EMPLOYMENT TRIBUNALS

Claimant Mrs Anne Roberts
Respondent APCOA Parking (UK) Ltd

Heard at: Southampton (By Cloud Video Platform)
On: 7 to 11 June 2021

Before Employment Judge Street
Mr J Shah
Mr M Richardson

Representation
Claimant: Mr Gidney, counsel
Respondent: Mr Howson, consultant, Peninsula

JUDGMENT on the merits of the claims made having been sent to the parties on 29 June 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided. Remedy is listed for hearing on 21 September 2021 by Cloud Video Platform.

REASONS

1. Evidence

1.1. The Tribunal heard from the claimant and from Chelsey Smith, Human Resources ("HR") Manager, Jay Jenkins, Contract Manager, Steve Winton, Contract Manager and Steve Morris, Senior Contracts Manager, for the Respondent.
1.2. The Tribunal read the documents referred to in the bundle provided.

2. Issues

The claims and issues before the Tribunal to decide are these. What follows uses the styles and numbering in the list of issues used at the hearing, for ease of reference.

1.1 Direct Discrimination on the grounds of age contrary to the Equality Act 2010 ("EQA") s13
1.2 Indirect Disability Discrimination contrary to EQA s 19;
1.3 Failure to make Reasonable Adjustments contrary to EQA s 20;
1.4 Harassment contrary EQA s 26;
1.5 Constructive unfair dismissal contrary to Employment Rights Act 1996 ("ERA") s95(1)(c);

2. The claims in respect of indirect age discrimination and direct disability discrimination are withdrawn and to be dismissed on withdrawal.

3. The following list of issues is compiled from the Regional Employment Judge Pirani's Order of 11 May 2021, itself based on an agreed list, and a subsequent Amended Agreed List of Issues, the amendments to REJ Pirani's Order being based on discussion at the hearing on Monday 7 June 2021 and made by consent.

4. The claims pleaded as in respect of the Transfer of Undertakings Regulations (Protection of Employment) Regulations ("TUPE") were incorporated into the constructive dismissal claim.

5. The issues are cross-referenced to the 11 May Order.

The Issues

6. Time limits (para 39)

6.1 The claim was brought on 5 July 2019, which is also the date on which the claim was presented to ACAS and the ACAS certificate issued. The Claimant resigned on 6 April 2019, giving one month's notice ending on 6 May 2019.

6.2 Given the date the claim form was presented and the dates of early conciliation, any complaint about any act or omission which took place more than three months before 5 July 2019 (allowing for any extension under the early conciliation provisions) is potentially out of time, so that the tribunal may not have jurisdiction. The Claimant relies on continuing acts save for the direct age discrimination claim. The Respondent challenges that the direct discrimination, indirect discrimination, harassment and failure to make reasonable adjustments claims were in time.

6.3 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010 ("EQA")? The Tribunal will decide:

6.3.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?

6.3.2 If not, was there conduct extending over a period?

6.3.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

6.3.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

6.3.4.1 Why were the complaints not made to the Tribunal in time?

6.3.4.2 In any event, is it just and equitable in all the circumstances to extend time?

7. Disability (para 40)

7.1 Was the Claimant disabled at the material times (September 2018 – 6 May 2019) within the meaning of section 6 EQA 2010? The Claimant claims that her physical impairment of lower back pain and shooting pains in her legs is a disability. The claimant also relies on mental health impairments, depression, anxiety and stress, first diagnosed in November 2018.

7.2 In particular:

a. Does the Claimant have a physical and/or mental impairment?

b. If so, has the Claimant had the impairment for 12 months or more, or is it likely to last for 12 months or more?
c. Does the impairment have a substantial adverse effect on the Claimant's ability to carry out normal day to day activities?

7.3 The Respondent accepts that the physical disability is a long-term qualifying disability.

7.4 The Respondent does not accept that the mental health impairment is a long-term, qualifying disability.

7.5 In each case, did the Respondent have actual or constructive knowledge that the Claimant was a disabled person within the meaning of section 6 EQA 2010 at all material times? The Respondent denies that they had actual or constructive knowledge of either disability.

