Case Number: 2204541/2019 V

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms E Campbell	**v**	**The Trustees of the London Clinic Limited**

Heard at: London Central **On**: 22 - 26 & 29 (in chambers) March 2021

Before: Employment Judge E Burns
Miss S Campbell
Mr D Carter

Representation

For the Claimant: In person

For the Respondent: Katya Hosking (counsel)

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is as follows:

(1) None of the claimant's claims of discrimination succeed

(2) The claimant was unfairly dismissed by the respondent.

(3) There should be a 100% Polkey deduction to the claimant's compensatory award.

REASONS

CLAIMS AND ISSUES

1. The claimant Ms Elsa Campbell worked for the respondent, as a radiotherapy receptionist, from 30 November 2009 until her dismissal on 18 July 2019. Her claim, presented to the tribunal on 23 October 2019, included claims for unfair dismissal, direct disability discrimination and direct age discrimination.

2. A list of issue had been agreed between the parties prior to the hearing. The list had been prepared based on drafts discussed at two case management hearings. The panel noted that the claimant had limited her claim of disability discrimination to a claim of direct discrimination under section 13 of the Equality Act 2010. We were satisfied that there had been a proper discussion of the legal basis as to how she wished to advance her claim at the case management hearings.

3. Prior to making closing submissions, the respondent conceded that it did not wish to pursue any time points or any argument that the claimant had contributed to her dismissal by reason of her conduct. It also conceded that the claimant was a disabled person by reason of her hypertension. The remaining issues which the tribunal has been required to determine were therefore as follows:

A. Unfair dismissal

1. What was the reason for dismissal? The respondent asserts that the reason was the claimant's refusal to sign a new employment contract varying her hours of work and that this was a substantial reason of a kind such as to justify the dismissal of the claimant pursuant to s. 98(1)(b) Employment Rights Act 1996.

2. Was the dismissal procedurally fair?

3. Was the decision to dismiss for this reason within the range of reasonable responses of a reasonable employer?

4. If the dismissal was procedurally unfair, what was the chance of the claimant being fairly dismissed if a fair procedure had been followed?

B. Direct discrimination because of disability

5. Did the respondent subject the claimant to the following treatment:

   (a) Dismissing her;

   (b) Having an agenda to end her employment;

   (c) Proposing part time working hours to the claimant in the expectation that she would not be able to accept them;

   (d) Requiring her to change her working hours, when staff in other departments were not so required;

   (e) Attempting to instruct occupational health to produce a report favourable to the respondent;

   (f) Failing to complete the claimant's appeal against her dismissal;

   (g) Attempting to prevent the claimant from appealing against the outcome of her grievance.

6. Has the respondent treated the claimant less favourably than it treated or would have treated the comparators? The claimant relies on a hypothetical comparator who does not have hypertension.

7. Was such less favourable treatment because of disability?

   The respondent conceded that (a) and (c) occurred.

C. Direct discrimination because of age

8. Did the respondent subject the claimant to the following treatment:

   (a) Dismissing her:

   (b) Having an agenda to end her employment;

   (c) Proposing part time working hours to the claimant in the expectation that she would not be able to accept them;

   (d) Requiring her to change her working hours, when staff in other departments were not so required;

   (e) Stating that the respondent's offer (of new working hours) would be "off" if the Claimant was going to work until the age of seventy;

   (f) Failing to complete the Claimant's appeal against her dismissal;

   (g) Attempting to prevent the Claimant from appealing against the outcome of her grievance;

   (h) Poorly handling the claimant's data subject access request.

9. Has the respondent treated the claimant less favourably than it treated or would have treated the comparators? The claimant relies on comparators in other hospital departments and/or a hypothetical comparator not in their 50s.

10. Was such less favourable treatment because of age?

    The respondent conceded that (a) and (c) had occurred.

THE HEARING

4. The hearing was a remote hearing. The form of remote hearing was V: video fully (all remote). A face-to-face hearing was not held because it was not practicable due to the ongoing COVID – 19 pandemic and all issues could be determined in a remote hearing.

5. The tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net Several observers attended the hearing.

6. From a technical perspective, there were a few minor connection difficulties from time to time. We monitored these carefully and paused the proceedings when required. At one point, with the agreement of the parties, Mr Livingstone turned his camera off while giving evidence.

7. For the claimant we heard evidence from her. For the respondent we heard evidence from:
   - Neil Livingstone, the respondent's Head of Radiotherapy
   - Jagnisha Chohan, Senior HR Business Partner for the respondent
   - Beverly Hoggins, Occupational health Adviser for the respondent
   - Russell Wernham, Head of Nursing for the respondent

8. The claimant provided a written witness statement from a friend, Alice Foley. Ms Foley was unable to appear to give evidence for very good reasons which were not challenged by the respondent.

9. There was a main agreed trial bundle of 616 pages (including the index). We admitted into evidence additional documents provided by both parties.

10. We read the evidence in the bundles to which we were referred and refer to the page numbers of key documents that we relied upon when reaching our decision below.

11. We explained our reasons for various case management decisions carefully as we went along and also our commitment to ensure that the claimant was not legally disadvantaged because she was a litigant in person. We regularly explained the process, visited the issues and explained the law when discussing the relevance of the evidence.

12. A preliminary issue we dealt with concerned the admissibility of covert recordings made by the claimant. There were 16 of these altogether. The respondent did not object to 10 of these which were recordings of meetings the claimant had attended. However, it did object to 6 recordings of private conversations to which the claimant was not a party. The panel ruled that the six recordings should not be admitted in evidence and gave oral reasons for our decision.

13. The claimant became distressed while giving her evidence. We adjourned the hearing to enable her to recover. Before proceeding we ensured that she felt able to continue.

FINDINGS OF FACT

14. Having considered all the evidence, we find the following facts on a balance of probabilities.

15. The parties will note that not all the matters that they told us about are recorded in our findings of fact. That is because we have limited them to points that are relevant to the legal issues.

Background

16. The respondent is a private, charitable hospital. It currently employees around 13,000 staff. It has a medium size HR function with 25 staff.

17. The respondent's HR policies are available on its intranet. It has a Staff Handbook which contains a Grievance Policy, the relevant version of which was issued on 4 June 2018 (166).

18. The claimant started working for the respondent on 30 November 2009 as a radiotherapy receptionist. She was issued with a contract of employment that confirmed she was required to work 35 hours per week (excluding meal breaks) but which did not specify her times of work (189).

19. A copy of the claimant's job description was included in the bundle. It includes a "Flexibility Statement" which states:

    "The content of this Job Description represents an outline of the post only and is therefore not a precise catalogue of duties and responsibilities. The Job Description is therefore intended to be flexible and is subject to review and amendment in the light of changing circumstances, following consultation with the post holder." (196)

20. The role of a radiotherapy receptionist is a specialist administrative role. As noted in the claimant's job description, she was

    "*expected to provide a professional and customer focus service to our consultant clients, their radiotherapy patients attending our radiotherapy department along with their families, friends and carers; an efficient telephone appointment booking service, administration support to Radiotherapy and Clinical Oncologist Consultants to ensure that the information, reports and letters are sent out at the agreed turnaround times*." (192)

21. At the material times for the purposes of this claim, the claimant was line managed by Diane Campbell, Radiotherapy Team Leader, who in turn reported to Neil Livingstone, Head of Radiotherapy. The claimant was one of two receptionists required to cover the radiotherapy reception area between the hours of 8.30 am to 5.30 pm.

22. The claimant's colleague (known as Toks) generally tended to work from 8.30 am to 4.30 with the claimant generally working from 9.30 am to 5.30 am. A limited degree of flexibility was required of both employees. They would occasionally have to stay late, but not later than 6 pm. In addition, as the respondent is open on bank holidays, there was occasional bank holiday cover required and a small amount of weekend working.

23. If neither the claimant nor Toks were at work, the reception would be covered by Ms Diane Campbell. Occasionally Mr Livingstone would step in.

24. The claimant was born on 3 March 1960 and is now aged 62. Her former colleague will be 56 next month. They were the oldest members of staff in the radiology team. The respondent does not operate a compulsory retirement age and since age discrimination became unlawful in the UK, has increased its proportion of older members within its workforce.

The Claimant's Medical Conditions

25. The claimant has several long-term medical conditions. For the purposes of this judgment, we need only to be concerned with her hypertension in any detail. We note however that she was diagnosed with osteoarthritis in her left knee joint in 2015 (457) and her spine in August 2017 (454). In addition, she suffered from Tendinitis in the summer of 2018 and had to take time off work between May and September 2018.

