



EMPLOYMENT TRIBUNALS (SCOTLAND)

5

Case Number: 4106158/2022

Claimant: Miss S McDaid

10

Respondent: 1. TDN by Michal Ltd

2. Michal Tereszczenko

15

CERTIFICATE OF CORRECTION

Employment Tribunals Rules of Procedure 2013

20

In accordance with the power set out in Rule 69 of the Employment Tribunal Rules of Procedure 2013, I hereby correct the omissions in the judgment sent to the parties on 30 June 2023, by inserting:

On page 1, line 18 change the name of claimant representative:-
Ms O Fawl

25

An amended version of the Judgment is attached.

Important note to parties:

30

Any dates for the filing of appeals or reconsideration are not changed by this certificate of correction or the amended Judgment or Case Management Order. These time limits still run from the date of the original Judgment or Case Management Order, or if reasons were provided later, from the date that those were sent to you.

35

Signed Employment Judge I McFatridge

40

Date: 04 July 2023

Sent to parties 04 July 2023

E.T. Z4 (WR)



EMPLOYMENT TRIBUNALS (SCOTLAND)

5

Case No: 4106158/2022

Hearing held at Dundee on 22, 23, 24 May 2023

10

**Employment Judge McFatridge
Tribunal Member W Canning
Tribunal Member P Fallow**

15

Miss S McDaid

**Claimant
Represented by:
Ms D Fawl,
Friend**

20

TDN by Michal Ltd

**First Respondent
Represented by:
Mr D Simpson,
Friend**

25

Michal Tereszczenko

**Second Respondent
Represented by:
Mr D Simpson,
Friend**

30

35

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that

40

1. the respondents did not unlawfully discriminate against the claimant on grounds of disability.
2. The claimant was not automatically unfairly dismissed.
3. The respondents did not unlawfully withhold wages from the claimant.

REASONS

1. The claimant submitted a claim to the Tribunal in which she claimed that she was unfairly dismissed by the respondent and that she had been unlawfully discriminated against on grounds of disability. She also ticked the box to indicate that she was claiming other payments. The respondents submitted a response in which they denied the claims. They pointed out the claimant did not have sufficient qualifying service to make a claim of unfair dismissal. A preliminary hearing was held following which the claimant sought to amend her claim so as to include a claim of automatic unfair dismissal in terms of section 104 of the Employment Rights Act 1996. Following a preliminary hearing which took place on 27 February 2023 this amendment was allowed and the respondents subsequently lodged an additional response to this claim. The final hearing took place over three days in May 2023. The claimant gave evidence on her own behalf and led evidence from her partner Mr C Sinclair and from her father Mr P McDaid. The second respondent Mr Tereszczenko who was the sole shareholder and Managing Director of the respondents gave evidence on their behalf. He also led evidence from Mr Ronan Reid the former General Manager of the restaurant. The parties lodged a bundle of documents which is referred to below using page number. On the basis of the evidence and the productions the Tribunal found the following essential facts to be proved or agreed.

Findings in fact

2. The respondent is a Polish national who came to Scotland in 2015. He suffers from dyslexia and as a result has poor reading and writing skills in both Polish and English. It took him around five years before his English was of a standard where he could communicate properly in spoken English. He left school to start work at 15. He started working as a Chef where he found he had a certain skill. From 2018 he started working at Michelin starred restaurants and won two awards whilst working at Balbirnie House a high-end restaurant in Fife.

3. Whilst working at Balbirnie House he came to be on friendly terms with the owners of a small bar/restaurant situated in Main Street, Milton of Balgonie, Fife KY7 6PR. It was then called 'Thistle Dae Nicely'. In or about June 2021 the owners of this restaurant indicated to the claimant that they

5 were requiring to give it up for family reasons and asked him if he would like to take it over. The respondent indicated that he would and arranged to purchase the goodwill in the restaurant. Initially he traded as a sole trader however in February 2022 he found he was hitting the VAT threshold and incorporated the first respondent and the business was thereafter carried out by the first respondent company of which he was a director and shareholder. At all material times during the period of the claimant's employment the business was operated by the first respondent and the claimant was employed by the first respondent. She was not
10 employed by the second respondent.

4. The business comprises a small bar/restaurant with a bar and some tables. There is a maximum of around 30 covers. The restaurant only operated on Thursdays, Fridays, Saturdays and Sundays. The second respondent was aware that there was very little passing footfall in Milton
15 of Balgonie which was bypassed by the main road and that for the business to be a success he had to be in a position to attract customers by the quality of the food which as an award-winning chef he was in a position to provide.

5. The claimant graduated from university in or about June 2022. The
20 claimant's medical history was unremarkable and whilst at school she had not been diagnosed with any developmental, neurological or cognitive conditions or other mental health issues. When she was around 13 she and her family had some concerns which they thought might be due to a thyroid condition which tended to run in the family. The claimant felt that she was suffering from poor concentration, tiredness and other symptoms.
25 She contacted her GP and the matter was investigated at this stage by her GP who decided that she did not suffer from a thyroid condition. She was not referred for any other tests relating to any other conditions. The claimant's family considered that any behavioural issues she had at this
30 time related to 'typical teenage stropiness' rather than any cognitive impairment.

6. Whilst at university in or about January 2020 the claimant found that she was having some difficulties with her studies. Again she suffered from poor concentration. She had issues with punctuality and completing her

work on time. She consulted her GP considering that she may be suffering from some type of personality disorder. She had two or three appointments with a mental health nurse. The mental health nurse thought she might benefit from group therapy however there was a lengthy waiting list for this and she did not actually receive an appointment.

7. The claimant became aware of a company called ADHD Direct. She had seen details of this on the internet. She contacted them. She completed forms which provided a medical history from the claimant and also arranged for family and friends to complete documents describing her. These were provided by members of her family including her parents, her partner and a former flatmate. The claimant put together the pack containing all of these materials and sent them to ADHD Direct. She also had an online consultation with a nurse practitioner at ADHD via Zoom. On 28 May 2021 ADHD Direct wrote to the claimant setting out the results of their assessment. This letter is lodged (pages 43-46). It was sent to Dr Andrew Ross the claimant's GP and signed by Lorraine Campbell who is described as an ADHD Clinical Nurse Specialist Independent Nurse Prescriber.

8. The letter noted the reason for referral as being

"Shannen feels unable to stay focused and organised which is preventing her from completing her bachelor's degree, which has led her to believe she has ADHD. She is very forgetful, impulsive and suffers from intense emotional dysregulation. These symptoms are greatly impacting on her life and relationships, hence the reason she has come forward for an ADHD assessment at this time." (page 44)

The next paragraph entitled "History of the presenting difficulties" goes on to state

"Shannen advised the following symptom history has been present from a young age and reflecting back on her childhood, she reports significant problems in areas of inattention; experiencing trouble paying attention to details, often having difficulty organising or finishing tasks and forgetting to complete routine chores."