Constructive unfair dismissal (para 43)

7.6 The Claimant claims that the Respondent acted in fundamental breach of contract in respect of the implied term of the contract relating to mutual trust and confidence. The breaches were as follows;

7.6.1 The mismanagement of the Claimant by the Respondent during the consultation process;
7.6.2 The Respondent changing the terms of the Claimant's contract of employment;
7.6.3 The failure to deal with the Claimant's Grievance in a timely manner;
7.6.4 The Respondent submitting the Claimant to instances of harassment;
7.6.5 The Respondent discriminating against the Claimant because of her age;
7.6.6 The Respondent discriminating against the Claimant because of her disability;
7.6.7 The Respondent failing to provide any reasonable adjustments in response to the Claimant's disability.

7.7 The list of acts itemised at paragraph 19 of the most recent Amended Agreed List of Issues at (a) to (i) are treated as illustrative of the breaches;

a. Requiring the Claimant to attend additional stations, forcing her to travel extra unscheduled mileage, which at times was unnecessary as the work had been completed by another colleague.
b. Delay in hearing the Claimant's grievance in a way that was suitable.
c. Failure to adapt to meet health requirements in terms of location of meetings and dealing with meetings in writing rather than in person.
d. Delay in providing outcome of the consultation meeting of 13 November 2018.
e. Acting in a manner which damaged the Claimant's reputation and career prospects, specifically holding meetings in an intimidating way which resulted in the Claimant becoming ill and doubting her own confidence and impacting on her ability to complete her workload to a satisfactory level. The Claimant was also informed by colleagues that management had discussed her situation with them specifically that she was unwilling to work weekends and they would have to cover for her.
f. Escalating work tensions by senior management following several phone calls received on personal telephone number from key staff on the contract asking the Claimant when she was coming back to

work and what was happening which made the Claimant nervous and anxious answering calls.

g. Fixing the grievance meeting at short notice.
h. Letters demanding equipment.
i. Poor processing of grievance and consultation meetings.

7.8 In addition, the Claimant relied on those matters pleaded as changes to employment terms or material detriments at paragraph 27 of the most recent Amended Agreed List of Issues:

a. Requiring employees to work across an increased operational area.
b. Increase the number of additional unscheduled jobs in the operational area.
c. Changed the job description and or duties.
d. Changed the working hours and days, including weekend working.
e. Introduced new technology with insufficient training.

7.9 Did the Respondent have an economic, technical or organisational reason to make those changes or were they authorised by the contract?

7.10 The Tribunal will need to decide:

7.10.1 Whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

7.10.2 Whether it had reasonable and proper cause for doing so.

7.11 Did the Claimant resign because of the breach? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

7.12 Did the Claimant tarry before resigning and affirm the contract? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

7.13 In the event that there was a constructive dismissal, was it otherwise fair within the meaning of s. 98 (4) of the Act?

8. Direct age discrimination (Equality Act 2010 section 13) (para 44)

8.1 The Claimant describes herself as over 60. The Claimant's age group is "over 60" and she compares herself with people in the age group.

8.2 Did the Respondent do the following things: asking her to retire in September 2018 and repeating the comment in November 2018.

8.3 Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone in a different age group was or would have been treated. There must be no material difference between their circumstances and those of the Claimant. The Claimant has not named anyone in particular who she says was treated better than she was and therefore relies upon a hypothetical comparator.

8.4 If so, was it because of age?

8.5 The respondent does not rely on any justification defence. They say the comment was not made.

9. Indirect disability discrimination (Equality Act 2010 s. 19) (para 45)

9.1 A "PCP" is a provision, criterion or practice. Did the Respondent have or apply the following PCPs:

a. Requiring employees to work across an increased operational area;

b. Locating meetings at various different places across said operational area;
c. Increase the number of additional unscheduled jobs in the operational area;
d. Changed the job description and or duties;
e. Changed the working hours and days;

9.2 The most recent Amended Agreed List of Issues includes two other complaints, which are added here by way of illustration of the above:
(i) Requiring employees to carry out litter picking at the carparks
(ii) Requiring meetings to take place face-to-face

9.3 Did the Respondent apply the PCP to the Claimant?

9.4 Did the Respondent apply the PCP to persons with whom the Claimant did not share the same protected characteristic, or would it have done so?

