statement from her daughter, Miss Cable. The contents of this statement were not in dispute and Miss Cable was not cross-examined.

8. For the Respondent, we heard evidence from Ms Carmelle Hartgrove (Strategic HR Business Partner), Ms Emma Camplin (People Business Partner Associate), Ms Lyn Patnell (Domestic Services Manager), Ms Sheila Connolly (Strategic Head of Property Services and Facilities) and Ms Toni Wright (Head of Nursing for Clinical Support Services).

9. We were provided with a bundle of documents. An initial dispute as to the admissibility of some of those documents was resolved by Counsel by consent. Earlier disagreements about the content of the bundle had also been resolved between the parties before the start of the hearing.

### **Findings of Fact**

10. The Claimant commenced employment as a Ward Assistant with the Respondent on 9 February 2015, working 24 hours a week over two shifts at the weekend.

11. From 2018, the Claimant and a female colleague raised concerns about the performance of two male Ward Assistants on their ward. The details of those concerns are not material to the issues before the Tribunal save to say that the Claimant was very unhappy at how she believed it had been dealt with by the Respondent.

12. In or about July 2020, the Claimant became aware through chats with colleagues that the Respondent was considering removing the role of Ward Assistant. A formal consultation process started on 14 September 2020 and concluded on 16 October 2020.

The Claimant regards the process with distrust as she believes the removal of the Ward Assistant role was a direct a response to her earlier complaint about her male colleagues and because, even after all other Ward Assistants roles were deleted, there remained two Ward Assistants remained on specialist wards. The Tribunal considers that the Claimant's belief that the consultation process and restructure was a sham, is relevant to her state of mind and her approach to the Respondent's management at material times when considering possible adjustments to the Housekeeper role.

13. The most significant difference between the role of Ward Assistant and that of Housekeeper was the extent to which they required involvement in food service.

14. On most wards, hot food is cooked in the main oven in the kitchen in industrial catering trays containing between 9 and 16 portions. The trays are removed from the kitchen oven and loaded onto the mobile oven to remain warm whilst served. The mobile oven also has a shelf for crockery and cutlery and an area for cold items. The washing up is done in the kitchen, where there is a draining board next to a sink, with another draining board on the other side to load the steriliser. The dirty crockery, cutlery and baking trays are rinsed, any burned-on food is cleaned off and they are loaded into the rack for the steriliser. The rack, which is on wheels, is manoeuvred into the machine, the hood (which is above head height) and tension bar are then pulled down. Once the steriliser cycle has finished, the bar is opened and the rack pulled onto an adjacent drainer on the other side.

15. A Ward Assistant was only required to hand out individual trays of food to patients and to clear up those individual trays after the meal had been eaten. It was the job of the Domestic to prepare the food, load it from the kitchen oven onto the mobile oven, serve it out from the mobile oven on the ward and do the washing up and sterilising afterwards.

16. From 4 January 2021, it became part of the new Housekeeper role to remove cooked food from the oven in the kitchen and load it onto the portable oven on wheels. The porter would take the portable oven to the ward but often the Housekeepers, and the Domestics before them, would wheel the mobile oven onto the ward from the landing area rather than wait for another porter in order to get a start on the food service. The Housekeeper serves the food from the mobile oven and gives it to patients. Once the meal is finished, the Housekeeper collects dirty crockery and cutlery and returns to the kitchen to do the washing up. The food service part of the Housekeeper role was approximately 50% on paper but the Tribunal find that in practice it probably took up more of their time and was the major part of the job.

17. Ms Patnell was a reliable and straightforward witness, largely agreeing with the Claimant's description of the food service on the ward. She accepted that the catering trays used for cooking could be quite heavy, depending on the meal being cooked, and on occasion they could get stuck in the oven and require, as she put it, "a bit of a yank". She also acknowledged that a woman of the Claimant's size probably would require two arms to operate the steriliser and conceded that it was obvious why someone with weakness in their arms would struggle with that part of the Housekeeper role.

18. On 6 October 2020, the Claimant attended a one-to-one consultation meeting with Ms Polly Read, Associate Director of Nursing in Urgent & Emergency Care, to discuss the proposed restructure and possible alternative jobs of Housekeeper, Porter, Domestic, Health Care Assistant or an administrative role. As summarised in the Claimant's follow-up email on 9 October 2020, she informed Ms Read that she had a problem with her

shoulder and was awaiting results for an MRI scan which were due on 2 November 2020. The Claimant described limited use of the arm and shoulder, constant pain, pins and needles shooting down the arm into the hand and said:

**“I am not at all sure that I would physically be able to do any of the jobs already offered. But, if I do not accept one of these, I am fearful of being out of work especially at my age”.**

19. In an exchange of emails on 13 October 2020, the Claimant again referred to her shoulder impairment in the context of the suitability of potential alternative employment. Ms Read made clear that the only roles were Porter and Domestic Healthcare Assistant or an administrative role in her area. The Claimant for her part made clear that she did not want the Housekeeper role, that she felt undermined and ignored and was unhappy that the Respondent appeared to be assuming that she would become a Housekeeper. Ms Read did not take any action upon the information about the Claimant’s shoulder impairment, for example she did not refer the Claimant to Occupational Health to see what parts of the Housekeeper role she could or could not do.