5 *Whilst she is highly intelligent, Shannen felt she never reached her academic potential at school as she was very easily distracted in class and as a result of her lack of attention and focus was unable to apply herself to the level that reflected her intelligence. Despite this Shannen has managed to go on to university and is currently studying a bachelor's degree at Edinburgh Napier, but this does not come without its difficulties. She is constantly late or misses lectures, submits assignments on the deadline or requires extensions, having left everything to last minute. She has failed a*

10 *module every year and unfortunately had to re-sit her second year and internalises feeling shamed and embarrassed about this. Similar patterns of behaviour continue at her workplace. Shannen reports being late every other day and getting pulled up for this, and due to her lack of attention and focus, feels she is not able to*

15 *complete her work to the best of her ability. Shannen reports to have always struggled to manage her time and balance household chores. She has always had a sense that there was more to her and the difficulties she experiences, that we now come to understand as ADHD, which has clearly held her back."*

20 Under "Current presenting symptoms" it states

"The following symptom history has been present from a young age for Shannen and continues to impair her in all aspects of her current everyday life. Shannen is someone who will often find it difficult to make decisions and procrastinate for long periods of time. She

25 *generally struggles with managing her time. Her poor working memory means it is difficult for her to hold in her mind things that she needs to remember, and this can lead to her not getting her tasks and projects started. Processing and storing information can be a problem for Shannen as she will very often not be able to*

30 *remember what it is that she has previously heard or read. Shannen can be impulsive and can find it difficult to tolerate waiting and this can lead to her making impulsive decisions or remarks and in hindsight regretting what she has said or done. Shannen is described as someone who is very easily distracted, her attention*

span is short, she starts new tasks without finishing existing ones, and has constant brain chatter. Whilst emotional regulation is often less understood in its role with ADHD, for many with the condition, this can be an area that causes them considerable difficulty. In Shannen's case, she experiences emotional sensitivity to the extreme, mood swings, irritability, struggles under pressure and has dealt with anxiety most of her life."

9. As part of the assessment process the claimant had an online meeting with the ADHD Clinical Nurse Specialist. The report states of this meeting:

"Over the course of her assessment, Shannen presented as well-groomed and casually dressed. She engaged well in the assessment process considering it was carried out virtually. She presented as very articulate and answered all questions put to her in a calm manner and her speech was at an appropriate speed and pitch. She reports a history of anxiety and has engaged with counselling sessions through university. She has also attended a few appointments with a mental health nurse who has referred her to group therapy to assist with mood swings and emotional disregulation.

During the course of our assessment Shannen's affect seemed normal. There was no evidence of thought disorder, she was able to answer questions in a spontaneous and direct fashion. There was no evidence of thought block, and her perception seemed normal. There was no indication of misinterpretations, depersonalisation, paranoia, or any other psychotic phenomena. She showed a good level of insight and awareness to her difficulties, however, was understandably frustrated as a result of been burdened by these ADHD symptoms."

10. Under the heading of "Diagnosis" the report goes on to state

"The assessment process has highlighted that Shannen has significant difficulties in the areas of attention, concentration, working memory, time management, planning, and other areas of

executive function. She also presents with a degree of motor restlessness and impulsivity. These symptoms have been present from a young age, persistent and pervade across settings, causing her major impairment in many aspects of daily living, hence the reason why she fulfils the diagnostic criteria for ADHD.”

- 5 11. The Nurse Practitioner goes on to recommend to her GP that the claimant is started on a course of Methylphenidate Hydrochloride. She goes on to propose a “shared care” arrangement with her GP to manage her ongoing conditions.
- 10 12. On receipt of this report the claimant contacted her GP. The GP advised her that he was not prepared to prescribe the drugs suggested on the basis of a diagnosis from ADHD Direct. He indicated that he would only be prepared to prescribe these drugs if the claimant had been diagnosed within the NHS by a Consultant NHS Psychiatrist. He declined to engage
15 in a shared care arrangement.
13. As a result of this the claimant contacted ADHD Direct and arrangements were made for the drug to be prescribed by an authorised prescriber within ADHD Direct as a private prescription. The claimant takes these drugs on a regular daily basis. As part of her ongoing care arrangements with
20 ADHD Direct she is required to be regularly reviewed. This review involves her completing a form detailing whether she has suffered from any side effects and also detailing the ongoing symptoms of her ADHD. Examples of the completed form were lodged at page 72 and 73.
- 25 14. The claimant started taking the medication in September 2021. She considered that she felt the benefit of this from the very start. She felt more clear-headed. She considered that instead of there being three or four trains of thought going through her brain at the same time she could concentrate on one task. Her experience of having three or four trains of thought at the same time meant that she had been easily distractable and
30 she felt that with the medication she was able to concentrate better. Previously, when she was distracted she would describe that what she had been doing before was just gone. This was even to the extent that she could forget people if they were not part of her regular life. She was

unable to complete a book. She had only read three books all the way through during her whole life. What would happen is that if she became distracted whilst reading the book then she would have to go back to the start and read it to completion in one sitting. She generally finds reading difficult. Her eyes follow the words but her brain doesn't necessarily follow. Watching television she always puts subtitles on. Without the subtitles she will have difficulty in concentrating. The main effect of her ADHD on her ability to carry out day-to-day activities is in procrastination. She describes this as executive disfunction. She has an inability to perform tasks safely in a normal amount of time. She describes this as brain not making connections and as "*ADHD paralysis*". She says that she can go on to the couch and lie down for hours. She will get into the shower and stay there for a long time. She says that she tends to do everything in one space.

- 15 15. The claimant found that taking the medication helped her considerably and whereas she had been getting around 40-50% marks in modules at university her examination and course work scores increased after she started taking the medication so that she was getting on occasions over 70%.
- 20 16. The claimant was on friendly terms with a Gordon Ross who in or about July 2022 was acting as General Manager of the respondents' restaurant. He was short-staffed and asked the claimant if she would be prepared to go in and help him out with a shift. The claimant was in need of money at that time and agreed. The work involved waiting tables in the restaurant and serving behind the bar. The shift went well. At that time Mr Ross had given notice that he was leaving and the respondent was looking for someone to work in the bar restaurant. The respondent had been advertising for staff and had had some applications and a few interviews but the people who had applied were unsuitable. The main issues were that they either had no car and were unable to travel to work from their home at the times required or did not want to work weekends or were too young to work serving alcohol. The jobs advertised by the respondent were for Front of House staff serving in the bar and restaurant. The
- 25
- 30

second respondent told Gordon Ross that this was what was needed and it was absolutely clear that this was the work which was required.

17. The claimant and Mr Tereszczenko the second respondent had a brief discussion immediately after the trial shift on 16 July. The claimant was invited to an interview at the restaurant which took place on Wednesday 20 July. It was a brief interview where Mr Tereszczenko explained to the claimant that the job would primarily involve serving in the restaurant and bar.
18. Up to this point the manager, Mr Ross had been posting on the restaurant's Facebook page. During the course of the conversation on 20 July Mr Tereszczenko and the claimant agreed that the claimant could deal with the Facebook posts. The amount of time generally spent dealing with Facebook posts would be around 10 minutes per day.
19. Following the interview on 20 July Mr Tereszczenko asked the claimant to complete a pro forma contract of employment document. The claimant duly did this completing it in her own handwriting. The contract was lodged (pages 93-98). It was signed by the claimant and the respondent on 22 January 2007. The claimant gave her job title as Operations Coordinator. This title was chosen by her. Mr Tereszczenko had no particular view on it one way or the other. The intention would be that the claimant would work under a General Manager. She would be one of two staff along with the General Manager who was over the age of 18 and thus able to serve drinks. At no time did the claimant suggest to Mr Tereszczenko that she be given the title of Social Media Manager. Despite this she told her family and partner that she had been hired as a Social Media Manager for the company. The company had absolutely no need for a Social Media Manager being a tiny restaurant/bar.
20. The claimant commenced working for the respondent and things seemed to go well. The restaurant was open four days a week and the claimant worked three days. During the first two weeks the claimant worked until the restaurant closed but she then said that she did not wish to work so late in the evening and the second respondent agreed that she would usually work until about 8.30 and would not be required to work late.

During the course of casual conversation over the first few weeks the claimant mentioned her ADHD diagnosis to the respondent. The conversation was casual and the claimant did not mention being disabled. The claimant simply indicated that she was not keen on working late. The claimant had been working late during the first two or three weeks. The claimant's explanation for this was that she was very short of money at that stage and was prepared to work late because she needed the extra money. The claimant was occasionally late for shifts. The respondent also took no action in respect of the claimant and others turning up late for her shifts. The claimant was generally fairly relaxed with staff about them coming in late. He had a conversation with the claimant and others where he said that he would much rather staff came in a few minutes late rather than risk their lives by driving fast on the road.

