**EMPLOYMENT TRIBUNALS**

**Claimant:** **Mrs A Charles-Lima**

**Respondent:** **County and City Cardiff Council**

**Heard at:** **Cardiff** **On: 17-20 May 2021**

**Before:** **Employment Judge RL Brace**
**Members:**
**Mrs L Bishop**
**Mrs K Smith**

**Representation:**
Claimant: Mr Charles (TU representative)
Respondent: Mr J Edwards (Counsel)

## JUDGMENT

It is the unanimous decision of the Tribunal that the Claimant's claim for failure to make reasonable adjustments is made out of time, it was not just and equitable to extend time and it is therefore struck out for want of jurisdiction.

## WRITTEN REASONS

1. The case was listed and heard as a hybrid hearing over the course of four days and an extempore Judgment was given to the parties at the end of the fourth day. Written Reasons were requested by Mr Charles, representative for the Claimant after a costs application had been made on behalf of the Respondent and these are those Written Reasons.

2. The Claimant was employed by the respondent local authority as a scheme manager from 19 March 2007 until the termination of employment on 30 September 2018, the claimant having left employment from the respondent on a voluntary redundancy scheme. The claimant is not complaining that the restructuring process or its conclusion was discriminatory.

3. On 21 September 2018 the claimant contacted ACAS and an early conciliation certificate was issued on 19 October 2018 [1]. On 9 December 2018 the claimant presented an ET1 claim form to the tribunal alleging disability discrimination [9].

4. As Judge Harfield set out in her helpful case management order from the preliminary hearing on 24 May 2019, the claim is essentially about alleged failure to make reasonable adjustments in the period April 2017 to around April 2018. The respondents concede that the claimant was a disabled employee from 22 January 2018 in relation to her knee condition. The claimant also suffers from psoriasis but she is not asserting that condition is relevant to the complaint she is making of the failure to make reasonable adjustments.

**Issues**

5. The issues between the parties, to be determined by the Tribunal were discussed at the outset of the hearing, some amendments having been made to the list of issues that Employment Judge Hartfield set out in paragraph 17-20 of her May 2019 case management order [39].

6. It was noted that Judge Harfield at the case management preliminary had ordered that a preliminary hearing would be listed to deal with jurisdiction/time issues, given the date of the claim form presentation and the dates of the early conciliation as highlighted by Judge Harfield at paragraph 15 of that order. The parties indicated that this had not been listed due to the Covid pandemic and it was noted that jurisdiction time issues remained a live issue to be determined by this Tribunal.

7. The parties agreed that the list of issues as set out by Judge Harfield with the location errors amended were agreed to be the issues for determination by this Tribunal and at the outset of the hearing these were adopted as follows.

1. *Time limit / limitation issues*

    a. Given the date the claim form was presented and the dates of early conciliation, were the claimant's complaints presented within the time limits set out in Sections 123(1)(a) & (b) of the Equality Act 2010 ("EqA")

    b. Dealing with this issue may involve consideration of subsidiary issues including: when the treatment complained about occurred; whether there was an act and/or conduct extending over a period,

and/or a series of similar acts or failures; whether time should be extended on a "*just and equitable*" basis.

2. *Disability*

    a. Does/did the claimant have a physical impairment, namely a knee condition at the relevant time?

    b. If so, does/did the impairment have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?

    c. If so, is that effect long term? In particular, when did it start and:

        i. has the impairment lasted for at least 12 months?

        ii. is or was the impairment likely to last at least 12 months or the rest of the claimant's life, if less than 12 months?

    d. Are any measures being taken to treat or correct the impairment? But for those measures would the impairment be likely to have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?

3. *EQA, sections 20 & 21: reasonable adjustments (for disability)*

    a. Did the respondent know or could it reasonably have been expected to know the claimant was a person with a disability?

    b. A "PCP" is a "provision, criterion or practice". Did the respondent, during the period complained about by the claimant, have / or apply the following PCP(s), physical features or failure to provide an auxiliary aid:

        i. In April 2017 (until July 2017) refusing the claimant light duties or office duties/ requiring her to return to full duties/refusing her to allow to return to work other than on full duties/ not allowing the claimant to return to work when using walking aids;

        ii. A few days after 11 July 2017 (until September 2017) continuing to require the claimant, as part of her duties, to continue driving to another work site (Poplar House). (The claimant states that she told her manager the driving was

aggravating her condition but that it was not remedied until September 2017);

iii. In September 2017 again being required to work again from two sites (which the claimant states again aggravated her condition);

iv. Following the claimant's return to work on 11 July 2017, when working at Poplar House, the requirement to undertake building checks (which the claimant states required additional walking and aggravated her condition and led or contributed to her accidents on 22 January 2018 at Worcester Court and in or around February 2018);

v. Requiring the claimant to attend team meetings at a different site (which the claimant states required additional driving and aggravated her condition);

vi. At a meeting between Darren Holmes (Unison) and the claimant's operation manager Ellen Curtis, Ms Curtis stated that the claimant should not use walking aids in work;

vii. Refusing/not agreeing in a timely manner Mr Holmes requests for adjustments on the claimant's behalf (for the claimant to work in Nelson House only/ to have paid morning and afternoon breaks/ to have assistance with driving to team meetings);

viii. the practice of not warning about or removing workplace tripping, slipping or falling hazards

c. Did any PCP /physical feature/failure to provide auxiliary aid put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time?

d. If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

e. If so, were there steps that were not taken that could have been taken by the respondent to avoid the disadvantage? The burden of proof does not lie on the claimant; however, it is helpful to know

what steps the claimant alleges should have been taken and they are identified as follows:

i. In April 2017 and thereafter allowing the claimant to return to work light duties/ office based duties / to return using walking aids;

ii. allowing the claimant to work from one site/ not requiring additional driving;

iii. Removing the requirement to undertake building checks;

iv. Allowing the claimant to use walking aids in work;

v. Paid breaks of 15 minutes in the morning and afternoons;

vi. Assistance by a member of staff in taking the claimant to team meetings to reduce driving;

vii. Warning about or removing workplace tripping, slipping or falling hazards.

f. If so, would it have been reasonable for the Respondent to have to take those steps at any relevant time?