26. The claimant's hypertension was diagnosed in 2000. It has never been well controlled. She has struggled for many years to find a medication that works and has tried many different medications. Even with medication, her hypertension remains erratic. Unfortunately, she suffers from severe side effects from the medication she takes. This includes drowsiness, dizziness, confusion, swollen ankles and feet, headaches and bedwetting.

27. Because of her medication side effects the claimant had, over time and with some difficulty, developed a routine that included her having a set time to take her medication to enable her to go to work and do her job without drowsiness or other side effects impacting upon her too heavily in the mornings. Her routine involved her taking her medication at 9.00 pm after which she would go straight to bed.

28. The claimant was attracted to the radiotherapy job at the respondent because it normally had fixed hours. She was able to finish work, travel home and have time at home to prepare her meals, shower and clean before taking her medication.

Chronology

29. In 2018, the clinic acquired a new 3T MRI scanner. The new scanner was placed in the radiotherapy department where the claimant worked. This meant that for the first time the Department would receive radiology as well as radiotherapy patients.

30. The clinic expanded its reception area for radiotherapy and radiology patients. The respondent employed different receptionists for types of patients with two people on reception at all times.

31. However, when the claimant returned to work from her absence due to Tendinitis on 17 September 2018, she was required to attend training on the Radiology IT system for the next two weeks. Toks had already started this training. This was to enable the radiotherapy and radiology receptionists to help each other. The claimant and Toks perceived this as an increase in workload and on several occasions approached Mr Livingstone to ask about a revised job description and pay rise.

32. As a result of the purchase of the scanner, the respondent also wanted to increase the hours it was open for radiotherapy patients from early 2019. This was to increase options for patients to have treatment outside working hours, but also to increase revenue to pay for the new scanner. The planned

opening hours were from 8.00 am to 8.00 pm resulting in the need for reception cover between 7.30 am and 7:30 pm.

33. The respondent planned to achieve this through employing three receptionists, each of whom would be on 37.5 hour (per week) contracts and between them required to work three different shifts: an early shift from 7:30 am to 4:00 pm, a middle shift from 9 am to 5:30 am and a later shift form 11 am to 7:30 pm. It was felt that having three reception staff covering rotating shifts would be good for the department it would provide flexibility in the event of staff being absent for any reason. The respondent also considered it would be easier to recruit an experienced new reception team member if it was able to offer a more regular working pattern rather than a split shift covering early morning and early evening hours.

34. We note that across the respondent there has been a general shift from 35 hour contracts to 37.5 hour contracts. New employees are usually given 37.5 hour contracts. A number of old contracts remain. The respondent has, since 2018, undertaken several exercises to move selected populations of employees in specific areas of its business onto new contracts.

Informal Consultation Meetings

35. On 26 November 2018, Ms Campbell and Mr Livingstone met with the claimant and Toks to inform them of the proposed changes to their terms and conditions. They were given a memo the front page of which confirmed the following:

Change of Terms and Conditions

1. 37.5hrs per week
2. New shift patterns; 07:30 – 16:00, 09:00 – 17:30, 11:00 – 19:30 (with 1hr lunch break)
3. Salary increase to £25419pa
4. New job description to reflect change of duties
5. Start date to be confirmed

(615)

36. This was accompanied by a Business Case (204) explaining the rationale for the change and a revised job description (206). The paperwork included a letter which they could sign to confirm their agreement to the proposed contractual changes (210).

37. The claimant and her colleague were asked by Ms Campbell and Mr Livingstone to attend an informal consultation meeting to discuss the proposed changes the following day. Although the claimant asked if it was possible to have longer to consider the documentation before attending the meeting, the meeting proceeded. Ms Campbell and Mr Livingstone explained that it would be difficult to rearrange it due to planned leave. The respondent did not offer claimant and Toks the given a right to be accompanied to the meeting, but we note that they attended together rather than separately.

38. At the meeting the claimant and her colleague were asked to voluntarily agree to the changes. They were informed that if they did not wish to do so, the respondent would enter into a formal consultation process, that would involve three meetings between December and February 2019. The business case included proposed dates for these meetings (205).

39. The claimant says that she was admonished for making notes at the meeting. We do not find that this was the case. Ms Diane Campbell told the claimant that she did not need to take notes because everything she needed to know was in the paperwork and she wanted to ensure the claimant participated in the discussion. The claimant's perception of this exchange as an admonishment set the tone for many of the future exchanges. The claimant did not trust the respondent from the beginning.

40. Following the meeting, on 30 November 2018, the claimant emailed Mr Livingstone with ten questions. He responded to these questions in writing (212 - 213).

41. In particular, the claimant sought clarity as to proposed increase in pay, the reference in the new job description to flexibility and the need for on call and out of hours participation.

42. Mr Livingstone responded on 13 December 2018 to explain that the increase in pay was not a result of an increase to hourly rates, but was due to the increase in weekly hours from 35 to 37.5 hours per week. He also confirmed that the flexibility / on call and out of hours requirements were no different to the claimant's existing job description or how the department currently operated.

43. The claimant also asked questions in her email about the next steps and whether the terms were open for negotiation. She concluded her email saying:

    "Once these points have been addressed I will be in a better position to analyse the impact. I would like you to note that there are aspects of the new terms and conditions that have the potential to negatively impact my life."

44. Mr Livingstone responded to say that if, after the informal discussions, the claimant did not wish to sign the change in terms and conditions, a formal consultation supported by HR would take place. He explained that as part of the consultation process, the respondent would discuss individual concerns at the individual consultation meetings and would look to see if any compromises could be made. He noted, however, that there was still a need for the service requirements to be met.

First Formal Consultation Meeting

45. Neither the claimant nor Toks had agreed to the changes. The formal consultation was therefore commenced.

46. The respondent invited the claimant to attend a "first individual consultation meeting" with Mr Livingstone and Julie Czornenkyi, an Employee Relations Adviser. The invitation was in the form of a letter dated 19 December 2018. The letter did not use the word "formal" to describe the meeting.

47. At the hearing, we felt the claimant did not understand the distinction between the informal and formal stages of the consultation process. She had, however, been given this information.

48. The letter explained that at the meeting, those present would:

    "…discuss your current contractual hours, with a view to agreeing a new schedule that is suitable for you and the business needs of the department. We will also discuss any concerns that you might have regarding the proposed changes to your terms and conditions in more detail."

    The letter noted that:

    "At this stage of the changes we are seeking solutions from yourself on how to address the situation and …if any changes are made at this stage they will be made on a voluntary basis."

    The claimant was advised that she had a right to be accompanied to the meeting by a work colleague or trade union representative. The letter concluded with a paragraph saying:

    "Please come prepared to discuss any suggestions or questions that you may have at the meeting. We will take a note of meeting. You or your companion may also take notes at the meeting, but please note that you are not permitted to make any other sort of recording of the meeting without express consent of the other people in attendance at the meeting." (214)

49. The meeting took place the following day as planned. A note was taken in the form of a handwritten checklist which the claimant signed (216). In addition, the claimant made a covert recording of the meeting which she later typed up (219).

50. Mr Livingstone began the meeting by explaining the business rationale for the proposed changes, reiterating the proposed changes and the process to be followed. This included confirming that the situation was not seen as a redundancy situation because no jobs would be made redundant and outline the next stages of the consultation process. He did not initially mention the possibility of dismissal and re-engagement at this meeting.

51. The claimant's first asked about the salary increase for the role. Mr Livingstone reiterated that the increase was not to the hourly rate. The claimant made the point that she and Toks had taken on an increased workload as a result of the radiology patients. Mr Livingstone explained that HR had looked into it and the claimant's and Toks' salary was already higher than the HR Benchmark Radiology salary. Ms Czornenkyi suggested that

they could check this again, however. Mr Livingstone later confirmed in writing this was the correct position.

52. The claimant then moved on to explain that her primary concern about the new shift patterns related to her blood pressure medication. She went into detail, including explaining that her medication caused her to experience side effects including drowsiness. She explained that she had developed a routine which enabled her to fit perfectly with her current hours of work and that it would be difficult for her to change.

53. Over the course of the meeting, Ms Czornenkyi and Mr Livingstone asked the claimant a number of questions about her medication and sought to understand what hours she might be able to work, including taking into account her commuting time. The claimant suggested that she would be able to work between 8.30 am and 6.00 pm, but changed this towards the end of the meeting to between 8.30 am and 7.00 pm.