21. The claimant's hours of work were calculated by the respondent from the respondent's records. They were put into a spreadsheet for ease of reading. The spreadsheet was lodged as Appendix 14 (page 99). The Tribunal considered this to be an accurate record of the hours which the claimant actually worked during her period of employment.

22. Shortly after the claimant commenced employment Mr Tereszczenko noticed that she had taken in her packed meal and stored this in the bar fridge where it could be seen by customers. He did not think that this was a particularly good look for the business and asked the claimant if she could store her food in one of the fridges in the kitchen. The claimant duly did this. A few days later the claimant noticed that she had stored food in the kitchen fridge but it was not in the correct fridge. As with all catering establishments the respondents required to take steps to ensure that there was no cross contamination of food and for this reason it was important that all items were stored in the correct fridge. The claimant had put her own items into a fridge which should not have had these items in it. Mr Tereszczenko mentioned this to the claimant and asked her to move her food into the correct fridge. He did not do so in anything other than a polite business-like way.

23. The claimant would normally work from around 12 or 2pm. Her end time would vary and was usually between 8 and 10pm. The claimant would be

given a break at some point during the day as were the other serving staff. The break was given at a time when it was possible for an employee to take a break. There was no fixed time allocated for breaks. The claimant never asked for a fixed time to be allocated for breaks.

5 24. Mr Tereszczenko would make food for the staff and his ideal scenario would be for the staff to eat this meal together round about 5pm provided the restaurant was empty. He was not keen on all the staff sitting at a table together in the bar having a meal when there were other customers in. Most of the time there was no difficulty about the staff all having their meal together but on occasions this did not work. The claimant and other
10 staff would then require to take their break at a different time.

25. The claimant has a dairy intolerance. This is nothing to do with her ADHD. Generally Mr Tereszczenko would attempt to accommodate this. On one occasion he made a risotto and forgot that he had put cream in it. When
15 he realised this and told the claimant (before she could try to eat it) he suggested to her that she eat chips which he had also prepared and which he knew she could eat. Mr Reid who had by this time joined the respondents as General Manager described himself as being a picky eater. On occasions he didn't like eating the food that had been prepared and would simply have chips the same as the claimant.
20

26. Mr Ronan Reid joined the respondents as General Manager in early September. He had known Mr Tereszczenko previously having worked with him at Balbirnie House. He had around a 25-minute interview with Mr Tereszczenko before starting. He had day-to-day management responsibility and was responsible for managing the claimant. He had no
25 say over any disciplinary matters. He had an initial conversation with the claimant during which the claimant mentioned her ADHD to him although it was never directly put to him that this was something he required to take into consideration. The circumstances at the discussion were that the claimant told him she was struggling to concentrate. He commented that she had her glasses on and she said that later in the night she could struggle with concentration due to her ADHD. Mr Reid compiled the rotas. He simply based the rotas he did on what had been done before. He did
30 not take specific account of the claimant's ADHD and she never asked

him to. He did not rota her to work late as he understood she did not like working late.

27. In August 2022 the claimant was due to attend an appeal against the refusal of her application for a Personal Independence Payment to the Department of Social Security. She asked Mr Tereszczenko if he would provide her with a letter in support of her application. Mr Tereszczenko agreed to this. The claimant wrote the letter. She came in to the restaurant on a day she was not working with a view to trying to get it printed but neither her nor her partner who accompanied her could link her laptop to the printer at the restaurant.. She was therefore not in a position to print off a copy for Mr Tereszczenko to read and sign. She showed Mr Tereszczenko the letter she had written on the laptop. The explanation she provided to him was simply that this was something that would be of great assistance to her if he could sign it. She explained that she would get more money from social security if her claim was successful. Mr Tereszczenko wanted to help her and said he was prepared to sign the letter. He briefly read this on her laptop although due to his dyslexia and his poor command of written English he was unable to read it in any detail. The only thing he said was that his title should be changed from Chief Executive to Director. The claimant then came back a couple of days later with a printed copy of the letter which Mr Tereszczenko then signed. The letter was lodged (page 29/30). The first paragraph of the letter states

“This letter is written to support my employee, Shannen McDaid, in her clam for Personal independence Payments (PIP). Shannen began working in my restaurant Thistle Dae Nicely (TDN) at the end of July, following the late completion of her dissertation and degree. This role was created especially for Shannen, as her diagnosis of attention deficit hyperactivity disorder (ADHD) greatly impacts her cognitive ability and executive functioning, so we had to make accommodations for her to manage working with us comfortably. Shannen was very open and honest about her capabilities and limitations during her interview, and what we would need to do as her employer.”

The letter goes on to list what are said to be the adjustments made by the respondents. It is as well to set out the terms of the letter in full.

- 5 • *Shannen has poor time perception and she cannot reliably arrive on time. This affects her more whilst on her medication as I am aware that it is a fairly new treatment she is undergoing, affecting her mental processing. Our solution was to not enforce her shift times because she is regularly up to 15 minutes late. Despite this, day shifts suit Shannen best due to her medication, so she is never on an open shift by herself and the other person completes the open procedure for us to open on time.*
- 10 • *We are only open from Thursday to Sunday, but Shannen receives one of these days off every week for her to rest midway through our days of service. Although the fastpaced environment is very stimulating and suits Shannen well, she cannot consistently work like that. It takes a lot of energy from her, reducing her productivity and mood and she is unsuitable for work in that state.*
- 15 • *Shannen cannot work close shifts as her medication wears off in the evening and this greatly affects her ability to work. Her mood and functioning are compromised for days following a late finish and it impacts her ability to work in any upcoming shifts greatly through lateness, forgetfulness, stress, motivation and poor health. I am aware that in Shannen's*
- 20 *previous job she never worked later than 8pm, so we prioritise this in planning her hours to allow her enough time to rest after working. Shannen is on a 20-hour contract and is firm about taking no overtime because she cannot physically work more than this. There have been times I had to close my restaurant*
- 25 *early because Shannen was unable to fill in for absent staff and I have lost money.*
- 30 • *Shannen has higher communication needs at work due to her ADHD. When assigning her tasks, she always asks questions to make sure she fully understands what she is to do and makes sure she is aware of what not to do. We often discuss*
- 35

a task list 3-4 times over at the moment of issue to help her remember what to do and how she should do it. We made sure she had full training before she was expected to perform any tasks alone, which involved a full and descriptive list of the actions required and a comprehensive demonstration.

5

- Shannen's short term memory is largely affected by her ADHD, so we have issued her a notebook to carry around with her at all times so she will not forget anything. She uses this regularly to note task lists.

10

- Shannen informed me that she has digestive issues which she developed following disordered eating from one of her past jobs, so she receives priority for break times that must go undisturbed so she can maintain her wellbeing.

15

- Shannen is permitted to do online work from home when possible, and she is permitted to use her phone recreationally during shifts if needed – within reason. This is to ensure that she is still sufficiently stimulated at quieter times and can complete her day with optimum productivity. She usually also relies on a message from her partner to feed her rabbits, as she always forgets when she is working and does not have time to prepare it before she comes to work.

20

I believe without a doubt that Shannen qualifies for PIP because of how badly she is impacted by her ADHD. I see first hand on nearly a daily basis how she struggles to maintain independence by working. We have even planned to reduce her hours to 12 a week after her claim is granted so she does not have to gamble on harming her wellbeing just to financially support herself."

25

28. Very little of what is written in this letter is true. There were no such discussions between the claimant and Mr Tereszczenko. Mr Tereszczenko was prepared to accommodate the claimant's preference not to work late simply on the basis that she had asked for this. He was also for the reasons previously stated not someone who was unduly concerned if she was late. He did allow her to use her telephone to contact her partner. He had not issued her with a notebook. He trained her in the same way he trained everyone else. It was a tiny restaurant

30

35

and bar and he would give direct instructions if there was anything she needed to be shown what to do he would show her. The claimant confirmed at the hearing that her digestive issues had nothing to do with her ADHD. There was practically no *“online work”* for her to do at home. Part of the claimant’s job was to put posts on the Facebook page. Usually, these were simply photographs with a caption and they were sent to Mr Tereszczenko first so that he could approve them. The amount of time spent doing this was absolutely minimal. In so far as he understood the document Mr Tereszczenko believed that he was simply signing a letter which would help the claimant with her application for a higher social security payment.