8. During the hearing, and part way through the cross-examination of the claimant an issue arose regarding an alleged failure to act promptly upon a Display Screen Assessment. Mr Edwards objected on the basis that this had not been pleaded and did not form part of the claim. It was accepted that it did not form part of the original claim and Mr Charles was given some time over a short adjournment to consider whether he wished to make an application to amend. On return, it was confirmed that no application would be made and any alleged failure to act on an assessment which took place in May 2018 did not form part of the claim.

**Bundle**

9. The tribunal was referred selectively to the hearing bundle of relevant documentary evidence of 548 pages and heard evidence from the claimant and her witness Mr Darren Holmes, union steward for Unison. The tribunal also heard evidence from the respondent's witnesses including: –

a. Mrs Chantelle Zwawi – Claimant's temporary line manager – October 2011 – January 2018
b. Mrs Susan Frost, Claimant's line manager
c. Mrs Andrea Williams – HR Officer for long term sickness absence to July 2017
d. Ms Ellen Curtis, Operational Manager Housing Services
e. Mrs Asmut Price, Sue Frost's line manager

10. All witnesses relied upon statements which were taken as read and were subject to cross examination, the Tribunal's questions and re-examination.

11. It is not necessary to reject a witness's evidence in whole or in part by regarding the witness as unreliable or not telling the truth. The tribunal naturally looks for the witness evidence to be internally consistent and consistent with the documentary evidence. It assesses a range of matters including whether the evidence is probable, whether it is corroborated by other evidence from witnesses or contemporaneous records of documents, how reliable is witness recall and motive.

12. However, we did have some concerns that, with the passage of time and the clear deterioration in the Claimant's health condition from the events and time in question, the Claimant was reflecting on her time at the Respondent through the prism of her current state of health as opposed to what her health was like at that time. Further, we found that the Claimant's answers to some of the questioning was far from clear and open to interpretation – examples were CCTV issue; in which the Claimant had indicated that there were CCTVs 'everywhere' and that she had she had to 'knock on doors' to checking on the residents, whereas in response to a later question, confirmed that welfare checks were undertaken from a module or intercom-type system (which did not require walking).

13. In contrast the Respondent witnesses were clear and concessions were made in cases, although in some cases respondent's exact recall of conversations was difficult due to passage of time. Where there is dispute we prefer the evidence of the Respondent.

**Facts**

14. The claimant commenced her employment with the Respondent on 19 March 2007 and at the time that employment was terminated by mutual agreement as a result of a Voluntary Redundancy programme operated by the Respondent, the claimant was employed as a scheme manager in the

respondent's sheltered housing team. She was 51 years old at date of termination.

15. There were 10 sheltered housing schemes within the Landlord Services Section of the respondent and the schemes were managed locally by scheme managers who split their time between all 10 schemes. Their duties included welfare checks on residents, building, health and safety checks, both of which are carried out on a daily basis. They also deal with queries that arise within the scheme such as dealing with tenant queries relating to housing, health and social care including general assistance with day to day issues and managing visitors to the schemes.

16. Initially the claimant indicated in cross examination that she undertook these welfare checks by knocking on individual doors. However in response to a later question from the Tribunal, the Claimant indicated that she did not knock on doors but buzzed them from a module, effectively an intercom, that she could operate.

17. The building checks required a walk around the building and the communal areas. The extent of the walking required would therefore be dictated by the physical size of the Scheme and amount of accommodation. The building check required the Scheme Manager to check the stairwells. The claimant confirmed in cross examination however that she did not undertake this part of the building check from the time that she returned to work in July 2017.

18. In addition to the Scheme Managers, there are also 7 house-keepers. Their duties include cleaning of the complexes and assisting, when required, with day to day management of the schemes, supporting .the Scheme Managers or providing support in the absence of scheme managers.

19. On 20 December 2016, the claimant commenced a period of sickness absence due to knee effusion/Baker cyst which was eventually to last until 27 of July 2017. Whilst the claimant's absence was covered by fit notes which indicated the claimant was unfit for work, the claimant was during this period was also referred to occupational health in February, April and again in May 2017.

20. The claimant asserts in her witness statement that Sue Frost, her line manager, called her a few weeks after her absence had commenced to ask about her wellbeing. The claimant further asserts that she told Sue Frost that she was on crutches, that her ability to walk was limited because of the pain she was in at that time. She says that she asked if she could come back to

work on light duties and that this was refused by Sue Frost on the basis that she was not insured to do so.

21. Sue Frost denies that she ever told the claimant that she would be unable to use walking aids and/or that the claimant was not insured to work on crutches. Whilst she accepted that she knew the claimant was on crutches at that time, no conversation regarding coming back to work on light duties took place.

22. We accepted the evidence of Mrs Frost. We did not consider it credible, in light of repeated GP notes and occupational health reports that indicated the claimant was unfit for work, that the Claimant would have at that point been pressing to return to work at all, whether on light duties using walking aids or otherwise. Further, we considered that had the Claimant indicated that, this would have been reflected in the contact meeting notes. It was not.

*Occupational health report 14 February 2017*

23. By the date of the report of the occupational health assessment of 14 February 2017 [236/245] the claimant had a confirmed diagnosis of the Baker's cyst affecting her right knee, a painful condition that affected the mobility. At that stage, the claimant was receiving physiotherapy and remained on prescription relief and the occupational health advisor considered that it was possible that the condition would take between 6 to 12 weeks to recover from. However, the claimant was not at that point considered fit for her substantive role. Equally, it appears that the occupational health adviser was of the view that there was no evidence that the claimant would not make a full recovery.

24. During this period of absence, and in accordance with the respondent's Attendance and Well-being Policy, contact visits are carried out in January, March 2017.