54. Ms Czornenkyi and Mr Livingstone asked the claimant whether she would consider alternative administrative roles elsewhere if it meant that she could remain on her current hours. She confirmed that she would.

55. The claimant said that Mr Livingstone and Ms Czornenkyi treated her inhumanely at the meeting and failed to realise how upset she was. She says that she was forced into offering to work until 7.00 pm because of the pressure she was put under by the way they behaved. We find that although the claimant genuinely felt extremely upset and distressed, she did not show it. We accepted Mr Livingstone's evidence when he told us that the claimant volunteered all of the suggestions she put forward without prompting and that he had no idea that she felt so anxious or upset. This interpretation is supported by the transcript.

56. The claimant also complains that Mr Livingstone did not want to discuss her tendonitis. The typed transcript shows that he said very little about it when she raised it and moved on very quickly to talking about the hours issue again. We note, however, that the respondent's note of the meeting records that the claimant mentioned that her recurring tendonitis was flaring up.

57. The respondent's note of the meeting records that the claimant said she had a GP appointment about her medication the following day and that she would speak to her doctor to discuss changing her medication. Mr Livingstone had suggested that the claimant might want to speak to her GP about this because his husband took medication for hypertension which did not make him drowsy. This interpretation is supported by the claimant's transcript.

58. The claimant's blood pressure increased significantly following the meeting and she took a week off.

59. On returning to work in the New Year, in preparation for the next consultation meeting, the claimant asked Mr Livingstone some more questions in writing about the proposed changes and in particular what would happen if she

wanted to stay on the current terms and conditions. He responded on 11 January 2018 saying:

"The clinic requires cover from 7:30 until 19:30 to provide a service for our patients, therefore we need rotas which will allow this cover. We would hope that we are able to work with individuals to achieve this. We will hold individual consultation meetings to discuss this. If, at the end of the process we are unable to reach agreement we may need to terminate an individual's contract and offer re-engagement on new terms and conditions, although we do hope this is not the case." (229)

Second Consultation Meeting

60. The claimant requested that the second consultation meeting be postponed. It took place on 29 January 2019. The meeting was not concluded on that date, but adjourned and reconvened on 1 February 2019.

61. The claimant requested that she be accompanied by a friend to the meeting. The request was refused, but the claimant was reminded that she could be accompanied by a work colleague or trade union representative.

62. A similar note was taken of the first part of the meeting by the respondent in the form of a handwritten checklist (239). It prepared a typed note of the second part of the meeting (249). The claimant also covertly recorded the meetings. This enabled her to make detailed corrections to the respondent's notes (255).

63. The respondent at this stage was no longer proposing that a shift rota. By this time Toks had agreed to the proposed changes to her terms and conditions, but wanted to work the early shift permanently. The respondent had agreed to this.

64. Mr Livingstone asked the claimant if she would be prepared to work the middle shift as a permanent shift (9 am to 5:30 pm), but be flexible to provide annual leave cover. Alternatively, he asked if she was prepared to do a mixture of the middle shifts and late shifts. This was based on the fact that at the last meeting she had said that she could work until 7.00 pm. The late shift meant an extra 30 minutes of working until 7.30 pm.

65. The claimant reiterated that early shifts were impossible for her and therefore she could not provide cover for annual leave. She said that working later would be difficult for her because it would mean taking her medication, which she took at 9.00 pm every day, later. She acknowledged that she had previously said she could work until 7pm, but now said that 6pm was really the latest she could work. As far as she was concerned this was a compromise because she would be increasing her hours by 2.5 hours per week.

66. As the meeting progressed, the proposal became that the claimant worked the 9 am to 5.30 pm shift permanently save for annual leave cover when she would do the late shift (11.00 am to 7.30 pm). The claimant agreed to

consider this option further though. In return, she asked Mr Livingstone to consider using bank staff to cover the late shifts when necessary rather than her. He agreed to look into this option. The meeting was adjourned for both reasons.

67. Before the meeting finished on 29 January 2019 the claimant asked why she and Toks were being asked to change their terms and conditions when other reception employees in other areas were not. She asked if this was because she and Toks were older, black women.

68. The following day, 30 January 2019, the claimant apologised to Mr Livingstone. She told him that she had to protect her position (244). Mr Livingston was concerned that the claimant was prepared to "tarnish his reputation" by making this allegation. He said their previously good relationship became strictly professional from then on.

69. At the reconvened meeting, Mr Livingstone reported back that there was no budget to use bank staff. The claimant reiterated that she could not provide annual leave cover because she could not do the early shift. The discussion then moved on to the medical position.

70. The claimant had attended her GP on 17 January 2019 and had presented a fit note at the consultation meeting which said that she suffered from hypertension and tendinitis. It certified that she was fit for work doing amended duties and altered hours. It recorded that the claimant felt sleepy as a result of her medications and that this would persist indefinitely (234).

71. The claimant later said that at this point in the meeting Mr Livingstone told her to either stop taking her medication or get it changed. This interpretation of what he said is not supported by the transcript of the claimant's covert recording of the meeting. The context was a discussion about the fact that the claimant had said in the previous meeting that she would ask her GP about changing her medication.

72. The claimant responded that that there was nothing Mr Livingstone could do regarding her medication and that her medication was her medication. He replied saying that at the end of the day he had a service to cover. He added that he was offering two options by way of a compromise, but that if the claimant was not willing to accept what was offered or suggest any other compromise this meant he was stuck. He then said, "And I know that you said [that you couldn't compromise] because of your health but for a few weeks of the year whether that flexibility in terms of take your medication at a different time or…" (424)

73. The claimant says she was shocked and upset by what Mr Livingstone had said. She was not so taken aback that she was not able to continue the meeting. She went on to provide more information about when her hypertension had begun and the difficulties she had had controlling it with different types of medication.

74. Because the fit note provided very little information, Mr Livingstone sought the claimant's consent for a referral to Occupational Health. This was so that the respondent could better understand the claimant's health condition. The claimant suggested that obtaining a report from her GP would be more informative. Mr Livingstone said that he would like the claimant to speak to Beverly Hoggins the respondent's occupational health nurse who could get further information from her GP.

75. During the meetings there was also a discussion about the process and the possibility of dismissal and re-engagement. The claimant asked if she could be made redundant and was told that this would not be possible.

76. The claimant also asked to be provided with information about suitable alternative vacancies. Mr Livingston had prepared information about suitable vacancies and emailed this to the claimant after the meeting (254).

77. Following the second consultation meeting, the claimant had formed the view that she would be dismissed and began to look for other jobs. The claimant felt that Mr Livingstone was not listening to her concerns about her health. This further contributed to a breakdown in their previously friendly relationship.

78. Following the meeting, the claimant also temporarily stopped taking her medication. This led to her becoming unwell and ending up in A & E. The claimant told Mr Livingstone about this and told him she had stopped taking her medication because of what he had said to her at the meeting. Mr Livingstone told her that he had not told her to stop or change her medication and would not have done so because it would risk his registration as a health professional.

79. Mr Livingstone wrote to the claimant on 18 February 2019 summarising the position at the end of the second consultation meeting. In his letter he confirms a revised proposal such that the claimant normally work the 9.00 approximately 8 weeks of the year in order to cover holidays. He also confirmed that the third consultation meeting would take place once an occupational health report was received (217).

Handbook and Policies

80. On 30 January 2019, between the meetings, the claimant had emailed Mr. Livingstone to ask him about making a data subject access request. She also asked for a copy of the company handbook and grievance policy and for information about raising a grievance (246). He replied to all the queries the following day. He explained that the Company Handbook was available on the internet and included a link (616).

81. When the claimant tried to access the Handbook using the link she could not do so. She did not inform Mr Livingstone of her difficulties until 25 February 2018 (274). He then sent her the Company Handbook as an attachment the following day (274). She subsequently (on 26 February 2019) requested copies of "HR processes, Redundancy process,

Consultation Process, Grievance procedures and Dismissal and Appeals process" (275). Mr Livingstone emailed her back the same day with links to the redundancy policy and grievance policy.

OH Report

82. Mr Livingstone emailed the claimant on 15 February 2019 to say that Ms Czornenkyi had spoken to the respondent's occupational health nurse, Beverley Hoggins about the claimant. He indicated that Ms Hoggins had suggested the claimant be reviewed by an Occupational Health Physician. He sought her consent for this (564).