29. During August 2022 the respondents were finding it difficult to hire staff. They had still not been able to find a manager. The claimant told Mr Tereszczenko that she would need two days off on 26 and 27 August 2022. This was the Friday and Saturday. The claimant usually took a Thursday as her day off. She did not like working on that day as she would be the only person on duty. The respondent had no staff to operate the restaurant in the absence of the claimant and the restaurant was therefore closed on Thursday, Friday, Saturday and Sunday. Mr Tereszczenko discussed this with the claimant and since she missed out on the shift on Sunday due to the restaurant’s closure it was agreed with her that she would work an additional day the following week. The following week she did work on the Thursday, Friday, Saturday and Sunday and therefore did not lose any wages as a result of the closure on Sunday which was the only day she had been ready and willing to work. The claimant did not indicate to the respondent at the time that she was in any way dissatisfied with this.

30. On or about 4 September there was a brief discussion between Mr Tereszczenko and the claimant about the possibility of the claimant working more hours on a regular basis but the claimant declined this. She did not mention her ADHD. There was an exchange of texts between her and her partner Mr Sinclair that day which was lodged. This included;

Mr S: “Thank u do you think Michal will sub u a wee bit? I should be able to get some tomorrow.”

Claimant: "Oh maybe? Ive not asked yet. He wanted to give me more pay but by upping my contract. I said no ofc"

Mr S: "He said he wanted to help. I'll happily give it back to him when I get again! Ahahaha get fucked mate you've already got another job, think he forgets that!"

5

31. On or about 18 September there was a minor incident over a bottle of prosecco. The claimant saw that a bottle of prosecco had been left out uncovered and as a result had been contaminated with fruit flies. The claimant threw out the bottle of prosecco. Later that day the claimant and Mr Reid were approached by Mr Tereszczenko who asked them what had happened to the prosecco. Mr Tereszczenko was unhappy that a nearly full bottle of expensive prosecco had been thrown out. The claimant explained about the fruit flies. It transpired that at some point a customer in the bar had ordered a glass of prosecco. The bottle of prosecco had been opened and instead of being re-sealed with a closure the bottle had simply been left out on the shelf. Neither the claimant nor Mr Reid could remember who had been responsible for leaving the bottle on the shelf without a closure. Mr Tereszczenko advised them that in future they should ensure that if a bottle of prosecco was opened like this then it was closed up before being put back on the shelf so that it would not be wasted. The incident was entirely straightforward and nothing that Mr Tereszczenko said to either the claimant or Mr Reid was in any way untoward. Mr Reid did not personally see any difficulty with this incident and could quite see why Mr Tereszczenko had been annoyed at an expensive bottle of prosecco being wasted.

10

15

20

25

32. A few days later there was another incident where a member of staff became tearful. She was a young 16-year-old who simply became overwhelmed on an extremely busy evening. Nothing that Mr Tereszczenko said contributed to her initially becoming upset. As soon as he saw she was upset Mr Tereszczenko suggested that she stop working in the bar restaurant area but come through to the kitchen. She stayed in the kitchen for about 20 minutes before going back out. The incident did not involve the claimant in any way but the claimant decided to write to Mr Tereszczenko about it. The claimant sent a text to

30

Mr Tereszczenko on 19 September regarding the incident with Mia. It is as well to set out the full terms of the text.

5 “Hi Michal. I kept my mouth shut last night after the day we had because I just wanted to get home, but you really should know that Mia was crying because of the way YOU spoke to her. I stand by everything I said yesterday afternoon, granted I shouldn’t have raised my voice, but as I said you have repeating issues with your staff, which makes you the common denominator. I mean no ill intent by this – I’m doing you a favour by discussing this with you because you’re my boss and I owe it to the team if there’s an issue I am aware of, especially the younger staff because I am responsible for them and dedicated to their care in front of house. So you cannot say we are not doing enough to support them, because frankly I feel like one of the only ones, but who is there for the older staff? We don’t feel like you are taking us and our issues seriously and it is not fair for you to create a toxic environment and then blame us for reacting. I hope we can discuss this properly when I’m in again next week.” (page 90).

10

15

33. On the claimant’s first day back at work after this incident Mr Tereszczenco sought to have a private word with the claimant in order to discuss her text. He was particularly concerned that she had used the phrase ‘toxic environment’ and wanted to know what she meant by this. The claimant was rude and aggressive to him and the discussion developed into an argument where both the claimant and Mr Tereszczenko shouted at each other.

20

25

34. By this time the claimant was in the habit of engaging in text conversations with her partner Connor Sinclair. By this point the claimant and her partner had already discussed the possibility of taking the claimant to an Employment Tribunal (page 55). It is clear from the tone that the claimant had no respect for Mr Tereszczenko as a manager. One of the texts from her partner stated

30

“he also can’t just fire you, you have rights, threaten a tribunal and he should shit himself, any employer with any sense would....”

35. On or about 1 October another incident occurred. The day got off to a poor start when the respondent checked to find there was no prosecco in the bar. He called the claimant as she was coming in to work to ask if she could pick one up for him. The claimant bitterly resented this and told the respondent that stock control was not her responsibility. All that Mr Tereszczenko had asked was that if a bar person served the last of something that they leave a note of this so that another could be purchased.

36. There was a local community event that day and the respondent had agreed that they would give a £60 voucher as a prize. Mr Tereszczenko had intended that what would happen would be that they would simply type out a voucher and that whoever won the prize would then take it along and it would be presented to the till and accounted for at the time it was redeemed. What the claimant did was use the till to produce a payment voucher. The effect of this would be that the respondents would require to pay VAT on this voucher at that point without ever having had any money or indeed supplied anything. Mr Tereszczenko raised this issue with the claimant. He was not annoyed with her but wanted to make sure that things were done properly next time.

37. Following the incident on 1 October the claimant had a text exchange with her partner. Portions of the text exchange were lodged (page 58, 59, 60). During this exchange the claimant's partner called Mr Tereszczenko

"... fucking dick man

....

What a fucking prick"

"What a fucking cunt man, honestly want to go in and make him shit his little piss pants"

The claimant responded saying

"Yas pls I want to quit this job so bad lmao"

The claimant's partner then responded stating

"big chat about it tonight, get our boundaries firmly set"

The claimant responded

“Yeaaa”

Her partner than responds

“Can’t wait for you to quit that place.”

5 38. From around 1 October the claimant started electronically recording as
many of her conversations with Mr Tereszczenko as she could on her
telephone. None of these recordings were actually lodged. The claimant’s
intention in recording the conversations was to try and catch
Mr Tereszczenko out and obtain evidence which could be used in a
10 tribunal claim. The tribunal’s finding was that at no time during the
claimant’s employment did Mr Tereszczenko behave towards her in
anything other than an entirely appropriate and respectful manner. There
was one incident which took place where both the claimant and Ronan
Reid were in the restaurant along with Mr Tereszczenko. A draft facebook
15 post had been sent to Mr Tereszczenko for approval. He tried to access
it on his phone but found that he could not. He thought that the reason for
this was that all three of them were logged in as administrators of the
facebook page at the same time and he asked the claimant and Mr Reid
to log out. He did so in a perfectly reasonable non-confrontational way.
20 The claimant logged out and Mr Tereszczenko was able to log on and view
the post.