25. A second Occupational Health Report was provided following further assessment on 4 April 2017 and at that point the claimant's left knee was now causing issues. It was reported to the respondent that the claimant needed crutches to mobilise and that she remained unfit for her substantive role due to ongoing mobility issues [241/250]. It was still expected at that point that the Claimant would make a full recovery and that a timeline for return to work would be weeks rather than months.

26. At a further contact meeting on 28 April 2017, the claimant was advised that there would at some stage need to be consideration of redeployment if the claimant continued to be unable to carry out her substantive role [247/256].

27. The meeting concerned the Claimant. The tone and content of the meeting upset the claimant. She said so as much in a letter of complaint of 28 April 2017 in which she raised with the respondent the obligation on them generally to make reasonable adjustments [249/258].

28. A meeting was arranged to discuss her concerns attended by the claimant, Mr Charles, her trade union officer, her line manager, Susan Frost, Asmut Price (Susan Frosts' line manager) and Angela Williams from HR, to informally resolve and explain that such discussions were part of the management of the sickness absence.

29. In the interim the Claimant attended Occupational Health for a third visit on 22 May 2017.

*May 2017 Occupational Health Report*

30. The third occupational health meeting took place on 22 May 2017, which addressed both the claimant's psoriasis and knee condition. It appears that the claimant's knee condition had altered, in that it was not the ruptured cyst that was causing issue but her left knee which was affecting her mobility and preventing her from walking at that point for more than a few yards or standing for more than a few minutes at that point. The report reflected the claimant's position at that time which was that she was comfortable sitting and that she was able to drive [255/264].

31. The adviser recommended that the claimant may benefit from temporary adjustments to facilitate her return to work including:

    a. a phased return to work;
    b. temporarily move to a smaller housing complex; and
    c. a workstation assessment with regard to getting from a sitting position to a standing position.

32. The Occupational Health Adviser did not at that point consider the claimant to be a disabled person due to the nature and duration of her condition.

33. A further contact meeting took place on 20 June 2017 and a phased return to work and a move to a smaller housing complex from Nelson House, Grangetown ("Nelson") to Poplar House in Whitchurch ("Poplar") was discussed with the claimant [258/267].

34. The claimant returned to work on 12 of July 2017 to Poplar. This was a very quiet, small scheme consisting of 16 self-contained flats over two floors accessed by stairs, stair lift and one lift with 6 flats on the ground floor and 9 on the first floor. Tenants were generally independent and the scheme was often used for training new staff as a result [55]. The scheme that the claimant had worked prior to her sickness absence was Nelson, Butetown, which had consisted of a high-rise block of flats consisting of 75 flats over 15 floors. This had a stairs and two lifts with 5 flats on each floor.

35. After a week of working at Poplar the claimant advised Sue Frost, that the additional driving to Poplar was aggravating her knee condition. She found the work there quiet and requested to return to Nelson [ET3 §18].

36. As a result of the Claimant's request she returned to return to Nelson on 14 August 2017 and remained there until 9 October 2017, seemingly without issue or at least none that has been brought to our attention, when she was advised that, due to staff shortages, it would be necessary for her to cover a second scheme.

*Nelson and Worcester*

*37.* In October 2017, the respondent had a requirement for Scheme Managers to manage two schemes due to staff shortages and the claimant asked to cover Worcester Court in Grangetown ("Worcester") as it was in close proximity to Nelson in Butetown, 1.6 miles away. Worcester had 33 tenants over two floors with a stairs, stair lift and a lift. The ground floor accommodated 15 flats; the first floor 18.

*38.* From 10 October 2017, the claimant worked at both Nelson and Worcester for a period. At around this time, Sue Frost commenced a period of sick leave which would continue until January 2018. During her absence Chantelle Zwawi took over line management responsibility for the claimant on an interim basis.

*Occupational Report November 2017*

*39.* On 13 November 2017 the claimant attended occupational health for a fourth visit [299/308]. The report reflected that the claimant was still suffering from bilateral knee pain for which she was still under investigation and treatment having received a multiple corticosteroid injections which had yielded some relief.

*40.* The claimant also reported to Occupational Health that her condition was being aggravated by multiple site visits, prolonged walking around sites and repeated driving between sites.

41. It was reported that she was fit for work and that again it was considered that the claimant was a disabled person [299/308]. They recommended temporary adjustments for 4-6 weeks, to allow a reduction in pain and allow the claimant to perform her exercise regime, of

    a. Restriction on walking distance/frequency

    b. Restriction on repeated driving episodes between sites

    c. Regular seated breaks

42. The claimant raised the issue of travel between the two sites with Chantelle Zwawi who suggested to her that rather than travel between the two sites, the rota could be changed so that the claimant worked alternate days at each site, thereby eliminating the drive between the two [§2 and 3]. The Claimant declined the offer as she stated that she was happy to spend half a day in each scheme as she could manage the drive between Nelson and Worcester. On cross examination, the claimant confirmed that she did not want to work alternate days at each scheme due to the number of telephone calls she received whilst not at site.

43. On 6 December 2017 the claimant met with Asmut Price, Sue Frosts' line manager and the email from Asmut Price to the Claimant that day confirms the matters discussed [307/316] which included discussion of the 22 November 2017 Occupational Health Report.

44. The email confirmed that:

    a. The claimant advised that she was able to manage walking with the assistance of a walking aid, such as a frame which the Claimant already possessed. In the email the Claimant was asked to advise when her use of the aid would begin when a risk assessment would be arranged;
    b. as the claimant had indicated that would find it easer to manage the two schemes by spending half a day at each, it was agreed that the rota was amended to reflect that; and

c. As the claimant was a lone worker, it was agreed that she would self-manage seated breaks and was told to have regular seated breaks as required.