83. The claimant replied on 18 February 2019 saying that she thought the respondent should contact her own GP who would be in a better position to comment on her medical history (565).

84. In the meantime, however, Ms Hoggins had prepared a referral form and made an appointment with an occupational health physician. The referral form asks about the claimant's ability to cover the late shift (11.00 am - 7.30 pm) for 8 weeks of the year as holiday cover. (261)

85. The appointment came through to Mr Livingstone who forwarded the details to the claimant on 25 February 2019. Mr Livingstone's email says:

"An appointment was made for you with the Occupational Health Physician who is independent to The London Clinic. It is entirely your choice to attend the appointment. To support you, should you wish to get a taxi there and a taxi back you're more than welcome to get receipts and claim the cost back.

As this is work related, you will be paid for this time and you are expected to return to work after the appointment." (594)

86. He also informed her that if she chose not to attend the respondent would have to make a decision based on the information it had from the first two consultation meetings. The claimant later said of this:

"I have reluctantly agreed this route as I have been threatened that a decision will be made with current information only" (292)

87. The claimant attended the appointment on 26 February 2019. She suggested to the Occupational Health Physician, Dr Preston, that her GP could provide additional information about her medical history. He prepared an interim report saying he would like to write to the claimant's GP for a background medical report before commenting on whether the claimant could work different hours on occasions (282).

88. The claimant's GP provided a short report dated 18 April 2018 (566). The report confirmed the claimant's hypertension and side effects due to her medication. The report stated that the GP is unable to comment on the claimant's routines. It concluded:

"*I would be grateful if [you would] take into consideration the various side effects she has reported from taking antihypertensive when [taking] any decision as relating to her work." (566).*

89. On receipt of the GPs report, Dr Preston updated his report. In the meantime, the respondent had also asked him to comment on whether the claimant would be considered to be disabled under the Equality Act 2010. He said he felt this was a matter for a legal authority, but that he could not rule it out. He recommended the respondent to err on the side of caution by working on the assumption that the Act applied and to consider reasonable adjustments (328).

90. The key paragraphs in the report say:

"Purely from a blood pressure treatment point of view I think there is licence to alter the timing of her medication by an hour or so without having a critical impact on the control of her blood pressure, but Ms Campbell became quite considerably distressed in my consultation room when I attempted to talk through this possibility. Ms Campbell described a routine when coming home from work having a meal, washing and dressing in preparation for bed. She told me that the later finishing time at work of 19.30 would leave her insufficient time for these activities.

Although I think there is some licence to take the medication at a slightly different time, as long as it is broadly at a similar time of day, I think Ms Campbell is still likely to report anxiety and distress in the context of the disruption to her usual daily routine.

Alternatively, in theory, she could still take her medication at the same time each night, but she tells me that she has to go to bed once she has taken it and therefore the later shift would give her less time to herself before going to bed after work. I think in this case the difficulty will be the anxiety and distress that Ms Campbell is likely to report in the context of any enforced change to her working hours. This anxiety is likely then to lead to an increased risk of sickness absence in itself."

91. Dr Preston also noted that the claimant had written to him to say:

'The issue is this will not be an eight week period. The other employees have considerable more holiday weeks due to length of service. Sickness and absence has also not been accounted for. During this process I have been requested to work additional hours due to the reasons listed above. The concern is the elongated hours could result in 12 hour shifts in the event of absence/holiday/sickness. Switching an early/mid and late shift may also result in there not being a twelve hour period between a shift end/start.'

He explained that this was not the information provided to him in the referral form and that his advice was provided on that information and not the comments from the claimant.

92. The final report was received by the respondent on 29 May 2019. Dr Preston did not attach the GP report.

93. There was no evidence before us that anyone at the respondent sought to or did unduly influence the Occupational Health Physician to prepare a report that was favourable to the respondent.

Grievance

94. The claimant submitted a formal grievance on 26 February 2019 (291). Her grievance included several procedural concerns about the consultation process. In addition, she noted in her grievance:

    "Neil is happy for the best part to allow me to continue on a similar contract in relation to hours (with exception of holiday cover.) There has been no strategy put in place for sickness and considering two of the candidates in the process are older and had months of long term sickness each in the last couple of years. This would have a dramatic impact on the proposed hours.

    It is a struggle for me to manage the medication and work a full time shift. I have been so stressed at the prospect of losing my job. I attempted to adjust meds over recent weeks which resulted in me suffering the symptoms of a mini stroke."

95. The respondent informed the claimant that she could not raise a grievance against the process. She therefore revised the focus of her grievance and it became a grievance about the way she felt she was treated during the consultation process.

96. The respondent decided to halt the consultation process while the claimant's grievance was being considered. A manager, Rosalinda Manglicmot, was appointed to consider the grievance who had no connection to the consultation and came from a different area of the respondent's organisation. The claimant was invited to a grievance investigation meeting which took place on 22 March 2019 (308).

97. Ms Manglicmot interviewed Ms Czornenkyi (315) and Mr Livingstone (318) before reaching an outcome. She met with the claimant in person on 29 March 2019 to tell her the outcome of her investigations before confirming the position in a detailed writing document (321)

98. The grievance outcome took the form of an overview of the consultation process and did not address many of the specific concerns raised by the claimant. Ms Manglicmot decided not to uphold the claimant's grievance against Mr Livingstone and Ms Czornenkyi as she considered they had followed a fair consultation process providing the claimant with opportunities to ask questions and propose alternatives to the changes to terms and conditions. She noted that they had stated that it was not their intention to make the claimant feel threatened throughout the process and had apologised for this (323).

Sickness Absence and return to work

99. The claimant was signed off from work by her GP from 3 April to 23 May 2019 due to her hypertension (339).

100. The grievance outcome letter, dated 4 April 2019, was sent to the claimant by email to her work email address on 5 April 2019 by Ashanti Coleman. By post to her home address. The letter explained that she could appeal in writing by sending an email to an employee relations email address within five working days form the date of receipt of the letter.

101. The claimant returned to work on Friday 24 May 2019 on a phased return. She attended a return to work interview with Ms Hoggins (339). She also saw Ms Hoggins again on 28 May 2019.

102. On one of these two occasions, Mr Livingstone called the claimant into his office to speak to her. He believed that she had not returned straight away from her meeting with Ms Hoggins, although she had in fact come straight back. At some point in their conversation, Mr Livingstone accused the claimant of "*always playing the victim*". By this he meant that she was always complaining that problems were caused by others and not taking responsibility for them herself. Mr Livingstone apologised to the claimant for his outburst, which he told us was unusual. He explained to us that he had had a bad day. His reaction was influenced by the fact that he felt frustrated because the consultation process involving the claimant had lasted several months. He acknowledged that what he had said was inappropriate.

103. On 24 May 2019 the claimant emailed Ms Coleman in response to her email of 5 April 2019. By this time Ms Coleman had left the respondent. The claimant received an automated out of office reply, but this did not make it clear that Ms Coleman had left. The claimant emailed Ms Coleman again on 29 May and 3 June 2019. On 11 June 2019, the claimant emailed Jagnisha Chohan about the grievance appeal. Ms Chohan had been dealing with the claimant's subject access request at that point.

104. Ms Chohan informed the claimant that the deadline for appealing against the grievance outcome would be extended to 5.00 pm on 13 June 2019. In fact, the deadline was moved to 12.00 pm on 14 June 2019 (362). We note that the claimant had wanted to receive hard copies of her personal data collated in response to the subject access request before having to submit the grievance appeal.

Informal Meeting and Follow Up Email

105. On 7 June 2019, Mr Livingstone conducted an informal meeting with the claimant to recap on consultation process. There had been a considerable delay due to the combination of her grievance, sickness absence and obtaining the occupational health report. By this date, the occupational health report had been received.

106. Mr Livingstone summarised the discussion in an email which he sent the claimant on 11 June 2019 (352). The claimant disputes that all of the points in the email were discussed at the informal meeting. She did not raise this issue with Mr Livingstone.

107. The email confirms in writing that the respondent was at that point in the process proposing the claimant would work a fixed 9.00 am to 5.30 pm shift, but would be required to cover the late shift during periods of annual leave. It notes that the OHP report suggested that the claimant would be able to adjust the timings of her medication with no ill effects to be able to cover the late shift pattern for approximately eight weeks of the year. It acknowledges that the OHP noted that she was distressed by this as covering those shifts would not give the claimant time to carry out her evening activities.