20. The Tribunal finds on balance that the Claimant made it explicitly clear to Ms Read that she did not want to work as a Housekeeper, principally due to the requirement to be involved in food service. Whilst the Claimant did refer to her physical ability to do the job, the Tribunal find that the Claimant was categoric that she did not want to do the new job in any event and would not agree to do so.

21. The consultation period concluded on 27 November 2020 and affected staff were informed that Ward Assistants would become Housekeepers with effect from 4 January 2021. On 14 December 2020 the Respondent wrote to the Claimant to say that she would be transferred to housekeeping, with her first day being induction and training.

22. The Claimant was not happy to receive this letter and on 21 December 2020 she wrote a lengthy email to relevant managers making it clear that she would not be transferring to housekeeping and that there had never been any suggestion that she would. The Claimant said that she was being pushed into a role that she did not want and that there was no other suitable alternative employment. Whilst the Claimant did refer to her shoulder impairment, the Tribunal find on balance that the clear message being conveyed by the Claimant was that she did not want to be a Housekeeper at all; she was not saying that she wanted to take the Housekeeper role but with adjustments to take into account her physical impairment to the shoulder. The Claimant ended her email with a reference to possible Tribunal proceedings and said, **“the lies and deceit are beyond belief”**.

23. On 3 January 2021, the Claimant contacted the Respondent to inform them that she would not be starting as Housekeeper on 4 January 2021 and said that she was experiencing stress and anxiety. On 7 January 2021, the Claimant tested positive for Covid and commenced a period of sickness absence.

24. On 11 January 2021, Ms Connolly replied to the Claimant’s email expressing disappointment with her refusal to transfer to the Housekeeper job. Ms Connolly said that the Claimant was effectively tendering her resignation, which was not what the Respondent wanted. Ms Connolly said that with the Claimant’s consent she would refer her to Occupational Health in order fully to understand any ongoing underlying health issues and what adjustments would need to be put in place to support her in the new job on her return to work. She asked that the Claimant identify in full any factors which might

limit the choice of her job so that the Trust could meet any identified training needs and make any reasonable adjustments via Occupational Health referral to the identified role if possible. She ended by proposing a meeting when the Claimant returned to work to discuss her concerns about the Housekeeper role.

25. Ms Connolly did not make the Occupational Health referral at this time. The Tribunal accepts as reliable her evidence that this was because the Claimant required time to recover from Covid and they were waiting for her GP to state that she was fit to return to work.

26. On 12 January 2021, the Claimant contacted Ms Connolly to say that she had received no contact from Occupational Health. The Claimant did not explicitly give her consent to a referral but it is clear that she welcomed Occupational Health input.

27. January 2021 was a very difficult time for the Claimant as she suffered two significant bereavements and the illness of a close family member. On 17 February 2021, the Claimant contacted the Respondent and advised them that her GP sick note had been extended. She also said that she would need an appointment with Occupational Health before she returned to work in view of her medical condition and that it would be advantageous for a meeting to be held to discuss working hours but that she would be working under protest. The extended sick note gave the reason for absence as bereavement and covered the period until 17 March 2021.

28. Ms Polke, the new line manager for the Housekeepers, replied on 18 February 2021 stating:

**“we would like to refer you to [Occupational Health] in order for us to see what support can be offered as this would be in line with our long-term sickness management procedures. Once we have feedback, we can then plan a Teams call, and we will also look at your contracted hours on eroster”.**

29. The Claimant's Occupational Health appointment was booked for 6 April 2021, after her intended return to work date. Ms Connolly confirmed that the Claimant would return on 22 March 2021 and that the first day would involve a discussion about the role and working hours and to go through the training plan with her prior to her starting to work on a ward. 22 March 2021 was a Monday and the Claimant made clear that she would be unable to attend as she needed to maintain her normal days of work due to her personal obligations. In her reply, Ms Connolly made it clear that the Respondent's intention was that the Claimant would complete a week of training, Monday to Friday, before starting on a ward. The Claimant was unhappy with Ms Connolly's response, but Ms Polke explained that a return to work on a Sunday would not be possible as the necessary people for the induction would not be available. It is clear that the intended induction training would be comprehensive, involving a number of teams, followed by a period of buddying up with other Housekeepers.

30. The Claimant obtained a further sick note which covered the period until 21 April 2021 and gave the reason for absence as a problem with her left shoulder.

31. The Tribunal finds that the Respondent's position was that the Claimant would not be expected to work as a Housekeeper on a ward until she had completed the induction training. The Tribunal can understand the Claimant's position that she was not able to

work Monday to Friday but it was reasonable for the Respondent to require the Claimant to return to work at a time when the training required could be delivered.