45. By January 2018, the claimant had engaged UNISON to assist her. Indeed Mr Holmes confirmed that he had first been assigned the claimant's case in November 2017 and, on 21 January 2018 Darren Holmes, on the Claimant's behalf emailed Asmut Price, Ellen Curtis and Stephen Doel making requests for the following on the claimant's behalf [319/328]:

    a. a stress risk assessment to be carried out with him to support the claimant;
    b. that the claimant's two current workplaces have specific risk assessments done at the earliest possibility, with the claimant's particular issues taken in mind, paying particular attention to stairs.
    c. assurance (in writing or email) that the claimant would not be moved to any new site without a specific risk assessment based on her needs being done, again paying particular attention to stairs.

46. He set out that the claimant requested four reasonable adjustments:

    a. Reduced travel time between sites;
    b. Reduced walking distance in her role;
    c. Regular seated breaks;
    d. Occasional use of walking aids in work;

47. He indicated that these adjustments could be accomplished by:

    a. Allowing the claimant to use walking aids in work;
    b. Restricting the claimant's working site to Nelson only;
    c. Allowing a paid morning break of 15 mins and a paid afternoon break of 15 mins;
    d. Giving the claimant assistance by a member of staff in taking her to team meetings and therefore reducing her driving.

48. Despite the claimant stating in cross-examination that she wished to use her walking aids at all times, the request from her union representative was clear – she only needed them for occasional use.

49. No request for redeployment was made, no request was made for removal of all or any duty that required the claimant to walk, indeed no request was made for the removal of the duty to undertake a building check, either

following the November Occupational Health Report or this email. At no time during the continuance of the claimant's employment, were these adjustments requested. Indeed with regard to the restriction on walking distance, it was suggested by Darren Holmes would be met by limiting the claimant to Nelson House.

50. On 22 January 2018 the claimant slipped in work and was advised by Sue Frost to take her time doing her checks and ensure that she wore appropriate footwear [311/320].

51. She also attended a fifth Occupational Health assessment later that day, and again the Report reflects the matters discussed. The claimant's knee condition appeared to have worsened over time not improved. The prognosis was 'guarded' and treatment was ongoing although the claimant as fit to work [312/321].

52. The Report also reflects that at that time the Claimant was reporting that prolonged walking and multiple sites, stairs and repeated driving between sites were likely to aggravate her condition and it was again recommended that there be a restriction on walking distance/frequency, restriction on repeated driving episodes between sites and that the claimant have regular seated breaks.

53. Despite Asmut Price having told the Claimant to alert her to when she wished to use the walking aids as an adjustment in her email of 6 December 2017, the Claimant had not.

54. On 22 February 2018 the Claimant fell again whilst working at Nelson. She had been opening up a locked and void flat for a contractor engineer, tripping over a pipe as she entered. Again an Accident Report form was completed [309/319] and the claimant was advised by Sue Frost to again ensure that she wore appropriate footwear and to be more aware of her surroundings .

55. On 26 February 2018 the requirement for the claimant to work at Worcester Court ended and from this date she was only required to work at Nelson House [56].

56. On 23 March 2018 Ellen Curtis met with Darren Holmes and further adjustments requested were discussed. The agreement on adjustments is reflected in the amendments to Mr Holme's email of 21 February 2018 which Ms Curtis sent to him on 23 March 2018 [536/546] whereby it was agreed by Ellen Curtis that:

a. A stress risk assessment would be carried out;
b. The driving would be reduced and the Claimant would mainly be working at Nelson (which was already in place by that stage and indeed since 26 February 2018). Further that Team Meetings would only take place at Worcester Court and that they would provide the claimant with lifts to such meetings. As an aside we also found that in any event lifts had been provided to the claimant for Team Meetings throughout 2017 by either colleagues or her husband when coinciding with medical appointments;
c. That it had already been agreed that the claimant could have regular seated breaks
d. The requested use of walking aids, which was still presented by the claimant as a need on an 'occasional' basis only, was expressly referred to and agreed. [536/546]

57. It has been a point of dispute as to whether Ellen Curtis at that point agreed that a risk assessment on the walking aids would be undertaken.

58. The respondent's position is that the email from Ellen Curtis referenced the Asmut Price email of 6 December 2017, and that it was for the claimant to notify the respondent when she wished to start using such aids, at which point a risk assessment would be undertaken on those aids.

59. The claimant's position is that Ellen Curtis agreed that a risk assessment would be undertaken on those aids and she was waiting for that to take place.

60. We preferred the evidence of the respondent. We took into account the following

a. the emails of 6 December 2017, 21 February 2018 and 23 March 2018, which indicated that the claimant wanted aids for occasional use only and that she was to alert the respondent when she needed to use for walking, at which point a risk assessment would be undertaken;

b. the live evidence of Ellen Curtis, which we accepted, which was that she did not say the claimant could not use aids and that she told the Claimant to alert Asmut Price when she wanted to use them for Asmut Price to get them assessed. We considered Ellen Curtis' email of 23 March 2018 supported that live evidence;

c. the live evidence of Asmut Price, which we accepted, which was that whilst she was aware that she did know the claimant wanted to use walking aids for occasional use, she did not believe that the claimant had mentioned actually using walking aids at that stress risk assessment; that neither the claimant, nor her union representative Darren Holmes told her that the claimant was using them; that if that had been the case, she would then have carried out a risk assessment on them and that this would have been reflected in the 10 April 2018 assessment [366] which had been carried out by her in conjunction with the claimant and her union representative.

61. We find for these reasons that neither the claimant, nor her union representative raised this at the stress risk assessment. It was for the individual to tell Asmut Price what her personal stresses were and if a major stressor for the claimant was that she was struggling to carry out work without aids but afraid to use them, she should and surely would have raised it at that meeting. She did not and neither did her representative.