108. The email also confirms in writing that the claimant would not have to work 12 hour shifts at any point. It adds that if the claimant was working late shifts but no patients were booked in the shift could be brought forward in the day meaning that she could finish earlier than 7:30 pm.

109. The email does not address the concern the claimant had raised which was that the respondent could not guarantee the only change would be a requirement to work the late shift for eight weeks of the year. Mr Livingstone told us that this was a firm guarantee and would have ensured that the claimant was not required to work at other times.

110. He explained to us that in the event of sickness absence or other absence, the claimant's line manager Ms Campbell would cover reception. When it was not possible for her to do so, he would provide cover instead. We note that the opening hours were extended before the end of the consultation, to ensure patient use of the new scanner. Although a third receptionist was employed, the extended hours led to Ms Campbell and Mr Livingstone covering reception on a number of occasions. In exceptional circumstances, radiology colleagues could also provide cover, but this was not sustainable on a permanent basis. Mr Campbell explained that he asked the receptionists if they were available to provide cover during this period, but there was no compulsion on them to do so and that would have been the position in the future.

111. Mr Livingstone believed that he and Ms Czornenkyi did their best to make it very clear to the claimant that what was being proposed was that she would only be required to undertake the late shift for 8 weeks a year. He told us that she did not appear to accept or trust this information.

Grievance Appeal

112. The claimant submitted her appeal by the revised deadline of 12.00 p on 14 June 2019 (541). An independent manager, Azeem Ahmad, Head of Pharmacy was appointed to consider it. He conducted a grievance appeal hearing with the claimant on 19 June 2019 (373). The consultation process was further delayed while the outcome of the appeal was pending. Mr Ahmed wrote to the claimant with an outcome letter on 10 July 2019 (384).

113. In her grievance appeal letter, the claimant highlighted that she had found Ms Manglicmot intimidating at the grievance meeting. She complained that Ms Manglicmot had not allowed her to go through her pre-prepared script and had ignored the first nine points of her grievance. One of the key matters she said Ms Manglicmot had not addressed was her concern regarding sickness/absence cover and the impact on the 8 weeks annual leave cover. She also raised that a suggestion she had put forward had not been considered.

114. The claimant said that the grievance ought to be able to be considered in relation to the consultation process and expressed concern about the tight deadline that she had been given to submit her appeal.

115. At the start of the appeal meeting Mr Ahmed told the claimant that his remit was to consider the way the consultation process had been managed rather than conduct the consultation process. The claimant went through the history with his and described various concerns she had. One of these was that Mr Livingstone had asked her to change her medication routine and implied she should either change or stop taking her medication during the process. She also explained that she had told Mr Livingston that she was prepared to forego any pay rise to fund the use of bank staff to provide the annual leave cover, but he had not considered this. She did not raise her anxiety about the annual cover not being guaranteed to just be 8 weeks of the late shift. At the conclusion of the meeting, the claimant told Mr Ahmed that the appeal meeting was the first time she felt that she had been listened to and taken seriously (383).

116. In his appeal outcome letter, Mr Ahmed reiterated that his remit was to consider the claimant’s grievance appeal about the way the consultation process was managed and who managed it and not conduct the actual consultation process (384). He confirmed that Mr Livingstone would consider the funding proposal that the claimant had put forward (386). He also addressed the allegation regarding what Mr Livingstone had said about her changing her medication saying:

“*On further investigating this point. Neil discussed your medication many times during the consultation and during other informal conversations that you had. During one informal conversation, you volunteered that you stopped taking your medication for a few days and that you did not feel well as a result. At no time during any of your discussions did Neil state or infer that you should stop taking your medication.*

Neil confirmed that he had told you a number of times that you needed to take your medication as prescribed. As a registered allied health professional it would be unethical of Neil to suggest for someone not to take their medicines as prescribed by their doctor. You discussed the possibility of taking your medication at a different time to coordinate working a late shift (something that the Occupational Health Physician said would be possible without detrimental effect to you) but you were not comfortable with doing

this as it would limit the time you had in the evenings for you to undertake your evening routine." (387).

Final Consultation Meeting

117. The respondent invited the claimant to a final consultation meeting by a letter dated 15 July 2019. The letter outlined the history of the consultation process to date. It warned the claimant that as explained previously, if following the final meeting they were still unable to reach agreement on the new terms it was likely that the respondent would terminate her employment. The letter added that hopefully this would not be necessary. The letter also advised the claimant of her right to be accompanied by a colleague or trade union representative (388)

118. The meeting proceeded on 18 July 2019. A full note was taken (390). The claimant was accompanied by a colleague. Mr Livingstone went through the history of the consultation. This included noting that the claimant had been advised of alternative vacancies during the consultation process, but had not applied for any. He confirmed that as a result of the concerns raised by the claimant during the consultation process, the original proposal had changed. He confirmed that it was now proposed that the claimant would work a fixed shift from 9.00 am to 5:30 pm, except for eight weeks annual leave cover where the claimant would work from 11.30 am to 7.30 pm. He specifically told her that she would never have to work the early shift. Mr Livingstone added that the medical opinion supported this as a viable option.

Mr Livingstone asked the claimant if she was prepared to consider this. She said that she could not change her hours, even just for the eight weeks of annual leave. When giving her evidence before tribunal the claimant conceded that there was no medical barrier to her adjusting her medication time for the proposed eight week period. The reason she refused this offer was because she did not believe the respondent could guarantee that the flexibility required was as proposed. We note that she did not say this at the final consultation meeting.

119. Mr Livingstone then put an alternative option to the claimant. This was the suggestion that she reduce her hours to part-time. He and Ms Czornenkyi explained this would enable the respondent to employ an additional part-time receptionist who would be able to be more flexible and cover the annual leave requirements. This would mean the claimant would never had had to work the late shift. There would still be three FTE positions, but four people, two of them (i.e. the claimant and another person) being 0.5 positions. This was a genuine offer that Mr Livingstone believed was workable and might enable the claimant to continue in her role. He thought it would be possible to employ someone permanently to undertake a 0.5 role.

120. Mr Livingstone offered the claimant the option of consider this option overnight. Although the meeting was adjourned briefly at the request of the claimant's companion, she rejected it very quickly as it would result in a significant reduction in her pay.

121. Before moving to dismiss the claimant, Mr Livingstone invited her to sign the contract variation letter, which he had at the meeting, one last time. When she did not sign it, he confirmed that her employment would be terminated with immediate effect as she would be paid in lieu of notice. The claimant was told that she could appeal against the decision to dismiss.

122. The respondent did not, following telling the claimant that she had been dismissed, offer her re-engagement at that point. The respondent assumed that the claimant would not want to work her notice period, telling her, "*The decision has been made to pay you in lieu of notice as we felt it would be difficult to work under [these] circumstances*" (393). The respondent did not consider the option of garden leave.

123. The respondent confirmed the termination of the claimant's employment in writing in a 4 page letter dated 23 Jul 2019 (394). The letter provided a detailed history of the consultation process and everything that the respondent had considered. It included the financial calculations that Mr Livingstone had undertaken to confirm that it would not be viable to cover the late shifts for 8 weeks a year using bank staff. The letter also advised the claimant how she could submit an appeal against her dismissal.

Appeal

124. The claimant submitted an appeal on 30 July 2019 (398). Russell Wernham, the Respondent's head of Nursing was assigned to conduct the appeal. He was supported by an Employee Relations Adviser from HR called Donna Shanks. He had had no previous dealings with the claimant.

125. The claimant was invited, by a letter dated 7 August 2019, to attend an appeal meeting on 16 August 2019. The letter advised her that she could be accompanied by a work colleague or trade union official.

126. The claimant attended the meeting on 16 August 2019 on her own. Notes were taken of the meeting (407). The claimant's appeal had included 25 separate bullet points. Mr Wernham treated these as 25 separate points. After explaining how he intended to approach his role, Mr Wernham began to go through each of the points so that the claimant could expand upon them.

127. We note that Mr Wernham told the claimant that many of the points had already been raised in the grievance appeal and that it was not his role to hear those points again (407).

128. The nineteenth point was "OH stated to air on the side of caution the DDA-this was ignored." During the discussion of this point and reasonable adjustments, the claimant alleged that Mr Livingstone had told her to change her medication at the second consultation meeting. She said that he had denied this and lied about it, but she could prove that he said it because she had a recording of what he said.