25 39. By the first week in October both the claimant and Mr Tereszczenko were
of the view that the claimant’s employment was not working out.
Mr Tereszczenko was having considerable financial difficulties by this
stage. As noted above he had been trading as a sole trader up until
February 2022. His change to a limited company had to some extent been
prompted by the fact that it was around then that he realised he would hit
the VAT threshold. As a result from February onwards once the business
was incorporated he had been registered for VAT. This had at a stroke
30 cut his income by the amount of the VAT, approximately 20%. He had
hoped that the business would increase but over the summer it became
clear that it would not. October was in fact leading up to be his quietest
month. He was concerned that the claimant was on a contract where he

was obliged to give her 20 hours' work per week and she was being paid at the rate of £10 per hour which was more than other staff. He was also aware that she had a clause in her contract stating that she was on probation for the first three months of employment and that her employment could be terminated during the probationary period by one week's notice in writing. After the end of the probationary period she would require one month's notice. He was also concerned that it was clear from the texts he was receiving from her and from the claimant's attitude that she had absolutely no respect for him as an employer. He thought she was a perfectly acceptable waitress and bar person but that she had a very poor attitude towards him.

40. The claimant was also aware of the fact that she was still within her probationary period. In texts to Gordon Ross, the previous General Manager on 7 October the claimant referred to the fact that the respondent had brought in a new waitress to do a trial shift and stated

"Im still in my probationary period as well so he only needs to give me a weeks notice to leave. Hes already given all my duties to Ronan so I bet he's hiring a new waitress and making me redundant."

41. Mr Tereszczenko was doing what he could to reduce costs at this time. He stopped using suppliers and started doing the shopping himself so he could buy ingredients at the cheapest price. He dispensed with employing a Kitchen Porter and washed the dishes himself. He changed all the bulbs in the restaurant to low energy bulbs. He himself organised a successful Italian night. He was aware from his costings that staff costs were still too high as a percentage of turnover. Mr Tereszczenko was well aware that if the claimant was dismissed during her probationary period then he would only require to give her one week's notice. If she was dismissed outwith her probationary period one month's notice would be required. Her probationary period was due to run out on 22 October and in order to give her notice the last day was 15 October. Mr Tereszczenko considered that he would be able to get by without replacing the claimant. He arranged for a new person to do a trial shift for casual waitressing on or

about 7 October. The claimant was aware of this and believed that the respondents were trying to get rid of her.

42. On or about 7 October, whilst she was not at work, the claimant drafted a lengthy grievance letter which she planned to give to Mr Tereszczenko on 9 October.

43. On 9 October Mr Tereszczenko raised with the claimant the possibility that she would go on a zero hours' contract. He indicated that he was finding her contract difficult to sustain for financial reasons. The claimant rejected this. There was a discussion about this between them. During this conversation Mr Tereszczenko asked the claimant if she wanted the job or not. He did so because it appeared clear to him that the claimant had absolutely no respect for him as an employer and appeared to be extremely unhappy in her work. There was a discussion about hours. The claimant handed Mr Tereszczenko the grievance letter and then went out to her car. It was her position that whilst in her car she wrote out what is described as a transcript of the conversation. This was lodged (page 35-36). In this transcript she indicates that she believed the claimant asked her to resign. The Tribunal were satisfied that this was not the case. The Tribunal's view was that Mr Tereszczenko asked her if she wanted to resign since she appeared to be unhappy with all aspects of the job. The Tribunal considered that the document lodged by the claimant was compiled by her with a view to assisting a Tribunal claim and was unlikely to be an accurate record of what took place.

44. The grievance letter lodged by the claimant was lodged (pages 31-34). The claimant makes reference to her version of the prosecco incident on 18 September. She refers to the argument which took place on 23 September when Mr Tereszczenko asked her what she meant by her comment of a "toxic environment". She referred to the incident on 1 October where she was asked about the bar running out of prosecco and about having put the vouchers through the till. She made extensive reference to her ADHD. She complained about Mr Tereszczenko having "*a pattern of refusing to make me break time meals following disputes*". She made reference to the incident where he had made a dish containing dairy for the staff. She stated that on the same day he had offered Ronan

that he would make something different for him but had not offered to make something different for the claimant. She referred to an incident where she had been asked to log out of Facebook. She stated that she was submitting the letter as *“a written record of my objection to any demotion of pay reduction”*. It suggested that she work strictly on virtual management.

5
10
15
45. Given Mr Tereszczenko’s dyslexia and difficulties with the English language Mr Tereszczenko passed this letter to the General Manager to draft a response. Mr Tereszczenko was extremely busy for the rest of that week. He was well aware that he required to give the claimant notice by 15 October during her probationary period. He considered that she had not passed her probationary period and appeared to have a serious attitude problem. He was also concerned about the finances. On 15 October he gave the claimant written notice. The letter was lodged (page 37). He stated

“I am writing to you today to inform you that as of October 22nd, your contract will not be continued past your probation and as a result you will no long be employed by TDNbyMichal. Please accept this letter as the official notice of the termination of your contract.

20
We are terminating your contract due to a lack in performance that is necessary for your position. We do appreciate your hard work and dedication to the company.

25
Once again, we would like to thank you for your service. If you have any questions regarding your contract termination letter please contact Ronan Reid.”

30
The Tribunal were satisfied that the second paragraph of this letter is not entirely accurate in giving the reason for dismissal. Mr Tereszczenko’s position was that the claimant was a perfectly acceptable waitress/bar person. He had not had any problems with her performance in that role. The reason for dismissing her was firstly his financial situation and secondly the fact that she appeared to have a very serious attitude problem and had clearly shown that she did not have any respect for him as an employer and was not prepared to accept instruction or direction from him.

46. Ronan the General Manager drafted a response to the grievance which was signed by Mr Tereszczenko on 17 October and sent to the claimant. This document was lodged (page 40-42). It answered the various points mentioned. The claimant wrote to Mr Tereszczenko and Mr Reid on 5 17 October stating that she had not been aware of any issues with her performance. She stated that her dismissal had come as a shock to her. This was simply untrue. She complained about Mr Tereszczenko conducting himself aggressively at work. She stated that she considered she had been victimised and claimed that she had been discriminated 10 against because of her disability.

47. Following the termination of her employment the claimant has not started other employment. She has decided to start a dog walking agency on a self-employed basis since she considers that she would have difficulty in fitting in with a normal workplace and taking instructions. The claimant 15 considers that her treatment by the respondents contributed to an exacerbation in her ADHD and lodged the self-assessment forms lodged at pages 72-73 in support of this contention.

48. Mr Tereszczenko did not replace the claimant. He continued to operate the restaurant until January 2023. He did so using casual staff brought in 20 on an ad hoc basis. By January he realised that he had insufficient funds to get through the remainder of the winter months which he knew from experience would be quiet. He made the decision to close the restaurant. He himself moved out of the UK in order to find work as a Chef. The restaurant was closed in January 2023

25 **Matters arising from the evidence**

49. Generally speaking there was a clash in evidence between on the one hand the claimant and on the other hand Mr Tereszczenko. The tribunal preferred the evidence of Mr Tereszczenko. Both Mr Sinclair the claimant's partner and Mr McDaid the claimant's father readily accepted 30 during their evidence that practically all of the information which they had in relation to the matter came from the claimant. This was all apart from two matters where Mr Sinclair himself gave evidence. The first was in relation to the circumstances in which Mr Tereszczenko was shown a copy

of the PIP letter on Miss McDaid's computer and the second was in relation to his assertion that he would collect the claimant from work and that she was often working past 10.30 at night. Mr Sinclair was also able to confirm that he had sent the somewhat intemperate and offensive texts to the claimant discussing Mr Tereszczenko in unflattering terms and making threats against him. We were unimpressed by Mr Sinclair's evidence. We considered that it was highly likely that he would say whatever he felt would assist his girlfriend's case. We did not consider his evidence to be reliable other than where it could be verified by other evidence.