62. No further interaction or discussion with regard to the claimant's requirements for reasonable adjustments appear to have arisen after that date and in July 2018 the respondent commenced a restructure of the sheltered housing team whereby the Scheme Manager posts were deleted. The claimant was unsuccessful in obtaining an alternative role in that re-organisation and was absent from work from 6 August 2018 and remained absent until her leaving date on 30 September 2019. Whilst the Claimant was on sick leave, in order to support her a referral was made to Occupational Health. Following the cancellation/rescheduling of two appointments by the claimant, an appointment was made for 18th September 2018. The claimant stated that she was unable to drive to the appointment and an offer to arrange transport was made to the claimant. The claimant failed to attend.

63. The claimant had expressed an interest in and applied for voluntary redundancy on 20 August 2018 which was agreed on 11 September 2018. Her employment ended on the mutually agreed date of 30 September 2018.

**Submissions**

64. The respondent's counsel provided oral submissions, having provided an opening statement at the outset of the hearing which is incorporated by

reference. Mr Edwards referred the Tribunal to **Robertson v Bexley Community Centre t/a Leisure Link** 2003 IRLR 434, CA, on limitation and jurisdiction and **Tarbuck** v **Sainsbury Supermarkets Ltd** [2006] IRLR 664 EAT.

65. He sought to persuade us that the Tribunal did not have jurisdiction to consider the complaints unless the claimant persuaded us to extend time and reminded us the claimant had accepted at the case management preliminary hearing and again in the hearing that adjustments were put in place by April 2018.

66. Both parties provided submissions to persuade us as to the date of disability, knowledge of disability and the PCPs/reasonable adjustments relied on.

67. In relation to jurisdiction, the claimant's representative submitted that the claimant had contacted ACAS in July 2018 and had been informed that as her employment had not terminated, it was premature to bring a claim. The claimant's representative was reminded that no evidence had been provided by the claimant in relation to such matters and whilst we would accept submissions from him, that would be taken into account.

68. Consideration was given to recalling the claimant for fresh evidence in chief to be taken from the claimant, no evidence having been included in the witness statement from the claimant or Darren Holmes regarding any delay in submitting a claim, and for the respondent to further cross examine the claimant. Mr Edwards had cross-examined both on jurisdiction points and the evidence given in cross examination is reflected in our decision. He objected to any fresh evidence being given taking into account live evidence had completed and he had completed his submissions.

69. Submissions had taken from the claimant's representative late on the third day and it was not considered in accordance with the overriding objective to recall the claimant, after all evidence had been completed and submissions had been heard by the respondent. The time/jurisdiction issues had been set out clearly in the case management order from 2019 and the claimant's representative was a trade union representative. There was a concern that there would be insufficient time for deliberation and an extempore judgment in the time listed and that as a consequence it was determined that the consideration of the time points would be dealt with

without hearing further evidence from the claimant, but on the basis of submissions only.

70. Mr Charles also submitted that as a reason for delay was that the claimant's mother was really unwell.

71. The claimant's primary position on limitation was however that the claim had been brought in time in any event, as this was a series of connected events, specifically not actioning the request for use of walking aids and that despite attempts to use walking aids, the person who led the stress risk assessment failed to ask correct questions that were put forward by Darren Holmes and Ellen Curtis.

72. Both parties provided submissions to persuade us as to the date of disability, knowledge of disability and the PCPs/reasonable adjustments relied on.

**The Law**

s.123 EqA –Time

73. s. 123(1) EA 2010 a claim must be presented to the tribunal before the end of the period of three months starting with the date of the act to which the complaint relates.

74. The three-month time limit for bringing a discrimination claim is not absolute: employment tribunals have discretion to extend the time limit for presenting a complaint where they think it 'just and equitable' to do so — S.123(1)(b) EqA.

75. The above time limit is modified if there is a course of conduct extending of a period and the claim is brought within three months of that period: s. 123(3); or if the tribunal considers it just and equitable to extend time.

76. Where the act complained of it a failure to do something, it is taken as occurring when the respondent made the decision not to act: s. 123(3)(b) EqA 2010.

77. In the absence of evidence to the contrary, an employer is to be taken as deciding not to do something when it does an act inconsistent with doing it (or, if there is no inconsistent act, at the expiry of the period in which it might reasonably have been expected to do it: s. 123(4) EA 2010).

78. In **Abertawe Bro Morgannwg University Local Health Board** v **Morgan** [2018] EWCA Civ 640, the Court of Appeal held that where the employer's breach is a failure to act, time begins to run from the end of the period in which the employer might reasonably have been expected to comply with the relevant duty, and that period should be assessed from the employee's point of view.

79. The Court of Appeal in **Matuszowicz** v **Kingston-Upon-Hull City Council** [2009] EWCA Civ 22 held that where an employer's alleged failure to make an adjustment is inadvertent, the three-month time limit for bringing a claim starts to run on the expiry of the period within which the employer might reasonably have been expected to make the adjustments.

80. In **Robertson v Bexley Community Centre t/a Leisure Link** 2003 IRLR 434, CA, the Court of Appeal stated that when employment tribunals consider exercising the discretion under what is now S.123(1)(b) EqA, 'there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.'

Disability – section 6 Equality Act 2010 ('EQA')

81. Under section 6(1) of the Equality Act 2010 ('EQA'), a person has a disability if they have a physical or mental impairment and that impairment has a substantial and long-term adverse effect on their ability to carry out normal day to day activities.

82. Reference is made to Schedule 1 of the EQA which provides supplemental information concerning the determination of a disability. In particular, it explains in paragraph 2(1) that the effect of an impairment is long-term if:
    a. It has lasted for at least 12 months,
    b. It is likely to last for at least 12 months, or
    c. It is likely to last for the rest of the life of the person affected.

83. Paragraph 2(2) goes on to say that '[I]f an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-today activities, it is to be treated as continuing to have that effect if that effect is likely to occur.'

Duty to make adjustments – s.20/21 EqA 2010

84. (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

…

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

85. The Equality and Human Rights Commission's Code of Practice on Employment contains guidance on the Equality Act, on what is a reasonable step for an employer to take will depend on the circumstances of each individual case (para 6.29). The examples previously given in section 18B(2) DDA remain relevant in practice, as those examples are now listed in para 6.33 of the Code of Practice.