32. The Occupational Health report dated 6 April 2021, sent to the Respondent on 20 April 2021, recorded the reason for referral as concerns about the employee's health and ability to carry out their duties. It identifies the underlying medical condition as affecting her musculo-skeletal system and her ability to lift, bend or push heavy items. The Occupational Health recommendations were that management arrange a workplace assessment for the Claimant on her return to work to assess her abilities and restrictions and advise on control measures to be put in place to help her carry out the role without a negative impact on her health and for a meeting with management and HR to resolve communication issues. It further recommended consideration of a phased return to work and no lifting of anything greater than 5 kilogrammes, avoiding contact sports, housework or lifting objects above shoulder/head height, pushing, pulling, bending and dragging heavy objects or dead weights.

33. The Claimant submitted a further sick note on 22 April 2021, covering an eight-week period, with the reason given as shoulder pain. This fit note stated that the Claimant may be fit for work on amended duties. The same day, the Claimant set out in writing her concerns about the way in which she had been treated in the recent period of her employment. The Tribunal consider it significant that the Claimant objected to the reason given for the Occupational Health referral, stating that her ability to do her job had never been called into question before. We find that the Claimant's annoyance was misplaced. The Respondent was seeking advice about the Claimant's ability to perform the Housekeeper duties given her shoulder impairment, objectively considered, in no way was it calling her performance into question. The Claimant also complained that Ms Read had not referred her to Occupational Health in December 2020 and that the Respondent was not interested in listening to her, adding:

**“The Trust is forcing us to take employment which we do not want, and this was actually part of the domestic consultation because they told us what was going to happen”.**

The Tribunal consider it significant that the Claimant refers to “us” and “we” in her letter. On balance, we find that the Claimant's complaint was that she and other former Ward Assistants had not wanted to become Housekeepers and that she considered the consultation process inadequate.

34. Ms Camplin acknowledged receipt of the Claimant's letter. She proposed a meeting with HR and told the Claimant that Ms Gemma Williams had been contacted to arrange an urgent workplace assessment prior to her return to work. In her evidence, Ms Camplin candidly accepted that there had been a delay in referring the Claimant to Occupational Health and that the period between October 2020 and March 2021 was too long. The Tribunal accept as reliable her evidence that she had decided to hold the meeting with the Claimant before receipt of the Williams recommendations in order to avoid further delay and to understand the Claimant's perspective and the specifics of what she could and could not do. The intention was to then have a follow up meeting after receipt of the Williams assessment.

35. The proposed meeting with HR took place on 29 April 2021. There are no notes but there is a contemporaneous email setting out Ms Camplin's record of what was said and which we accept as broadly accurate. Ms Camplin and Ms Polke told the Claimant the

purpose of the meeting was to support her return to work and any amendments she would require for her best to do her role and to determine what exactly what she would like. There was a discussion about the Claimant's shoulder pain. The Claimant said that she did not want to be a Housekeeper and that she could not be a Domestic or a Porter. The Tribunal find the Claimant's choice of words to be instructive: she did not *want* to be a Housekeeper, she *could not* be a Domestic or a Porter. When asked what job she wanted, the Claimant said Ward Assistant.

36. The Claimant accepts that the meeting focused on her return to work, her left shoulder difficulties were discussed and she was asked what adjustments she would require. In the meeting, the Claimant said that she did not know. In evidence, she explained that it was inappropriate to ask her about adjustments when she had not yet had the workplace assessment. The Tribunal finds as a fact that it was made clear to the Claimant in this meeting that the Respondent intended to make adjustments to the role of Housekeeper so that the Claimant would be able to perform it without aggravating her left shoulder; the only question was precisely what these should be.

37. The workplace assessment was undertaken by Ms Williams on 11 May 2021. As confirmed to Ms Polke in advance, Ms Williams looked at the job description to assess the nature of the job. Ms Polke did not suggest that the assessment should take place on a ward or in a kitchen. There is no evidence that Ms Connolly knew that the assessment was a desk-based exercise only.

38. The Williams assessment report confirmed that the Claimant had osteoarthritis in the left shoulder affecting the tendons and muscles, with limited movement in the shoulder and that the Claimant had no trust in her arm and would often drop things. The Tribunal accepts as reliable the Claimant's evidence that anything which required the use of both arms (such as taking hot trays of food out of the oven) caused her substantial disadvantage due to her left shoulder impairment including the fact that it could give way. In the section on working in the kitchen, the report recommends that the Claimant does not complete tasks relating to the handling of hot food, for example, removing trays from the oven, carrying plates and loading the dishwasher, lifting food trays and reaching for plates on the trolley. Other recommendations were that she should never prepare and make beds on her own, that she should not lift boxes over 2.5 kilograms in weight and that she only push trolleys and wheelchairs with lighter loads. If service needs allowed, the report recommended that the Claimant work in an area of the hospital that does not involve the handling of hot food (such as the emergency department). The report anticipated a review within one month of the Claimant's return to work. The Tribunal find that Ms Williams had not anticipated that there would be any need for an on-site assessment before the Claimant returned to work.