129. An account of what happened next is contained in an email drafted by Ms Shanks on 20 August 2019. We consider it to be accurate. It says:

"During the meeting, we discussed your reasons for your appeal and at one point towards the end of the meeting, you said that at one of your consultation meetings, your line manager (Neil Livingston) made a statement to you to - "Change your medication. Or……...." You said that he denied saying this and it was not stated in the notes and that he had lied. When I asked you why you thought he had lied, you clearly said that you had it recorded. I asked you if you had asked those present at that meeting if you could record the meeting and you replied, "Did I say that it was me?"

I then asked you if you were recording our meeting and you did not reply, but you picked up your mobile phone which was on the table beside you and turned it off. I told you that you did not have to do that but you insisted. I stated that this was a serious matter and I decided to stop the meeting. I said that I would seek advice regarding whether you can use recordings of meetings where permission from those present was not sought.

You did not confirm to me, who took the recording of the consultation meeting and neither did you confirm that you had not recorded our meeting. I said that once I had sought advice on this matter, I would be in contact with you."

130. The claimant told us that she had wanted the appeal meeting to continue and did not understand why Mr Wernham stopped it when she had removed her phone from the table. She also told us that she expected Mr Wernham to get back in touch with her within a short period of time as to when the meeting would be reconvened.

131. On 20 August 2018, Ms Shanks emailed Mr Wernham with the email that included the extract above. It was an email she intended Mr Wernham to send to the claimant. In addition to explaining the circumstances of how the appeal meeting came to stopped, the email added:

"During our meeting, I said that there were a few issues that needed further investigation, which I will continue to look into. However, I do feel that we covered the majority of your points in the appeal meeting which was approximately 2.5 hours in duration.

Please let me know if there are any outstanding points that you feel were not covered in writing, by Friday 23 August 2019 and I will take these into consideration. I would ask that if you do have further points, that these are focussed on your grounds of appeal to of your dismissal."

132. Unfortunately, Mr Wernham missed the email. In fact, he only located it after having completed giving his evidence during the course of the tribunal hearing. This led to him having to be recalled to give further evidence. The email was therefore never sent to the claimant. We note that Mr Wernham had been on annual leave between 8 and 14 August 2019. He was in work on Thursday 15 and Friday 16 August and the following two weeks, but

spent one of them covering the annual leave of a senior nurse rather than doing his normal job. He was then absent on annual leave until Monday 9 September 2019. At the time he was receiving an average of 187 emails a day. Ms Shanks did not check whether he had sent the email.

133. As the claimant had not heard anything further following her appeal meeting, she emailed the respondent in early September to chase. She also had outstanding queries about her data subject access request. Ms Shanks sent an email on 9 September 2019 telling her that Mr Wernham had returned from leave that day and she anticipated him finalising his outstanding investigations and providing an outcome by no later that 11 September 2019. She did not refer to the earlier email.

134. The claimant did not receive the email because it was sent to an old email address that she was no longer using. Ms Shanks realised her mistake on 11 September 2019 and forwarded the email to the correct email address then.

135. The claimant replied to Ms Shanks on 13 September 2019 to query how Mr Wernham could be in a position to conclude the appeal when it had been adjourned and she had not been contacted subsequently. Ms Shanks replied on 18 September 2019 telling the claimant the following:

"You were sent an email asking you to confirm whether you wished to comment on the six points that were not covered in the [appeal] meeting and we did not receive a response."

136. The claimant says she did not receive this email and pointed out that the copy in the bundle was undated (421). The respondent provided another version with the date on it showing it had been sent to the correct email dress for the claimant. The claimant was adamant, however, that she had never received it. This is not a factual discrepancy we need to resolve. The claimant did receive the outcome letter which was dated 10 September 2010 (413).

137. In the outcome letter, Mr Wernham comments on all of the bullet points contained in the claimant's appeal. His conclusion was not to uphold her appeal. His letter informed the claimant that she had no further right of appeal.

138. Although Mr Wernham's outcome letter refers to each of the claimant's appeal points, he did not conduct a thorough investigation into the points raised. We find, as a matter of fact, that he did not complete the appeal process.

139. The reason for our finding is because Mr Wernham does not address the substance of a great number of the claimant's key concerns. In places in his outcome letter, he says is unable to comment on the claimant's allegations. He incorrectly identifies that matters were covered in the claimant's grievance when they were not. He fails to comment on whether the claimant has legal protection as a disabled person and does not seem to understand

this means the respondent may have certain duties. He conflates the issue of her ability to agree to a permanent change to her working hours with the adjustment to her working hours during her phased return form sickness absence. We know that Mr Wernham made no effort to speak to Mr Livingston before reaching his conclusion, nor did he check what information was available to the claimant on the respondent's intranet.

Subject Access Request

140. The claimant first asked how she should go about making a subject access request for her personal date on 30 January 2019. Mr Livingstone advised how of the respondent's process and to whom to address the request the following day (616).

141. The claimant submitted a subject access request for all of her personal data on 26 February 2019. The original 30 day deadline for compliance was therefore 28 March 2019. Well before this deadline, on 19 March 2019 Ms Chohan entered into an exchange of correspondence with the claimant about the scope of her request and the deadline for responding (314).

142. Ms Chohan explained that as the request was complex and searches were generating over 4,000 emails, the respondent intended to rely on legal provisions that allowed it to extend the time for responding for a further two months, until 28 May 2019. Ms Chohan sought agreement from the claimant that the search for emails be narrowed to a shorter timeframe and against a limited number of people. The claimant agreed to limit the search to 8 months, but not otherwise.

143. The respondent's IT department conducted a search of emails containing the claimant's personal data for the period 1 June 2018 to 26 February 2019. This generated a potential 11,834 emails. The respondent went through the emails to identify those that contained personal data and make redactions to them in line with the legal requirements. It then uploaded them and the claimant's other personal data to a secure website. An email was sent to the claimant's personal email address with a link to the website on 24 May 2019. The respondent also emailed her at her work email address that day to inform her the email had been sent.

144. This as the day that the claimant had returned to work after sickness absence which meant she was in work for a short period of time and spent much of that meeting with Ms Hoggins for her return to work interview. It was not until 29 May that she was in a position to point out to the respondent that it had used an old email personal email address for her, despite having had the correct one. The respondent corrected this error, and the claimant accessed the secure website on 31 May 2019. We note that the website allows documents uploaded onto it to be downloaded and printed.

145. The claimant found it difficult to read the material via the secure website and asked the respondent if she could be provided with hard copies. The respondent agreed to this, and led the claimant to believe that it would be possible to do this. As it transpired, the respondent was only prepared to

provide hard copies of a limited amount of the material which it was not prepared to post to the claimant for confidentiality and data security reasons. Instead, she was required to collect it on 1 July 2019. The claimant had wanted to rely on the hard copy material for the purposes of her grievance appeal, final consultation meeting and appeal against dismissal.

146. Taking into account the above, we do not consider, as a matter of fact, that the data subject access request was poorly handled. The respondent complied with the legal requirements. Asking for documents using the subject access request mechanism is different from simply asking for documents. The claimant felt that the respondent treated her as if she was senile in the way it approached the subject access request, but there was no evidence of this at all.

LAW

Direct Discrimination

147. Section 13 of the Equality Act 2010 provides that 'A person (A) discriminates against another (B) if, *because of* a protected characteristic, A treats B less favourably than A treats or would treat others'.

148. Disability is a protected characteristic as is age. In relation to the protected characteristic of age, this can include a particular age or a range of ages (section 5(2) of the Equality Act 2010).

149. Under section 23(1), where a comparison is made, there must be no material difference between the circumstances relating to each case. It is possible to compare with an actual or hypothetical comparator.

150. In order to find discrimination has occurred, there must be some evidential basis on which we can infer that the claimant's relevant protected characteristic is the cause of the less favourable treatment. We can take into account a number of factors including an examination of circumstantial evidence.

151. We must consider whether the fact that the claimant had the relevant protected characteristic had a significant (or more than trivial) influence on the mind of the decision maker. The influence can be conscious or unconscious. It need not be the main or sole reason, but must have a significant (i.e. not trivial) influence and so amount to an effective reason for the cause of the treatment.

152. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of a protected characteristic. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the claimant was treated as she was.

153. Section 136 of the Equality Act sets out the relevant burden of proof that must be applied. A two-stage process is followed. Initially it is for the claimant to prove, on the balance of probabilities, primary facts from which we could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination.

154. At the second stage, discrimination is presumed to have occurred, unless the respondent can show otherwise. The standard of proof is again on the balance of probabilities. In order to discharge that burden of proof, the respondent must adduce cogent evidence that the treatment was in no sense whatsoever because of the claimant's protected characteristic. The respondent does not have to show that its conduct was reasonable or sensible for this purpose, merely that its explanation for acting the way that it did was non-discriminatory.