86. In **Environment Agency** v **Rowan** [2008] ICR 218, the EAT set out how an employment tribunal should consider a reasonable adjustments claim (p24 AB, para 27). The tribunal must identify:
    a. the provision, criterion or practice applied by or on behalf of an employer, or (b) the physical feature of premises occupied by the employer;
    b. the identity of non-disabled comparators (where appropriate); and
    c. the nature and extent of the substantial disadvantage suffered by the claimant'.

87. PCP is not defined within the EA 2010. EHRC Code of Practice (6.10) states that the phrase should be construed widely and could include informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions.

88. The burden of proving the PCP and the substantial disadvantage lies on the claimant (**Dziedziak** v **Future Electronics Ltd** EAT 0271/11).

## Conclusions

*Jurisdiction*

89. Dealing with jurisdiction, we concluded that the claims had been brought out of time and we were not persuaded that, the claims not having been brought in time, it was just and equitable to extend time.

90. It has not been argued by the respondent that the primary limitation period for claims started to run prior to April 2018. As reflected in the case management order, the claimant also accepted that by April 2018 all adjustments were in place.

91. On the best of the claimant's case, she asserts she was told that she could not use the crutches until they were risk assessed. On the basis of our findings and our conclusions set out below, we concluded that any failings asserted, to allow her to use a walking aid, arose at the very latest on 10 April 2018, being the risk assessment date when it could be said that the respondent might reasonably have been expected to make the adjustment of allowing the claimant to use walking aid, written approval having been given on 23 March 2018.

92. We concluded that contact with ACAS should have taken place within three months, namely by 9 July 2018. ACAS was not contacted until 21 September 2018 and the claim was not issued until 9 December 2018.

93. We were not persuaded by the submissions, made by the claimant's representative, which has been unsupported by evidence from the claimant, that:
    a. the claimant sought advice from ACAS in July 2018 and they had told her that she had to wait for her employment to end before bringing a claim and
    b. that during 2018 her mother had been ill.

94. The claimant was, throughout the relevant period that she complained of failure to make adjustments, represented by Darren Holmes of UNISON. The claimant on cross examination confirmed that she did not know she could bring a claim and that Darren Holmes did not advise her to; that it '*was never mentioned'.* Darren Holmes gave live evidence on cross examination that he felt it best to wait for the restructure to be completed before he pushed further on the reasonable adjustments as he a '*significant concern that they would use the restructure to dismiss the*

*claimant''* and that his '*tactics'* were to deal with the reasonable adjustments once the claimant '*got through the restructure*'. He confirmed on cross examination that he made a decision to wait until restructure and by that stage the claimant had been told that she would be redundant.

95. If there has been any failings there, that is a matter that the claimant should take up with her union representative and we did not consider that where there is a risk that the union representative has not appropriately advised the claimant on time limits, that this was a persuasive factor or reason for us to consider extending time.

96. It is far from clear that the claimant made any attempt, even in July 2018 to ensure she contacted ACAS before the primary limitation period. Even if we accepted the submissions, that the claimant had contacted ACAS prior to the primary time limit, were not convinced that it was more likely that termination of employment as a result of restructuring was at the forefront of her mind rather than failure to make reasonable adjustments, hence the purported advice of having to await termination prior to issuing a claim.

97. Within the claimant's own Disability Impact Statement, she confirms that her mother was diagnosed back in 2017, passing in November 2018. Whilst we understand how deeply personal issues, such as the illness of a loved one, impacts on individuals, we have no evidence that the impact of her mother's illness was the reason or a reason for failing to submit a claim in time.

98. During this period, the claimant continued in work to August 2018, was able to contact ACAS in July and again in September 2018 and deal with her voluntary redundancy application. This was insufficient to persuade us that there was any justifiable reason that the claimant had delayed in presenting her claim.

99. In terms of prejudice, we accepted the arguments from the respondent that the delay in presenting the claim, particularly due to the advent of Covid-19 and the delays that has arisen as a result of that, has resulted in a much longer delay in getting these claims heard. We accepted that the passage of time, particularly where the claimant's health had deteriorated further was likely to have affected the claimant's evidence.

100. We concluded that then claimant should and could have brought her claims in time and that it was not just and equitable to extend time. The Tribunal therefore essentially has no jurisdiction to consider the claims and the claims should be struck out.

*Disability and Reasonable Adjustments*

101. For completeness, even if we were wrong on the exercise of our discretion and in our conclusion that the Tribunal lacked jurisdiction we concluded that the claims of failure to make reasonable adjustments were not well founded and would be dismissed in any event for the following reasons.

102. In relation to disability, it is conceded by the respondent that the claimant did have a physical impairment, namely a knee condition at the relevant times. It was our conclusion that this impairment started to impact on the claimant's day to day activity of walking from December 2016.

103. The respondent has conceded that the physical impairment had a substantial adverse effect on her ability to carry out normal day-to-day activities by 22 January 2018.

104. We concluded that this impairment had a substantial effect on her ability to carry out normal day-to-day activities i.e. on her day-to-day mobility, which continued and progressed through 2017.

105. The claimant was, in our view, a disabled person by the end of December 2017 as the impairment had, by that stage impacted on her day to day activities for 12 months. She was not a disabled person prior to this date.

106. Whether the respondent knew or ought to have known the claimant was a disabled person by the end of December 2017 is a separate issue.

107. Whilst some impact on mobility was arising and evident from the outset of her condition in December 2016, the occupational health reports of February, April and May 2017, whilst the Claimant was off sick, indicated nothing more than a short-term condition, with no indication that the condition would not improve, if not disappear entirely. Indeed, these reports recommend temporary adjustments only to facilitate the claimant.

108. Whilst not a particularly significant factor for us, we did also note that the occupational health advisor did not consider the claimant to be a disabled person due to the nature and duration of the claimant's condition at this time, although we acknowledge that this is ultimately a question for this Tribunal.