39. Ms Connolly was provided with a copy of the Williams assessment report and decided that the Respondent would gain a better understanding of what the Claimant could and could not do if the assessment were completed on the ward or in the kitchen with the Claimant assessing the actual tasks, rather than the purely desk-based assessment which had taken place.

40. In her email to Ms Polke on 13 May 2021, Ms Connolly made clear her view that in order to **"get a better understanding of Janet's capabilities the risk assessment should be completed carrying out the individual tasks as listed on the risk assessment"**. This is consistent with Ms Connolly's contemporaneous annotations on the Williams assessment report seeking



more detail as to why there was a 2.5 kilograms lifting restriction and its application to the food element of the role, what constituted a lighter load and the context of pushing a wheelchair with a patient in it. The Tribunal finds that Ms Connolly was not, as the Claimant suggested, ignoring the Williams recommendations but was only trying better to understand the practical effect of them.

41. The Tribunal found Ms Connolly's evidence on the second assessment to be reliable and straight forward. This was a new job which the Claimant had not previously undertaken. Indeed, prior to the restructure the Respondent had not operated in this way. A paper-based exercise was hypothetical whereas a workplace assessment could look at all of the tasks in detail, for example different sizes of trays, hot and cold items, and the complete range of tasks to see what the Claimant could do without disadvantage due to her shoulder. The Tribunal accepts that on-the-job assessment was required so that both the Claimant and the Respondent could fully understand the requirements of the role and the limitations caused by the Claimant's shoulder impairment and the adjustments then required. This is consistent with Ms Camplin's evidence (which we accept as reliable) that in her experience, such assessments were undertaken quite frequently particularly for manual jobs and involved attending the area of work to look at specific duties, for example lifting plates and washing up, to see what the employee was specifically capable of.

42. On 14 May 2021, therefore, Ms Polke contacted the Claimant to say that they needed to perform an on-the-job assessment with the Claimant having two days training followed by the assessment. Nobody explained to the Claimant why the further assessment was required nor what it would entail. The Claimant was very unhappy as she interpreted it as a decision to ignore the Williams assessment recommendations. It was agreed that the Claimant would be re-referred to the internal Occupational Health provider (albeit not to a physician as she had requested).

43. On 26 May 2021, the Claimant met with Ms Wright (Associate Director of Nursing and Therapies) and Ms Giby (HR Business Partner Associate). There was some limited discussion about a return to work, reasonable adjustments and the need for a further assessment. The Claimant was clearly not happy, but a lot of her discontent related back to the initial restructure which had removed the Ward Assistant role and introduced the Housekeeper role, as demonstrated in her contemporaneous emails after the meeting.

44. As the dispute about the further assessment had not yet been resolved and the adjustments agreed, on 14 June 2021, Ms Wright suggested to the Claimant that she renew her sick certificate. The Claimant pointed out that she was no longer on sick leave as she was fit for work with minor amendments to her duties, had been assessed by Occupational Health and had had a workplace assessment all of which had been ignored by management. It is clear from Ms Wright's email to Ms Giby stating that she was at a loss to know how to reply, and an exchange of emails between a Ms Griffin and Ms Patnell with regard to the Claimant, that the Respondent did not understand why the Claimant was unable to load or unload a dishwasher or use a microwave although they did understand that she could not lift weights above 2.5 kilograms.

45. The Tribunal accepts as consistent with the contemporaneous documents Ms Connolly's evidence that it was the Respondent's intention for the Claimant to return to work to complete induction training and to observe the role in practice, then the adjustments required would be clearer. There was never any intention that the Claimant would carry out the full range of the Housekeeper duties. The tone and content of the

Claimant's emails at this time, even to managers not involved in the discussions about the Housekeeper adjustments, for example that sent to Ms Read on 14 June 2021, lead us to find that the Claimant was very angry at the way she felt that she had been treated. The Claimant had no trust in some of her managers, accusing them of lies and fabrication. This was not, we find, a promising basis for a return to work and discussion about adjustments. Indeed, we find on balance that the Claimant was reading something sinister into the requirement for an on-the-job assessment when it was a sensible step to address the detail of the job which the Claimant had not previously undertaken and about which she was unable to suggest adjustments.

46. On 16 June 2021, Ms Giby emailed the Claimant to tell her that upon expiry of her sick there would be a phased return to work and an exploration of reasonable adjustments. This is consistent with our finding that it was always the Respondent's intention to make adjustments to the role of Housekeeper. The uncertainty was what particular adjustments and this required discussion with the Claimant as well as Occupational Health and workplace assessment input.

47. The Claimant did not return to work but instead presented a further sick note covering the period from 17 June until 16 August 2021.