50. We considered Mr McDaid to be a truthful witness although he had absolutely no evidence to give other than what he had been told by the claimant. It is noteworthy that both Mr Sinclair and Mr McDaid said that the claimant had told her that she was employed as a Social Media Manager. This was simply untrue as the claimant eventually accepted during her evidence. There was absolutely no way that a business of this sort would need a Social Media Manager. The claimant was already bigging her title up when she wrote the words "*Operations Coordinator*" into her contract. There was absolutely no way that the claimant could reasonably have believed that she was employed as Social Media Manager or Social Media Coordinator. Despite this, it is clear that this is what she told her family.

51. The Tribunal did not consider that the claimant was an honest witness. The claimant had produced a number of written documents for the hearing where she set out her case in full. These contained allegations which simply did not make it into her oral evidence and were simply incorrect. For example, she refers to having written numerous grievances. Her evidence was clear to the effect she had only written one. She refers in the letter sent after her dismissal to her dismissal coming as a shock to her. It is absolutely clear from the texts exchanged with her partner and others that this was simply untrue. The claimant was well aware of the true situation and in the documents she produced following her discussions with Mr Tereszczenko on 9 October she makes specific reference to him having raised his financial problems with her.

52. The Tribunal's view of the text messages exchanged between her and her partner are that the claimant was by this time quite clearly planning to manufacture a case in order to take the respondent to a tribunal. The Tribunal noted that the claimant's evidence was that from about the beginning of October she started recording her interactions with Mr Tereszczenko. She could really provide little explanation as to why having done this she did not actually have a proper recording of the discussion on 9 October. Her evidence was that she wrote this down in the car immediately afterwards. The Tribunal also considered its significance that having admitted that she was recording Mr Tereszczenko she did not in fact seek to lodge any recordings with the Tribunal. The claimant's general position was that Mr Tereszczenko was loud and aggressive whilst working in the restaurant. She could give no detail of this and when asked to provide details she referred to the incidents which we have set out above. The Tribunal's view was that these incidents were nothing more than part of the warp and weft of ordinary working life. It is entirely unsurprising that a business owner is going to be annoyed if a nearly full bottle of expensive prosecco is thrown out. Mr Reid saw nothing untoward in his reaction. The claimant tried to say that this was something arising from her ADHD because she was forgetful and that this was somehow relevant. The Tribunal's view was that this was nonsense. The claimant, Mr Reid and Mr Tereszczenko were all at one in saying that no-one could remember precisely who had taken the prosecco out and put it away without putting a closure on it. All three said that the claimant was not being singled out for doing this. Mr Reid's evidence was that this discussion was something entirely normal and reasonable in his experience.

53. With regard to the incident on 23 September the Tribunal preferred the evidence of Mr Tereszczenko and Mr Reid. The schoolgirl waitress had become upset for reasons which had absolutely nothing to do with Mr Tereszczenko. He had then suggested that she work in the kitchen rather than try and work in the restaurant when she was visibly upset. The claimant's intemperate texts sent afterwards talking of a toxic environment was totally uncalled for and completely inappropriate. The evidence was that following this Mr Tereszczenko had quite properly asked her what she

meant by a toxic environment. Both Mr Tereszczenko and Mr Reid indicated that both the claimant and Mr Tereszczenko were shouting at each other in the ensuing discussions. The claimant's view was that this somehow engaged her ADHD diagnosis but the Tribunal did not accept this. Finally, the two incidents referred to on 1 October where Mr Tereszczenko asked the claimant to get a bottle of prosecco as they had run out and where he told her that she should not have put the vouchers through the till prior to them being cashed are again entirely normal and reasonable incidents. During the hearing the claimant and her representative went on at great lengths that the claimant was not responsible for stock control and Mr Reid was cross examined on the basis that he was trying to offload his responsibilities on to someone else. The Tribunal considered this was nonsensical. Both Mr Reid and Mr Tereszczenko indicated that all Mr Tereszczenko had asked was that if something was running out whichever member of staff noticed this should put it in the book. This is not being responsible for stock control, this is standard bar/restaurant procedure. It had nothing whatsoever to do with the claimant's ADHD. The evidence is that Mr Tereszczenko spoke to the claimant in a completely standard normal way. With regard to the vouchers Mr Tereszczenko had unfortunately not given the claimant any detailed instructions. He accepted that she had done what she thought was right and what he was saying to her was that next time do not do it this way but do it a different way which would not result in the restaurant having to pay additional VAT they were not owing.

54. At the end of the day we considered that given the evidence of the texts and given the tenor of the claimant's evidence the claimant was essentially trying to manufacture a claim against the respondent and was prepared to say anything which she felt would further that cause. Her general position that Mr Tereszczenko was loud and aggressive in the workplace was not supported by the evidence of Mr Reid who was a neutral witness. The specific incidents she sought to rely on did not support this general allegation in any way. We accepted that she was probably telling the truth about what she considered to be her ADHD symptoms-she does genuinely feel she suffers from these symptoms to the extent they amount to a cognitive impairment. We did feel that her evidence she had been

discriminated against on account of this was not credible or reliable. The various incidents referred to in evidence where she has produced written documents which were later flatly contradicted by her oral evidence at the hearing also did not enhance her credibility.

5 55. We found the evidence of Mr Reid to be particularly compelling. It was clear to us that he was giving honest evidence and was not seeking to favour either the claimant or the respondent. He was a very careful witness who would say precisely what he had observed and no more. It was noteworthy that even subject to this his evidence was entirely in
10 keeping with that from Mr Tereszczenko and at various points starkly contradicted that of the claimant.

56. The Tribunal considered that Mr Tereszczenko was an entirely credible and reliable witness. It was clear that his dyslexia and the fact that English was not his native language had put him at a considerable disadvantage
15 in dealing with the claimant. We accepted his evidence in relation to the initial discussions. We accepted that the detailed discussions which are set out in the PIP letter drafted by the claimant simply did not take place. We accepted Mr Tereszczenko's evidence that the claimant had mentioned her ADHD diagnosis to him after a few weeks but that it was
20 not in any way seen by him as an issue other than that the claimant was unable to work late nights.

57. With regard to the late nights there was considerable discussion around the document lodged at page 99. The Tribunal eventually accepted that this document was an accurate record of the hours actually worked by the
25 claimant. The position was that the claimant was paid weekly based on the hours worked the previous week. With one minor exception the hours set out on this form coincided with the hours she was paid for. The Tribunal found it inconceivable that the claimant would have worked the additional hours she claimed without being paid for them and been silent. The evidence was that initially rotas had been done by Mr Tereszczenko
30 and on the basis of a manual record. When Mr Reid started he had introduced an app whereby each member of staff logged in using facial recognition. The claimant had access to this app and shortly after she was dismissed the app was deleted online. Both Mr Tereszczenko and

Mr Reid suspected the claimant did this maliciously. The Tribunal does not make any finding in relation to this. What happened however was that Mr Tereszczenko and Mr Reid together with the respondent's lay representative Mr Simpson contacted the company which supplied the app and Mr Reid was eventually able to have the access to the data within the app restored. When they did so, they decided that the raw information from the app would be difficult for the Tribunal to understand and so they put this into a spreadsheet. The Tribunal considered this explanation to be entirely rational and believable. It is noted that initially the claimant appeared to accept that this document was correct but later on in the hearing she indicated that she did not accept it. During submissions (i.e. after it was no longer possible for the claimant to be cross examined on this and without having put the matter to Mr Tereszczenko), the claimant's agent raised the issue that for one week the figures in the spreadsheet did not tally with the claimant's pay slips. The respondent's representative indicated at the time that having been faced with this during submissions and the matter not having been raised in evidence they were not prepared or ready with an answer. It should be noted that subsequently the respondent did write to the Tribunal with an explanation however given that the matter was not raised during the hearing the Tribunal did not consider that we could take this explanation into account. In any event, our view was that the discrepancy of one week did not alter the substantive fact that for all the other weeks the hours in the spreadsheet tallied with the hours for which the claimant was paid. In our view this, together with the evidence of Mr Tereszczenko and Mr Reid conclusively disproved the claimant's suggestion that she was often required to work until very late at night. The Tribunal much preferred the evidence of Mr Tereszczenko on this point which was that after the first couple of weeks the claimant had said she couldn't work late nights and he had accommodated this.