109. Despite the claimant having been in work for four months by the date of the November 2017 Occupational Health Report, and at that Report confirming to the employer that the claimant was reporting that work was aggravating her condition, that report still does not indicate how or if that the condition was going to last. Therefore we concluded that it was still could not be said that any substantial adverse effect on her normal day to day activities was known to be likely to last 12 months, even at that point.

110. The optimism, that the claimant's condition would improve, dissipates however with the January 2018 report, at which point we concluded that it could be said with certainty that the claimant met the definition of disability.

111. We concluded that the on receipt of the January 20217 Report, the Respondent knew or ought to have known that the Claimant was a disabled person.

112. In that regard, some of the PCPs relied on by the Claimant would not give rise to any duty on the Respondent to make a reasonable adjustment as, at the relevant time, the Claimant was not a disabled person. However and for completeness we do turn to and deal with the failure to make a reasonable adjustment claim by dealing with the three issues of:

a. whether the Respondent had or applied a PCP, physical features and/or failure to provide auxiliary aid;
b. whether any PCP, physical feature and/or failure to put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time; and
c. If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage;

in relation to each PCP relied on in turn, as agreed at the outset of this hearing and reflected by Judge Harfield at Para 19b) of her case management order as follows:

113. In relation to PCPs at 19b of her case management order

i. **In April 2017 (until July 2017) refusing the claimant light duties or office duties/ requiring her to return to full duties/refusing her to allow to return to work other than on full duties/ not allowing the claimant to return to work when using walking aids**;

1. Based on our findings we concluded that this PCP, in all its iterations was not applied by the respondent. The Claimant was not refused light duties/refusing her to return to work other than on full duties Rather, she returned to work in July 2017, on a phased return basis of hours between 10am and 2pm to Poplar which was agreed between the parties to be a smaller quieter scheme than Nelson.
2. The PCP of refusing to allow the Claimant to use walking aids was not applied in April 2017 or at any time during her employment at the Respondent. We have dealt with this in more detail later in our reasons.
3. Further, based on our conclusions in relation to disability and date of knowledge of disability, as at April-July 2017 even our view on the PCP is incorrect, there would be no obligation at that point to make a reasonable adjustment for the Claimant.

ii. **A few days after 11 July 2017 (until September 2017) continuing to require the claimant, as part of her duties, to continue driving to another work site (Poplar House)**.

1. Whilst requiring the claimant to work at Poplar in July 2017 was a PCP that the respondent applied to the Claimant, this PCP was no longer applied when the claimant returned to Nelson House on 14 August 2017. In any event, we also concluded that at that point.
2. the respondent would not have had any know knowledge that driving may have caused the claimant any disadvantage, the May 2017 occupational health indicating that the Claimant could drive.
3. An adjustment was made within a reasonable period when she was transferred to Nelson on 14 August 2017 in any event; and fundamentally
4. There was at this point no duty to make a reasonable adjustment for the claimant as she was not a disabled person within s.6 EqA 2010.

iii. **In September 2017 again being required to work again from two sites**;

1. Whilst we accepted that there was a PCP of a requirement to work at more than one site (and this has been conceded by the respondent), and that by around October 2017 (when the Claimant was required to work at Nelson and Worcester) was a PCP that would have put the claimant at a substantial disadvantage, we were not persuaded that the respondent would have had knowledge of the substantial disadvantage in driving between the two sites, which were in close proximity:
2. The occupational health report of May 2017 indicated that the Claimant could drive
3. The claimant had only indicated the lengthier Dinas Powys - Whitchurch drive to Poplar was too difficult for her
4. She was offered to work one site at a time by Chantelle Zwawi, which she did not accept.
5. That knowledge however changed in November 2017, on receipt of the November 2017 Occupational Health Report.
6. At that point we concluded that the PCP was applied and that the Respondent had potential knowledge of the disadvantage to the claimant in driving between two sites. However, we accepted the evidence of Chantalle Zwawi, that she had offered the claimant to work alternate days at each site, which would have removed the requirement to drive between the sites, such that it could be said that the respondent did not apply the PCP of requiring the claimant to work at multiple sites. That she did was due the claimant's own insistence on working both sites on the same day as opposed to alternative days.
7. On that basis it is difficult to see how it could be said that the Respondent had knowledge of the disadvantage that the additional and unnecessary driving was causing the Claimant.
8. In any event, even that obligation was removed by 26 February 2018 such that even if it was a PCP that was applied to the Claimant this was no longer a PCP from that date.

**iv. Following the claimant's return to work on 11 July 2017 the requirement to undertake building checks;**

1. It is conceded by the respondent that the respondent did apply a PCP of requiring the claimant to undertake building checks and that this PCP had been applied from the date that the claimant returned to work in July 2017.
2. Further, for the reasons given in relation to knowledge we also concluded that by point of knowledge of disability, namely 22 January 2018, the respondent knew or ought to have known that the PCP of carrying out building checks put or would put the Claimant at a substantial disadvantage.
3. Indeed, they were with knowledge of this disadvantage since receipt of the 13 November 2017 Occupational Health Report

v. **Requiring the claimant to attend team meetings at a different site**;

1. This was a PCP that was applied to the claimant from her return to work in July 2017.
2. Whilst the November 2017 OH Report refers to repeated driving being an issue, we concluded that by that stage the claimant was not driving herself to the Team Meetings, she was either getting lifts from colleagues or her husband was taking her. Further, from 23 March 2017, lifts from colleagues to Team Meetings at Worcester was a permanent arrangement which did not disadvantage the claimant as has been conceded by her.
3. Therefore whilst this was a PCP that applied to the Claimant and continued to be applied to the claimant that was not a PCP that placed the claimant at a substantial disadvantage.