48. In a contemporaneous series of emails, Ms Tina Griffin (HR) and the Claimant discussed her eventual return to work and the training she would be required to undertake. On 23 June 2021, Ms Griffin made it clear that the recommended adjustments in the Williams' assessment would be adhered to, such as not using a microwave or oven. The Claimant's position was that she did not need training and that she could not serve hot food or wash up. Ms Griffin suggested that the Claimant come into work for an hour to assess her needs in the workplace and that the risk assessment was to allow Ms Patnell, who would be her line manager, to understand what the Claimant could and could not do and what proportion of the role would be difficult for her. Ms Griffin made it clear that Ms Williams would risk assess and no decisions could be made until they had a better understanding of what they needed to do to support her. The Claimant was concerned that the risk assessment would make her physically do tasks to prove what she could not do and suggested that it must be conducted by a doctor. Ms Griffin sought to reassure the Claimant that there was no intention to make her do things which she was physically unable to.

49. The Claimant asked for what purpose and how the physical assessment would be conducted. As she explained in her evidence to this hearing, the Claimant did not refuse to undertake a physical workplace assessment but required further information because she was concerned that she may be required to undertake tasks that she was physically unable to do and which may cause her damage. Ms Griffin replied that it was about the job role and tasks within it and that she must not push herself and cause injury. The Claimant replied to question the value of the assessment in such circumstances as it would be the same as the original Williams assessment. The Tribunal does not agree. The Claimant's indication of inability when actually on the ward or in the kitchen would be more detailed, for example identifying particular parts of the task which were problematic (such as the size of the oven baking trays) and with a better understanding herself of the equipment involved and the nature of the tasks.

50. The Tribunal finds as a fact that the Respondent was open to, and at all times intended to, make reasonable adjustments to the Housekeeper role in order to avoid any

disadvantage to the Claimant caused by her shoulder impairment. Whilst the Claimant may not agree, the Tribunal finds that HR and relevant managers were trying to be supportive whilst seeking the additional practical information from a further Williams assessment and there was explicit reassurance that the Claimant was not being asked to perform any tasks which she was physically unable to do.

51. On 6 August 2021, Ms Patnell made a further Occupational Health referral for the Claimant, having unsuccessfully tried to get a copy of the earlier Occupational Health assessment. The Claimant was due to return to work on 16 August 2021 on the expiry of her sick note but instead she resigned that day. The length and content of the resignation letter show how clearly unhappy the Claimant was with the way in which she perceived she had been treated. Although Ms Patnell had still been trying to arrange the workplace assessment, it was agreed that for the six shifts to be worked during the Claimant's notice period her duties would be limited to tasks set out in an email on 23 August 2021. These did not involve use of the ovens or dishwasher, nor did they involve hot food other than to hand out patient meals as she had done previously as a Ward Assistant.

52. The Tribunal does not accept as reliable the Claimant's evidence that she was required to move boxes weighing in excess of 2.5kg when tidying store cupboards during her notice period. During this time, the Claimant sent a number of emails complaining that she should have been offered a retained Ward Assistant role, that there had been a data protection breach about her list of adjusted duties and about her roster. She raised no such complaint about being required to perform duties beyond those agreed or in breach of the Williams recommendations.

53. The Claimant's last day of employment was 12 September 2021.

54. Following subsequent without prejudice discussions between the parties, the Claimant and Ms Hartgrove agreed that the Claimant would return to work as a Housekeeper with effect from 20 November 2021 with amended duties. An email sent on 17 November 2021 records that the Claimant would spend her first two days back completing relevant training and shadowing, that she could only work in the Emergency Department and is only able to provide hot food to patients using the restaurant service, but she was able to use the trolley to provide drinks and sandwiches.

55. Unlike other wards, in the Emergency Department there was no normal hot food service. Any hot food that was required by a patient would be obtained on an individual basis from the restaurant and heated up in the microwave. The kitchen in the Emergency Department still had a steriliser and dishwasher but there were no portable ovens, only a small trolley. The Claimant's amended duties did not require her to use the steriliser, ovens, dishwasher, do large amounts of washing up or lift heavy items.

56. Initially in cross-examination, the Claimant could not remember whether she was in fact required to wash-up and/or use the steriliser when on the Emergency Department. There is only one contemporaneous email of complaint that she had been required to spend a long-time washing-up and had burned herself on hot food cooked in the microwave on 30 November 2021. The remainder of the email was about the amount of time spent on food service and concluded: **"I just do not feel that I can do the food element of this job"**. Ms Hartgrove replied that they could make the agreed duties even clearer about hot meals, if need be taking out the need to collect hot meals from the restaurant or have any involvement in the hot meals service.