58. With regard to the reasons for dismissal we entirely accepted that Mr Tereszczenko dismissed the claimant for the two reasons given namely his financial issues and the fact that he felt she had a poor attitude towards him. He indicated he understood from his accountant that he was able to dismiss for any reason at all during the first two years. He said that the suggestion that he refer to 'performance' in the letter had come from

his accountant. The financial pressures that the respondent were under were very real. The Tribunal also considered that it would have been clear to Mr Tereszczenko by the beginning of October that the claimant had no respect for him and appeared to be “*working her ticket*” albeit at that time he would not have had access to the texts she was exchanging with her partner which clearly show her attitude to the job. Our view overall was that Mr Tereszczenko was a somewhat naïve businessman. During his evidence he spoke of the fact that he would give all of the staff a substantive meal and that they were permitted to drink whatever soft drinks they wanted. He expressed surprise at the fact that over the months this amounted to a substantial cost. He also understood that having employed the claimant on a contract with fixed hours at a fairly high rate of pay, it would be much cheaper for him to rely on casual staff on zero hours’ contracts which is what he ended up doing.

59. With regard to social media it was his position that he needed someone who was a native English speaker to put posts up on Facebook. This was not a major issue and eventually the work was effectively shared out between the claimant and Mr Reid. He was correct to be extremely sceptical about the claimant’s idea that she could become a full time social media consultant for the company working from home. With regard to the claimant’s grievance being the ostensible reason for dismissal the Tribunal rejected this. There is an obvious temporal problem in that from the claimant’s own evidence she was well aware prior to sending the grievance that the respondent was thinking of getting rid of her. The text she sent to the former General Manager confirms this. She was well aware of the issue regarding notice if she was dismissed outwith her probationary period. The Tribunal’s view was that this was probably why she put her grievance in and also probably why she lied in the letter she sent on 17 October to say that her dismissal had come as a shock to her.

60. The Tribunal noted the submission by the respondent’s representative to the effect that it would have been fairly easy for Mr Tereszczenko to simply ignore the Tribunal given that his company is no longer trading and that he has moved abroad. The Tribunal noted that he had required to give up wages and pay for air fares in order to travel back to the UK for the hearing.

We accepted that this was because he wished to clear his name of the allegations against him.

Discussion and decision

5 61. Both parties made full submissions which rather than repeat will be referred to where appropriate below.

62. The claimant made claims under sections 15, 26 and 27 of the Equality Act. She also made reference to a failure to make reasonable adjustments. Her protected characteristic was disability. She claimed
10 automatic unfair dismissal in terms of section 104 of the Employment Rights Act and an unlawful deduction of wages. She accepted in evidence that her employer at all times was the first respondent. It is assumed that the claim against the second respondent was made in terms of s111 and/or s112 of the Equality Act although this was not specifically stated.
15 In any event, given that we found none of the Equality Act claims to be established the matter need not be investigated further.

63. With regard to the discrimination claims the first question to be determined by the Tribunal was whether or not the claimant was disabled in terms of section 6. The definition contained within section 6 of the Equality Act is well known. It states
20

“(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.”

25 64. The claimant's position was that the claimant was diagnosed with ADHD in May 2021 and started taking medication in September with bi-annual medical reviews. It was stated that her ADHD impacted her executive function and her abilities as follows – that she struggled with timekeeping, that her attention deficit hampers ability to do things in time, she lacks the
30 ability to maintain concentration. She would jump between tasks and this had impact on her short-term memory. It was stated that she often forgot

where she had put everyday items although the claimant had not mentioned this in her evidence. It was noted that her perception of time was distorted and her time management difficulties impacted on a day-to-day basis. She struggled to make plans. It was noted that she would need encouragement in order to remain focused and that each day she has to evaluate her mental state and decide if it is possible to do the tasks allocated. It was noted that she reserved the evenings for eating, showering and resting and had to plan each day to ensure tasks were done at bedtime (the claimant did not give any evidence in relation to this). The effects were said to be long term on the basis that they had lasted more than 12 months. It was noted that the claimant now believed that she had exhibited symptoms at age 12 when she was suspected of having a thyroid condition. The effect on normal day-to-day activities was said to be that due to the level of concentration she couldn't maintain focus long enough to finish a book or a TV programme, that she would sometimes forget to eat or drink because she was hyper-focused. She noted that her medication affected her appetite and blood sugar and she had to plan what tasks to do in the day. It was noted that there had been an impact on her university work in meeting deadlines and that there had been a significant improvement in her academic performance once she started medication and adjustments were made by the university. Within the workplace she found it difficult to time manage and follow instructions and found it difficult to work in the evenings.

65. The Tribunal were divided over whether the claimant had met the burden of proof in order to establish that she did indeed meet the test of disability under section 6. The majority which consisted of the two lay members believed that she had. The lay members have indicated that the reasons why they considered there was a substantial adverse effect on her ability to carry out day-to-day activities was because if she doesn't have her medication she found it difficult to concentrate and understand tasks. It was noted that she suffered from stress and mood swings and that without her medication she found it hard to concentrate and that after work she was in a frozen state only able to rest, shower and sleep. They also noted her position that she was unable to work five days in a row and that she needed to rest. It was noted that her studies went badly until she received

a diagnosis and subsequent medication, as well as reasonable adjustments made by the university. She also forgot to eat. All of these had an effect on her ability to carry out day-to-day activities. In particular, her inability to work five days would restrict how much she could work. She also required to plan household tasks.

5

66. The Employment Judge's view was that the test had not been met. The claimant had not met the onus of proof on her to establish her impairment had a substantial long term effect on her ability to carry out day to day activities. She had done no more than recite the symptoms of ADHD. Essentially the claimant had given evidence about what was going on inside her head. She did not give evidence herself during evidence in chief of activities she could not do or which were effected by her impairment. When specifically asked to give examples by the Employment Judge the only examples the claimant could come up with were that she found it difficult to finish a book, that if she laid a book aside then she would have to start reading it from the beginning again and that she would only be able to watch a television programme to the end if she put subtitles on to assist with her concentration.

10

15

67. The Employment Judge also noted that within the letter from ADHD Direct all of the findings indicative of ADHD come from the written material provided by the claimant in advance. The record of the clinical interview which took place online does not in fact show any observations from a third party but simply records what the claimant is saying about her internal processes. The evidence from the claimant's father was that when, at age 13, the claimant was advised that she did not have a thyroid condition, he and the family put down what are now said to be the claimant's neurological difficulties as typical teenage stropiness.

20

25

68. The Employment Judge was aware that he is not medically trained and is not in any position to question the diagnosis. He did however consider it noteworthy that the claimant's GP declined to accept a diagnosis and declined to prescribe the drugs sought on the basis of the letter from ADHD Direct. He also declined to engage in any shared care.

30

69. At the end of the day it is for a claimant to prove disability. Often this will be fairly straightforward. In a case such as this the Employment Judge believed that it was important to look for evidence as to what the effect of the claimant's ADHD was on her ability to carry out day-to-day activities.
- 5 All of the issues mentioned by the claimant are essentially matters of degree. Many people get distracted, many people get tired, many people either jump from one thing to another or become hyper-focused both of which the claimant considered to be symptoms of her disability. The reason the claimant did not work five days was because the restaurant
- 10 was only open four days. Notably, when asked in evidence why she had been happy to work late for the first few weeks she said that at that point she really needed the money. There is also some evidence from her text conversations with her partner that she in fact had another job at the time. There was no evidence that in the past she found it difficult to work five
- 15 days a week. At the end of the day given the Employment Judge's strong reservations about the claimant's credibility on other matters the Tribunal Judge felt that the claimant had not got over this hurdle. That having been said, the Employment Judge was in the minority and the Tribunal's view was that disability had been established.
- 20 70. Notwithstanding that they were divided over whether the claimant was disabled, the members and the Employment Judge were unanimous that there was absolutely no merit in the claimant's claim of disability discrimination.