155. Guidelines on the burden of proof were set out by the Court of Appeal in *Igen Ltd* v *Wong [2005] EWCA Civ 142; [2005] IRLR 258* and we have followed those as well as the direction of the court of appeal in the *Madarassy* case. The recent decision of the Court of Appeal in *Efobi v Royal Mail Group Ltd* [2019] ICR 750 confirms the guidance in these cases applies under the Equality Act 2010.

156. The Court of Appeal in *Madarassy*, states:

'*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination*.' (56)

157. It may be appropriate on occasion, for the tribunal to take into account the respondents' explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (*Laing v Manchester City Council and others* [2006] IRLR 748; *Madarassy v Nomura International plc* [2007] IRLR 246, CA.) It may also be appropriate for the tribunal to go straight to the second stage, where for example the respondent assert that it has a non-discriminatory explanation for the alleged discrimination. A claimant is not prejudiced by such an approach since it effectively assumes in his favour that the burden at the first stage has been discharged (*Efobi v Royal Mail Group Ltd* [2019] ICR 750, para 13).

158. We are required to adopt a flexible approach to the burden of proof provisions. As noted in the cases of *Hewage v GHB* [2012] ICR 1054 and *Martin v Devonshires Solicitors* [2011] ICR 352, they will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they may have little to offer where we in a position to make positive findings on the evidence one way or the other.

159. Allegations of discrimination should be looked at as a whole and not on the basis of a fragmented approach *Qureshi v London Borough of Newham* [1991] IRLR 264, EAT.

160. Direct discrimination because of age is not unlawful where it can be objectively justified (section 13(2) Equality Act 2010). The burden is on the respondent to prove justification.

Unfair dismissal

161. The test for unfair dismissal is set out in section 98 Employment Rights Act 1996.

162. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal and that it is "either a reason falling within subsection (2) or "some other substantial reason of such a kind as to justify the dismissal of an employee holding the position which the employee held." We refer to this latter reason as the "SOSR" reason for the sake of convenience below.

163. A basic principle of contract law is that variations to a contract of employment must be agreed by both parties. However, an employer can fairly dismiss an employee for refusing to accept detrimental changes to his or her terms and conditions where there it has a "sound business reason" for doing so using the SOSR ground (*Hollister v National Farmers' Union* 1979 ICR 542, CA)

164. The business reason need not be one the tribunal considers sound. In general, the tribunal should not investigate the business reason, except in cases where it is sham or has been imposed arbitrarily or in a discriminatorily manner (*Kerry Foods Ltd v Lynch* 2005 IRLR 680, EAT; *Catamaran Cruisers Ltd v Williams and ors* 1994 IRLR 386, EAT).

165. Once an employer has shown a potentially fair reason for a dismissal, the determination of the question whether the dismissal is fair or unfair, having regard to that reason "…depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case." (Section 98(4) of the ERA).

166. When considering reasonableness, the tribunal cannot substitute our own view. Instead, we are required to consider the decisions and actions of the employer through the lens of the range of reasonable responses test. The test applies to the procedure followed by the tribunal and to the question of dismissal. The ultimate question for the tribunal is whether dismissal was within the band of reasonable responses open to a reasonable employer.

167. Each case should eb determined on its own facts, but in cases of changes to terms and conditions we would expect to see the employer demonstrating

a sound business case for the proposed changes, evidence of a meaningful consultation process before the changes are implemented and consideration of alternatives to dismissal.

168. The ACAS Code of Practice on Disciplinary and Grievance Procedures does not generally apply to a SOSR dismissal where an employee has refused to accept a change to terms and conditions, unless the employer treats the refusal as a disciplinary matter. The Code nevertheless contains useful guidance as to the approach employers should adopt to conducting fair meetings with employees.

169. The statutory right to be accompanied to meeting, contained in section 10 of the Employee Relations Act 1999, applies to where a worker is required or invited by his employer to attend a disciplinary or grievance hearing <u>and</u> reasonably requests to be accompanied at the hearing. The companion can be a work colleague or trade union official.

170. When considering the question of the employer's reasonableness, the tribunal must take into account the process as a whole, including any appeal stage (*Taylor v OCS Group Limited* [2006] EWCA Civ 702; *West Midlands Cooperative Society Ltd v Tipton* [1986] ICR 192, HL. A procedural failing in the appeal process can, but will not necessarily displace the fairness of the dismissal at the dismissal stage. Each case will turn on its own facts.

171. In this case, the respondent highlighted the case of *Foster v Cardiff University UKEAT/0422/12/LA.* The respondent's counsel explained that although the case dealt with reasonable adjustments, the panel might find it helpful as it dealt with an issue relevant in this case. That issue was the extent to which an employee's anxiety should be taken into account.

172. In *Foster* the claimant had Chronic Fatigue Syndrome (CFS). One of the grounds of appeal concerned the approach the tribunal had taken to the fact that the claimant suffered from anxiety and stress which had the effect of triggering or exacerbating her CFS. The tribunal had held that the respondent was under a duty to take reasonable steps to remove the disadvantages that resulted from the effects of her CFS, but was not under an additional duty to reduce the claimant's levels of associated anxiety (paragraph 40). The Employment Appeal tribunal held that this approach was correct. The reasoning was that taking into account the anxiety and stress would have engaged the tribunal in an exploration of the cause of the claimant's disability rather than focus on the effects.

173. We are grateful to the respondent for bringing this case to our attention. It is helpful. We do not consider it prevents us from taking the stress and anxiety the claimant experienced into account as a general factor when applying the section 90(4) reasonableness test.

Polkey/Chagger Principles

174. In accordance with the principle established in *Polkey v AE Dayton Services Ltd* [1988] ICR 142 if we find the dismissal to be unfair, we are required to

consider the possibility (in terms of a percentage chance) that the respondent would have been in a position to fairly dismiss the claimant. This also includes considering when a fair dismissal would have been able to take place *(Mining Supplies (Longwall) Ltd v Baker* [1988] ICR 676 and *Robertson v Magnet Ltd (Retail Division)* [1993] IRLR 512).

175. Where the act complained of is also a discriminatory dismissal, the tribunal will have to decide whether the claimant would have been dismissed in any event if there had been no discrimination (*Abbey National plc v Chagger* [2009] ICR 624).

ANALYSIS AND CONCLUSIONS

176. We turn now to the application to the facts that we have found in this case.

Direct Discrimination

177. We have found that several of the claimant's allegations of direct discrimination fail on the facts, because the detriment she complains of did not take place.

178. The first allegation where this is the case, is the allegation that the respondent proposed part time hours to the claimant in the expectation that she would not be able to accept them. This is the allegation at 5(c) and 8(c) in the list of issues above. We found on the facts that the respondent did offer the claimant part time hours. This was a genuine offer made because it would have enabled the claimant to keep her job and not to have to work any late shifts.

179. The next allegation which fails on the facts is the allegation at 5(g) and 8(g) in the list of issues that the respondent attempted to prevent the claimant appealing against the outcome of her grievance. There was no such attempt. The claimant was permitted extra time to submit an appeal. Although she was given a relatively short, revised deadline to get her written appeal in, this was extended at her request and at the grievance appeal hearing she was able to expand upon her written document and add to it. The claimant was given every opportunity to raise whatever issues she wanted to raise.

180. We also found, on the facts that the respondent made no attempt to attempting to instruct occupational health to produce a report favourable to it (allegation 5(e) in the list of issues).

181. The claimant did not present any evidence that the respondent stated that its offer (of new working hours) would be "off" if the claimant was going to work until the age of seventy. This allegation (8(e)) therefore also fails on the facts.

182. We also found that the allegation that the respondent's handling of the claimant's data subject access request was not poor, but complied with the relevant law.

183. It is appropriate for us to consider the allegations at 5 (a), (b) and (d) and 8 (a), (b) and (d), that the respondent had an agenda to end the claimant's employment, that it required her to change her working hours when staff in other departments did not have to and dismissed her together.

184. We consider this is a case where the shifting burden of proof provisions offer little assistance because we in a position to make positive findings on the evidence, although for the sake of the sake of completeness, we note that we consider the claimant has failed to establish any prima facie facts that would shift the burden of proof onto the respondent.