57. As her cross-examination progressed, the Claimant went on to say that she was required to use the steriliser on every shift following her return to work. On balance, we find this evidence to be unreliable and find that the requirement to do the washing up and problems with the microwave happened as a single one-off incident and she was not required to use the steriliser. Throughout December 2021, the Claimant sent many emails complaining about her roster and her pay but not about washing up, the steriliser or hot food duties she was undertaking. Indeed, to Ms Hartgrove on 6 December 2021 and again to Ms Watkins on 21 December 2021, the Claimant referred to an occasion when she had made clear to another Housekeeper that she could not do the full food service; she did not say that she had in fact been required to do so. It is not credible that she would not have complained about having to wash up or use the steriliser if this had indeed happened, especially on every shift worked.

58. On 3 December 2021, Ms Patnell informed the more experienced Housekeepers on the Emergency Department of the limits upon the Claimant's duties. This instruction email was not copied to the Claimant, but the Tribunal finds that there was no need for it to be copied to her. The Claimant regards this as back-handed conduct. The Tribunal disagrees; Ms Patnell was trying only to ensure that the Claimant was not inadvertently asked to do tasks beyond those which had been agreed.

59. The Claimant presented her claim to the Employment Tribunal on 3 December 2021.

60. In discussion with Ms Hargrove and Ms Stapleton, on 3 December 2021, the Claimant raised the possibility of doing night work in the Emergency Department as it would have an even lower requirement for food service. The Respondent agreed to trial it as a further reasonable adjustment and an agreed list of duties was confirmed – these were to provide a hot and cold drinks service, to help handing out sandwiches and hot food, help with top up and stock rotation, linen distribution, keeping the ward clutter free and wiping down equipment. The duties were expressly stated to be undertaken in line with the workplace assessment.

61. From 18 December 2021 the Claimant worked as a Housekeeper on the night shifts only. When put to her that thereafter she had only worked the agreed tasks, the Claimant said that she could not remember. When put to her that none caused problems with her shoulder, the Claimant again said that she could not remember. The Tribunal found her evidence unreliable not least as on 8 December 2021, she had volunteered to Ms Stapleton that she was happy to get patients a cup of tea and a sandwich, a piece of toast or may be warming some milk for a hot breakfast.

62. On or about 30 December 2021, the Claimant sent an email to Ms Watkins in which she stated:

**“I am so unhappy in this role as is the general feeling of ex Ward Assistants. It needs to be remembered that I did not choose this role I was placed in it by Polly Read with no agreement from myself. It does not in any way mirror the Ward Assistant role and I am frustrated with there being no patient contact other than asking them if they want a cup of tea or something to eat. I know this job is not for me which is why I am extremely upset that some Ward Assistants were kept in post and this fact has been lied about.”**

63. On 26 January 2022, the Claimant sent an email to Mr McCarthy, Ms Hartgrove and Ms Watkins in similar terms. The Claimant referred to her dissatisfaction with the Housekeeper job, stating that she was not happy in the role and enjoyed nothing about

the job, adding that she hated it, had never wanted it and had been placed into it by Ms Read without her agreement. She missed the patient contact and suggested the only suitable alternative job was one of the Ward Assistant roles which had not been removed.

64. This is consistent with the numerous times during cross-examination, when asked about specific duties of the Housekeeper role, the Claimant made it clear that she regarded food service and washing-up as a Domestic role. She also gave evidence that when, on her return to work, Ms Patnell had asked her to go round with a duster and cleanser cleaning touch points, the Claimant had refused as she was not a Domestic. The Tribunal finds that quite irrespective of her shoulder impairment, the Claimant did not want to be a Housekeeper and regarded many of the aspects of the job as being less congenial than her role as Ward Assistant.

65. On 17 February 2022 the Claimant again resigned. Her last day of employment was 16 March 2022.

## Law

66. The duty to make adjustments is defined by section 20 of the Equality Act 2010. The duty is applied to an employer by section 39(5) of the 2010 Act; and Schedule 8 contains additional provisions. Section 20(1) to (3) provide that:

### **“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.”**

65. Where, as here, the employer is alleged to be in breach of the duty to make reasonable adjustments imposed by section 20(3) of the 2010 Act, the Tribunal should identify (1) the PCP(s) applied, (2) the identity of the persons who are not disabled in comparison with whom comparison is made, and (3) the nature and extent of the substantial disadvantage suffered by the employee, **Environment Agency v Rowan** [2008] IRLR 20 at paragraphs 26-27 (Judge Serota QC). Having done so, the Tribunal must consider and identify what (if any) step it is reasonable for the employer to have to take to avoid the disadvantage. The aim of the duty is to remove or at least ameliorate the substantial disadvantage so that the disabled person may remain in the workplace. The potential adjustment need only have a prospect of alleviating disadvantage and there is no need to show that it would have been completely effective or even that there was a good or real prospect of it being so.

66. The Code of Practice on Employment, at paragraph 6.28, suggests that the following factors might be taken into account when deciding what is a reasonable step for the employer to have to take:

- whether taking any particular steps would be effective in preventing the substantial disadvantage; the practicability of the step;
- the financial and other costs of making the adjustment and the extent of any disruption caused;
- the extent of the employer's financial or other resources;
- the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
- the type and size of the employer.