Equality Act s15

- 25 71. S15 (1) of the Equality Act states:

"A person A discriminates against a disabled person (b) if

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim"

30

72. With regard to the section 15 claim the Tribunal's view was that with the exception of her dismissal the specific incidents raised by the claimant did not amount to unfavourable treatment. In any event they had absolutely

nothing to do with her ADHD. As noted above the claimant would at times attempt to manufacture a link such as saying that due to her ADHD she was particularly sensitive to the poor treatment of the other member of staff and that this led her to have the argument with Mr Tereszczenko on 5 23 September. Given the evidence of Mr Reid and Mr Tereszczenko the Tribunal did not accept that this had anything to do with her ADHD. With regard to the incidents on 1 October again the Tribunal were struggling to see how this amounted to unfavourable treatment. The claimant was asked to get a bottle of prosecco as she came in and there was a 10 discussion that in future note is taken when things are running out. Again, it had absolutely nothing to do with her disability. The claimant's view seems to be that anything that happens at work that she doesn't like amounts to discrimination arising from her disability. This is not the legal test. The claimant gave generalised evidence both in the written material 15 which she provided and on occasions orally to the effect that Mr Tereszczenko would speak angrily or be inappropriately loud and aggressive whilst at work. The Tribunal did not accept this evidence for the reasons given above primarily that Mr Reid, who was also there, confirmed that this was not the case.

20 73. With regard to the dismissal the tribunal were satisfied that although this could be regarded as unfavourable treatment there was no way that it could be said to be because of something arising in consequence of her disability. We would refer to our above findings as to the reasons for dismissal. None of these had anything to do with her ADHD.

25 *S26 Equality Act*

74. S26 of the Equality Act 2010 defines harassment:

(1) A person (A) harasses another (B) if-

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

30 *(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.....

(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;*
- 5 *(b) the other circumstances of the case;*
- (c) Whether it is reasonable for the conduct to have that effect.”*

75. With regard to the claim of harassment the Tribunal did not accept that a hostile environment to the claimant had been created by the respondents. Our findings in fact are that the individual incidents founded upon by the claimant were simply part of everyday working life. Even if the claimant felt there was a hostile environment it was entirely unreasonable of her to do so. The tribunal found it significant that the only incident where there was clear evidence that Mr Tereszczenko had raised his voice was in a situation where he and the claimant were having an argument and the claimant was shouting at him. This was subsequent to the claimant sending an intemperate and accusatory text to the respondent. In any event, none of the matters raised had anything to do with her ADHD. In submissions the claimant’s agent attempted to build a narrative where the claimant was being criticised for forgetfulness which was simply not borne out by any evidence whatsoever. None of the incidents referred to in evidence engaged the claimant’s ADHD in any way. The claim of disability related harassment was completely unfounded.

S26 Equality Act 2010

25 76. With regard to the claim of victimisation the claimant indicated that the protected act was the sending of the grievance on 9 October. The Tribunal accepted that this was a protected act. The unfavourable treatment referred to was said to be the claimant’s dismissal. The Tribunal have set out in its reasoning above why this was simply not the case. Mr Tereszczenko was already well aware of the strong possibility that he would be dismissing the claimant. In the view of the Tribunal there was absolutely no evidence that this letter contributed to that.

S20 & 21 Equality Act

77. With regard to the claim of a failure to make reasonable adjustments it was not particularly clear just exactly what these were supposed to be. The claimant's own position as set out in the PIP letter of 23 August was that a large number of adjustments had been made. The respondent's position was that although he was not consciously making these as reasonable adjustments due to the claimant's disability there were a number of matters where he gave the claimant leeway. These were that he would not make an issue if she came in late, that she would be allowed to text her partner and others recreationally during the day and that she not work late. The evidence was that apart from these matters the claimant's position seemed to be that she wanted to be allowed to work full time from home doing social media work. No PCP was identified by the claimant which she said put her at a particular disadvantage. If the suggestion was that she be allowed to work from home on social media work as an adjustment was an adjustment to her ADHD it was not a reasonable one given the circumstances. The social media work required amounted to no more than maximum 10-15 minutes per day. This was a tiny restaurant bar in financial difficulties. The only way to proceed would be to effectively create a sinecure for the claimant doing work which was not required by the business and this would not be a reasonable adjustment. The claimant also made reference to breaks. At one point during her evidence she said that the respondent should allow her a fixed break of 30 minutes each day. The Tribunal was unclear as to how this request was linked to her ADHD. The claimant gave no evidence or even argument that a regular 30-minute break was a requirement of her condition, and in any event even if it was we were satisfied on the evidence that this was not something which the respondent could reasonably be expected to provide. The claimant did get a break as did the other staff as and when the business allowed. The evidence was that for much of the day the restaurant was practically empty and the aim was for all staff to get a break at the same time at 5pm. On the other hand if there were customers in the Tribunal quite accepted it would be inappropriate for staff to be taken off serving tables to sit in a corner of the restaurant at a staff table. This would not be a reasonable adjustment. During her evidence the claimant said that the respondent should have provided a separate staff room and that the fact that there was no room

for this in the building was not her problem and that the fact that the respondent could not afford it was “one of the tragedies of life if a business can’t afford something they need to do.” The Tribunal considered the claim of a failure to make reasonable adjustments had not been established.

S104 employment Rights Act 1996

78. The claimant claimed that her dismissal was automatically unfair in terms of section 104 of the Employment Rights Act. During submissions she did not specifically state what the statutory right was. She made much of the long line of cases which suggest that in a case of ordinary unfair dismissal a Tribunal is entitled to look behind the reason given and try to establish the real reasons. In this case the Tribunal have done so and are quite satisfied that the real reasons were the reasons now given by the respondent and not the reason (performance) given by him at the time. The reason for dismissal however had absolutely nothing to do with the claimant’s assertion of a statutory right.

79. There appeared to be a suggestion that the statutory right being relied on was the right not to be discriminated against however the list of relevant statutory rights for the purpose of section 104 does not include any rights under the Equality Act. In any event, the Tribunal’s view based on the evidence was that the reasons for dismissal were as stated above and had absolutely nothing to do with the claimant’s assertion of a statutory right.

S13 and 28 Employment Rights Act 1996

80. Finally with regard to the claim for unlawful deduction of wages it was the claimant’s position that she was due a guaranteed payment for the week where she was not scheduled to work despite the fact she was unwilling to work on two of these days. It was her position that she should be paid £150 amounting to five days’ guaranteed payment at the statutory rate of £30 per day.

81. The Tribunal's finding was that an arrangement was made at the time whereby the claimant would work an additional day the following week. This was on the basis that the reason for closure was that the claimant herself had said she was unavailable for the two days that she would normally work (Friday and Saturday). The claimant had not worked a Thursday since this was her normal day off. The evidence shows that in fact the claimant did work an additional day the following week and was paid for this. The Tribunal's view was that the liability for a guaranteed payment did not arise.
82. The Tribunal did have a concern that since the claimant had taken two of these days as holiday she does not appear to have been paid that at the time however it is clear from her final pay slip that she did receive payment for those two days at the termination of her employment and no sums were due in respect of holiday pay either.
83. Given that the claimant has been unsuccessful in all of her claims they are dismissed.

Employment Judge:	I McFatrige
Date of Judgment:	30 June 2023
Date sent to parties:	30 June 2023