**vi. At a meeting between Darren Holmes (Unison) and the claimant's operation manager Ellen Curtis, Ms Curtis stated that the claimant should not use walking aids in work;**

**1.** On the basis of our findings of fact, the claimant was not refused the use of walking aids in work by Ellen Curtis in March 2018, by any other manager or indeed at any time.

**2.** Being told that she should not use walking aids in work was not a PCP operated by the Respondent.

**3.** We further concluded that the claimant did not at any time give anyone an indication that she needed the use of walking aids on a more constant or permanent basis.

**4.** As Mr Holmes put it in his email of 21 February 2018, when requesting adjustments – the need was 'occasional' only, which would have ameliorated the disadvantage arising from the walking duties.

**5.** As Mr Edwards put it in his submission, there was no PCP to the effect that she could not use her crutch and it was open to her to do so as she did during Team Meetings without reproach or question from her colleagues, including managers.

vii. **Refusing/not agreeing in a timely manner Mr Holmes requests for adjustments on the claimant's behalf (for the claimant to work in Nelson House only/ to have paid morning and afternoon breaks/ to have assistance with driving to team meetings**);

1. We construed this PCP as a PCP of delaying or refusing requests to work in Nelson only
2. On the basis of our findings of fact, we concluded that the respondent did not apply a PCP of refusing or delaying a request for the claimant to work in Nelson only and we did not conclude that the respondent applied a PCP of refusing or not agreeing seated breaks at any time.
3. Indeed Asmut Price had agreed to seated breaks in December 2017 and as the claimant's role was lone working and predominantly sedentary, this was open to the claimant at any time;

**viii. the practice of not warning about or removing workplace tripping, slipping or falling hazards;**

1. We did not conclude that on the basis of the incident on January and February 2018, the claimant had been able to prove a PCP of not warning about or removing workplace, tripping, slipping or falling.
2. Further we do not accept and did not conclude that any failures gave rise to a substantial disadvantage to the claimant as a disabled person when compared to a non disabled Scheme manager when entering a void property at that Scheme.

114. Turning to the PCPs, that we do consider to have been applied and our consideration of whether there were steps that were not taken that could have been taken by the respondent to avoid the disadvantage, we concluded the following in relation to the reasonable adjustments that were identified at the PH and during the hearing as follows:

i. The Claimant was allowed to return to lighter duties of a smaller quieter Scheme and on reduced hours. The Claimant was not refused to use walking aids at any point. From 6 December 2018 Asmut Price implicitly accepts their use and, if there was any doubt in the claimant's mind, from 23 March 2018, she had in clear unambiguous terms that Ellen Curtis agreement to the use. There was no failure to make a reasonable adjustment in this regard.

ii. Throughout her return the claimant appears fixated with working at Nelson despite this being the largest of the three properties. On a number of occasions the claimant has been offered adjustments to reduce both her walking time and driving duties. Objectively we considered it irrational that the claimant would have rejected Ms Zwawi's suggestion of alternate days at Nelson and Worcester, in November 2017 instead preferring, for reasons wholly unrelated to her disability, to continue working and driving between two sites. In any event, that was stopped in 22 February 2018, when the claimant stayed at Nelson only. Further the claimant has not been required to drive to TM since at the very latest 23 March 2018 and in any event had been given lifts by colleagues or her husband prior to this date.

iii. Having considered the requirements of the role of Scheme Manager and what practically could have been undertaken to remove the building checks from the role of Scheme

Manager, we did not consider that removing the requirement to undertake building checks would have been a reasonable adjustment. It was, as Mr Edwards had put it, an integral part of the role as Scheme Manager and we accepted that they could not be delegated to the housekeeper for the reasons of time, training and necessary liaison with the tenant. For similar reasons, it could not be re-allocated on a more permanent basis to letting contractors. When considering reasonableness it was a factor for us that this had not been raised by either the Claimant or her union representative at any point during the continuance of her employment. Ensuring that the building was checked and residents welfare was protected through physical checks was a core part of the Scheme Manager's role and we unpersuaded that it would have been reasonable to reallocate those duties to another or a third party reallocate to the Housekeeper or emergency contact as a reasonable adjustment.

iv. Paid breaks is an adjustment that would be and was routinely provided to the claimant as has been conceded by the claimant. The claimant was a lone worker that was in a predominantly sedentary role – she managed her own breaks and could take paid seated breaks at any time. There was no failure to make such an adjustment.

v. Likewise any disadvantage caused by attending team meetings off site was met with the respondent providing assistance to the claimant in colleagues taking claimant to Team Meetings and from 23 March 2018 more permanent arrangement at Worcester – 1.6 miles away.

vi. We have already dispensed with the slipping tripping and decline to comment on the wider health and safety obligation of the Respondent in such circumstances.

115. Thus even if the Tribunal did not lack jurisdiction to consider the complaints, we would have considered the claims to be not well-founded and they would have been dismissed in any event.

116. Following the oral decision, the respondent's counsel made an application for costs on the basis of Employment Tribunal Rules:

a. Rule 76(1)(a) that the claimant had acted unreasonably and
b. (b) no reasonable prospects of success.

117. In support he also provided the Tribunal with a copy of a Without Prejudice save as to costs letter from the respondent to the claimant and dated 20 April 2021, in which the respondent placed the claimant on notice as to costs following offers made by the respondent of £7,500 and a counter-offer of £548,095.45 from the claimant to settle the claims.

118. The Tribunal declined to make a costs order in the respondent's favour on the basis argued that the claimant had no reasonable prospect of success and having been put on notice of Judge Harfield that limitation issues were a live issue failing to lead evidence that was capable of or likely to persuade a Tribunal to extend time. We were not persuaded that it could be said that the claimant acted unreasonably in continuing her claim even in the absence of direct evidence of the reason for not bringing her claim in time and/or had no reasonable prospects of success

_____
Employment Judge R Brace
Dated: 21 May 2021

JUDGMENT SENT TO THE PARTIES ON 26 May 2021

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FOR THE SECRETARY OF
EMPLOYMENT TRIBUNALS
Mr N Roche