67. In considering the burden of proof, we referred to s.136 Equality Act 2010 and the guidance set out in the case of **Igen Ltd v Wong** [2005] IRLR 258, CA as approved in **Madarassy v Nomura International Plc** [2007] IRLR 246, CA. This guidance reminds us that it is for the Claimant to prove facts from which the Tribunal could conclude, in the absence of adequate explanation, that the employer has committed an act of unlawful discrimination. The outcome at this stage of the analysis will usually depend upon what inferences it is proper to draw from the primary facts found by the Tribunal. Where the Claimant has proved such facts, the burden of proof moves and it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the prohibited ground.

## Conclusions

68. The Tribunal considered first whether the Respondent had applied a provision, criterion or practice which required the Claimant to discharge the full duties of the Housekeeper role from 4 January 2021. We conclude, based upon our findings of fact above, that it did not.

69. The Claimant had made it clear during the consultation process that she did not want to take the Housekeeper role. Whilst she did refer to her physical ability to do the job, we conclude that she also made it absolutely clear that she did not want the new role in any event and would not agree to be deployed into it. In those circumstances, it is understandable that Ms Read did not in October 2020 refer the Claimant to Occupational Health to consider adjustments to a job that the Claimant had made clear that she did not want and would not be taking. In her email of 21 December 2020, the Claimant repeated this unequivocal objection to transferring at all. As we found, her clear message was that she did not want to be a Housekeeper at all; not that she wanted to take the Housekeeper role but with adjustments to take into account her physical impairment to the shoulder. This is why on 3 January 2021, the Claimant contacted the Respondent to inform them again that she would not be starting as a Housekeeper on 4 January 2021.

70. The Tribunal can understand why Ms Connolly's reply on 11 January 2021 may have appeared unsympathetic to the Claimant who was off sick at the time. Ms Connolly was making it clear that if the Housekeeper role was not accepted, the Claimant was effectively going to bring about the end of her employment. This was ultimately the Claimant's choice given that she had said that all other alternative roles were also unsuitable. The result was that the Claimant chose to remain in employment and transfer to the post of Housekeeper, albeit working under protest.

71. What, in the Tribunal's judgment, is also significant about Ms Connolly's reply is that she made it explicitly clear to the Claimant that the Respondent would put in place support and make reasonable adjustments to the job of Housekeeper with the input of Occupational Health. The Respondent did not require the Claimant to discharge the full

duties of Housekeeper from 4 January 2021. It was always intended that there would be adjustments to the role so that she was not placed at a substantial disadvantage.

72. The Claimant was off sick for a variety of reasons unrelated to her shoulder until 17 March 2021 during which time there was no expectation for her to work as a Housekeeper. The Occupational Health referral was made before the Claimant was due to return to work on 22 March 2021, albeit that the appointment would be some two weeks after. However, even then the Claimant was not going to be required to undertake the full range of Housekeeper duties from the date of her return to work. The Tribunal has found that the first day would be a discussion about the role and working hours, there would then be a period of induction training anticipated to last a week before the Claimant would start working on a ward. Had all gone to plan, and the Claimant returned to work for her induction training, her duties and the Occupational Health recommendations would have been discussed as part of that process.

73. The Claimant remained unfit to work during March to June 2021. By this date the Williams assessment had been received and clear recommendations about adjustments had been made. The dispute that arose was about the second, on the job assessment. However, even during this period, it was made clear to the Claimant that the Respondent wanted to and was prepared to make reasonable adjustments. That much is clear from the email sent by Ms Giby on 16 June 2021 and Ms Griffin's explicit statement on 23 June 2021 that the adjustments in the Williams assessment would be adhered to, such as not using a microwave or oven.

67. The Tribunal has found as a fact that the Respondent was open to, and at all times intended to, make reasonable adjustments to the Housekeeper role in order to avoid any disadvantage to the Claimant caused by her shoulder impairment. Whilst the Claimant may not agree, the Tribunal finds that HR and relevant managers were trying to be supportive whilst seeking the additional practical information from a further Williams assessment and there was explicit reassurance that the Claimant was not being asked to perform any tasks which she was physically unable to do.

74. The Tribunal can understand why it would have been better if the first assessment had taken place in the workplace. Indeed, much of the evidence we heard about the nature of the duties of Housekeeper and the Claimant's ability to perform them focused on practical matters such as the size of the baking trays, the portability of the oven, the nature of the steriliser/dishwasher machine and the volume of crockery and cutlery to be washed up. The Tribunal conclude that it was reasonable and appropriate for a more practical assessment to be undertaken in the circumstances and that it was not an attempt to ignore the Williams recommendations.

75. Ultimately when the Claimant did return to work in August 2021, and tendered her resignation the same day, the Respondent did agree adjustments to her duties which she worked throughout her notice period. The same applied when the Claimant returned to work as part of an agreement in November 2021, including deployment to the Emergency Department where the food service element was much reduced. The Tribunal has rejected the Claimant's evidence that she was required to use the kitchen oven or steriliser at any time. The burn from use of the microwave and excessive washing up was a one-off incident which was acted upon immediately by the Respondent. Indeed, it agreed a further adjustment by way of transferring the Claimant to nights.