185. The respondent had a sound business reason for proposing changes to the working hours of the claimant and her colleague Toks. This had nothing to do with age or disability. Discrimination was not, to any extent, an effective cause of the reason for the claimant's treatment. Her treatment was caused because the purchase of the new scanner led to the decision to increase opening hours which in turn necessitated an increased need in reception cover.

186. It is correct that the claimant and her colleague Toks were required to change working hours when staff in other departments were not. This was because they were the only staff affected by the increased need in reception cover. They were in a unique situation for the purposes of this consultation. We note, however, that staff in other departments have been asked at different times to change working hours in response to changes in the respondent's business model. This reinforces our view that the respondent did not use this particular business change to try and remove an older, disabled member of its workforce, but would have adopted a different approach if the claimant had been younger or not disabled.

187. The respondent dismissed the claimant because she refused to accept any of the proposed changes and not because of age or disability. We conclude that the respondent would have dismissed a younger person and a non-disabled person in the same circumstances. That is to say, it would have dismissed a younger person or a non-disabled person who refused to accept any of the proposed changes. There was no less favourable treatment of the claimant when compared to hypothetical comparators. The treatment would have been the same.

188. The ability of the claimant to agree to the changes because of her disability is not a matter that we can consider in a direct discrimination claim argued under section 13 of the Equality Act 2010. We must look solely at the fact that she refused the changes. We can consider it in relation to the question of unfair dismissal though and we do so below.

189. Finally, we have made a finding that the respondent failed to complete the claimant's appeal against dismissal. We do not consider this was because of age or disability. Mr Wernham's approach to the appeal was to do the bare minimum required. It was entirely inadequate. However, there is no evidence that Mr Wernham would have behaved differently had the claimant

been younger or not disabled. He was merely going through the motions of the appeal process on behalf of his new employer because this was something that he had been asked to do.

Unfair Dismissal

190. We have concluded that the reason for the claimant's dismissal was because she refused to agree to a variation in her contractual working hours. The variation was proposed for a sound business reason, rather than for an arbitrary or discriminatory reason and therefore there was a fair reason for dismissal in this case.

191. In our judgment, the procedure the respondent followed was extremely fair and reasonable part form two significant problems: its approach to alternative roles and the appeal stage.

192. The respondent did not rush to impose the proposed contractual variation on the claimant. Having established that she was reluctant to agree to a contractual change, it initiated a formal consultation process with her. That process consisted of providing the claimant with information about the change both verbally and in writing. The information explained the proposal and the reasons for it. The claimant was able to ask questions, verbally and in writing, and was provided with answers. The quality of the information was excellent.

193. The formal consultation process was not rushed. It consisted of three meetings, one of which was in two parts. It was undertaken over many months and paused while the claimant was absent on sick leave and to enable her to pursue a grievance and grievance appeal.

194. The claimant was given written letters inviting her to the meetings, which included clear explanations of the purpose of the meetings and informed her of her right to be accompanied by a work colleague or trade union representative. She was provided with the respondent's relevant policies.

195. The claimant had a very good reason for not wanting to accept the proposed changes. This was because of her long standing medical condition. She had struggled for a significant period of time with finding a way of managing her struggled to manage her medical condition and work full time, but felt she had found a way to do this at the respondent. She had achieved this by taking medication that caused her to have some very challenging side effects and through sticking to a rigid routine. It is therefore not surprising that the claimant became extremely anxious about the proposed changes.

196. The respondent obtained an expert occupational health report so that it could better understand the claimant's medical condition. This is best practice. The claimant felt that her GP would be the best source of information about her medical history and she was correct, but it was appropriate that the respondent used an occupational health physician to interpret the information received form the GP.

197. The respondent's occupational health physician confirmed that the claimant had hypertension. Dr Preston did not express an opinion on the claimant's ability to work the late shifts for 8 weeks of the year until he had information form the claimant's GP. Ponce it was forthcoming, that information did not indicate that the claimant was unable to do the late shift for 8 weeks each year and Dr Preston accordingly reported this back.

198. Even before it had the medical advice of Dr Preston, the respondent had adapted its proposal. It moved from requiring the claimant to work flexible shifts to permanently work the shift from 9 am to 5:30 pm, except 8 weeks of the year when she would be asked to work the late shift (11 am to 7.30 pm). This was guaranteed, as demonstrated by the questions asked of Dr Preston in the referral form. Mr Livingstone could not have been at the final consultation meeting when he outlined this option to the claimant.

199. Dr Preston's medical opinion confirmed that there was no medical barrier to the claimant being able to adapt her medication routine for 8 weeks each year. Dr Preston's report, however, identified the claimant's anxiety as a key issue.

200. The respondent did not fully appreciate the extent that the claimant's life was built around her medical condition or the anxiety she was feeling. The panel found it surprising that the respondent had not previously conceded that the claimant was disabled. It seemed obvious to us, but we appreciate that the claimant shared much more information with us when compared to what she told the respondent at the time. Talking about her medical condition was humiliating and painful for her.

201. The claimant was also deeply of Mr Livingstone's and Ms Czornenkyi's motives as demonstrated by the fact that she began to covertly record them. Unfortunately, the claimant's anxiety and suspicion appear to have prevented her from clearly articulating her concerns and from trusting what she was being told.

202. We consider the respondent probably could have done more to allay the claimant's fears. The initial stage of the grievance procedure offered an ideal opportunity to do this, but it did not succeed. This was primarily because of the approach the respondent whereby it chose not to address the claimant's specific concerns. Although such an approach was within the range of reasonable responses of a reasonable employer, it had the effect of making the claimant feel that she was being shut down. The appeal stage of the grievance process was much better. Mr Ahmed was much more successful at enabling the claimant to articulate her concerns.

203. The respondent had understood a great deal of what the claimant was saying, however. It fully evaluated the proposals she put forward and considered using bank staff to provide the holiday cover. This included funding this option by using the 2.5 hours extra pay she was willing to sacrifice. Unfortunately, this was not feasible, nor was the option of relying on radiology reception colleagues on a permanent basis.

204. The respondent had also provided the claimant with details of alternative vacancies. We consider that the respondent could have done more to assist the claimant to find an alternative role. The situation was not a redundancy situation, but in our judgment, it was analogous to one. We would expect a reasonable employer to take the same approach to alterative employment in this situation to a redundancy situation. This would include giving the claimant preferential treatment for vacant roles which were within her capability. This was not done.

205. Nor was there an adequate conversation with the claimant about whether the respondent was able to make reasonable adjustments to any of the roles. The claimant formed the view that she was not going to be able to do any of the vacant roles because they required 37.5 hours and flexibility. However, as she was a disabled employee, the respondent was under a duty to consider reasonable adjustments to any existing vacancies. The failure to discuss this issue pre-dismissal was not just the fault of the respondent, however. The claimant did not adequately articulate her concerns and therefore it is not surprising that the respondent did not address them.

206. The claimant was denied the opportunity to look for alternative roles during her notice period. However, in light of the history at that point, it was within the range of reasonable responses of a reasonable employer for the respondent to decide that the claimant should not be required to work her notice and make her a payment in lieu of notice. The relationships had broken down by this point in time.

207. An appeal against dismissal is meant to offer an employee the opportunity to have someone new review their dismissal and consider their arguments as to why the dismissal might be unfair and/or discriminatory. The appeal in this case failed to do that entirely. In our judgment the appeal was so awful that it renders the dismissal unfair. The appeal completely failed to address the claimant's key concerns. Although the outcome letter contains comments on each the 19 points the claimant had raised in her appeal letter, this has the appearance of simply going through the motions. The outcome fails to demonstrate an understanding of many of the points or that they were explored or investigated at even the most basic level.

Additional Conclusion – Polkey

208. We have found that the claimant's dismissal was unfair because of the poor appeal. To conclude our judgment, we are required to speculate as to what would have happened, had the appeal been conducted correctly.

209. Our conclusion is that a better appeal would not have resulted in the claimant accepting the change in terms and conditions and returning to her role, nor would it have resulted in the claimant accepting an alternative role. Although the respondent had behaved fairly and reasonably up to and including the point of dismissal, the relationships had broken down. The claimant had been actively exploring opportunities elsewhere and had decided not to accept the changes in terms and conditions that meant she

would have to work the late shift for 8 weeks a year. Instead, she had decided to find a job that had fixed hours. This means that although the dismissal is unfair, we have decided that a Polkey deduction of 100% is appropriate in this case.

Employment Judge E Burns
6 April 2021

Sent to the parties on:

06/04/2021............................

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For the Tribunals Office