76. At no time was there a provision, criterion or practice requiring the Claimant to discharge the full duties of the role of Housekeeper. The Tribunal rejects the submission on behalf of the Claimant that there was an expectation that she would discharge all of the associated duties of a Housekeeper if and when she attended work or that she was never given any meaningful contra-indication.

77. The Tribunal considered as an alternative PCP that set out in Mr McMillan's closing submissions, namely whether there was a requirement from 4 January 2021 that the Claimant discharge the duties of a Housekeeper (presumably at all). Based upon our findings of fact and conclusions above, it is clear that the Claimant did not want to be a Housekeeper. The Respondent told her that she would be transferred into the role, without her agreement, and ultimately she remained in the role albeit under protest until she resigned in August 2021. Thereafter, the Claimant agreed to return to the Housekeeper role as part of the agreement reached in November 2021.

78. In the circumstances, the Tribunal concludes that the Respondent did not require the Claimant to discharge the duties of Housekeeper. Rather the Claimant reluctantly chose to do so, even though it was a job which she did not want and by her own admission hated, because the alternative was the termination of her employment as she considered all proposed alternatives to be unsuitable.

79. In any event, even if the Claimant were required to discharge the duties of Housekeeper, the Tribunal concludes that any such PCP did not place her at a substantial disadvantage. The substantial disadvantage relied upon is the requirement to serve food to patients on wards, with an expectation that she would lift and carry heavy items and hot items and to dish up food. The serving of food to patients, of itself, did not cause substantial disadvantage. The Claimant had previously been undertaking this part of the Ward Assistant role and made it clear that she was able to serve toast or warm milk. The Tribunal infers that it is the requirement to lift the catering baking trays out of the oven and into the mobile oven, or the lifting of heavy objects, which would cause the substantial disadvantage. Ms Williams report had recommended that the Claimant not complete tasks relating to the handling of hot food, for example, removing trays from the oven, carrying plates and loading the dishwasher, lifting food trays and reaching for plates on the trolley or lifting boxes over 2.5kg in weight. As set out above, on 23 June 2021, Ms Griffin had clearly stated that the adjustments in the Williams assessment would be adhered to. The Tribunal has found that Ms Connolly was not, as the Claimant suggested, ignoring the Williams recommendations but was only trying better to understand the practical effect of them.

80. In Mr McMillan's closing submissions, he refers to the Claimant's evidence about the difficulties her disability *would have* caused her with all of the duties of the role. Section 20, however, requires that a provision criterion or practice *puts* a disabled person at a substantial disadvantage in comparison with a person who is not disabled. The Respondent had made clear that the Williams recommendations would be adhered to. The duties which the Claimant actually performed as a Housekeeper during her notice period and during the period from her return to work in November 2021 until the termination of her employment on 16 March 2022 were all adjusted to avoid any substantial disadvantage by reason of the left shoulder impairment.

81. There can be no doubt that the Claimant was unhappy in the Housekeeper role, even when significantly adjusted. The Tribunal concludes that this was because she



missed the previous patient contact of the Ward Assistant role and regarded aspects of being a Housekeeper as being more domestic in nature (by inference, a lesser role). The issue at the heart of this case is not that the Claimant was placed at a substantial disadvantage by reason of the duties of the Housekeeper role, it is that she never wanted her role to change due to the restructure process and felt strongly aggrieved that it had been changed against her express objections. The Claimant's unhappiness and even hatred of the job is not because of her disability in any way, as she makes clear in her use of the plural words "we" and "us" in April 2021 and January 2022 when describing her discontent as shared with those of her former ex Ward Assistant colleagues. Regrettably, the job was not for the Claimant because it was not congenial and rewarding work with patient contact as before and not because it put her at a substantial disadvantage because of her disability.

82. Finally, the Tribunal bears in mind that the claim is framed not only by reference to the application of a provision, criterion or practice but it is also said that a physical feature put the Claimant at a substantial disadvantage. This physical feature is the weight of the kitchen equipment and oven doors as she could not lift the kitchen equipment, could not reach into the ovens and could not push the mobile ovens onto the ward. For the reasons set out above, the Tribunal does not accept that the Claimant was put at such a disadvantage. Had the Claimant been required to use any of this kitchen equipment, kitchen oven or mobile oven in the way suggested then it is likely that her claim would have succeeded, not least given Ms Patnell's concessions about the weight of the trays used for cooking, the difficulty of getting them out of the oven sometimes and the use of the steriliser requiring two arms without weakness. However, the Claimant was not required to do any of these duties and, therefore, we conclude that she was not put at the substantial disadvantage required.

83. For these reasons therefore, all claims are dismissed.

**Employment Judge Russell**  
**Dated: 21 August 2023**