9.5 Did the PCP put persons with whom the Claimant shared the characteristic, at a particular disadvantage when compared with persons with whom she did not share the characteristic?
The particular disadvantages pleaded (see Amended Agreed List of Issues paragraph 4) are those relied on in respect of the Claimant herself at 10.6 below.

9.6 Did the PCP put the Claimant at that disadvantage in that it:
a. Increased the travel time of the Claimant, leading to an exacerbation in the pain the Client suffers as a result of her disability;
b. Altered the daily routine the Claimant had to manage her condition;
c. Lowered the number of rests and breaks the Claimant was able to take to alleviate her symptoms.
d. Carrying out duties, litter picking, aggravated musculoskeletal conditions
e. Requiring meetings to take place face to face aggravated symptoms of stress and anxiety and prevented grievances from being fairly processed when disabled colleagues could not attend.

9.7 Was the PCP a proportionate means of achieving a legitimate aim? This was clarified for the first time at this hearing. The Respondent says that its aims were to comply with the tendering contract. The Respondent says it was proportionate because the terms were not imposed. There was an open consultation process on how to and whether the changes could be achieved. They were not in fact imposed on the Claimant because she went off sick so the consultation process could not be completed.

9.8 The Tribunal will decide in particular:
9.8.1 Was the PCP an appropriate and reasonably necessary way to achieve those aims;
9.8.2 Could something less discriminatory have been done instead;
9.8.3 How should the needs of the Claimant and the Respondent be balanced?

10. Reasonable Adjustments (Equality Act 2010 ss. 20 & 21) (para 47)

10.1 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

10.2 A “PCP” is a provision, criterion or practice. Did the Respondent have the following PCPs: in relation to physical impairments:
a. Requiring employees to work across an increased operational area;

b. Locating meetings at various different places across said operational area;
c. Increasing the number of additional unscheduled jobs in the operational area.

10.3 In respect of those, (d) and (e) in the most recent Amended Agreed List of Issues are taken as examples of the above:
(d) the requirement for employees to litter pick at car parks
(e) requiring employees to attend meetings in person

10.4 Did the Respondent have the following PCPs in relation to mental impairments,
a. Requiring employees to attend meetings at short notice.
b. requiring employees to attend meetings in person (rather than in writing)

10.5 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that the claimant had difficulties making long journeys or litter picking due to her physical disabilities and coping with meetings at short notice or in person due to her mental disabilities.

10.6 Did the Respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

10.7 What steps (the 'adjustments') could have been taken to avoid the disadvantage? The Claimant suggests:
a. To allow the Claimant to take regular breaks from driving as needed;
b. To provide additional cover if the Claimant was unable to complete all the stations she was allocated on a said shift.
c. Providing meetings closer to the Claimant's home location.
d. Providing alternative cover for absent staff
e. Allowing a longer period of notice of meetings
f. Authorising a written process instead of the requirement to attend, for example, grievance and appeal hearings in person.

10.8 Was it reasonable for the Respondent to have to take those steps and <u>when</u>? The claimant says the reasonable adjustments should have been in place by February 2019.

10.9 Did the Respondent fail to take those steps?

11. Harassment related to disability / age (Equality Act 2010 s. 26) (para 48)

11.1 Did the Respondent do the following things:
a. Repeatedly arrange meetings at short notice; *(disability – stress)*
b. Writing letters to the Claimant demanding the return of equipment while the Claimant was signed off as unfit for work; *(disability - stress)*
c. Calling the Claimant on her personal mobile phone; *(disability - stress)*
d. Gossiping between senior management and work colleagues;
e. Holding the meeting of 13 November 2018 with a hostile tone and an intimidating manner (age and disability)
f. Being told by Chelsey Smith that she should retire on 25 October 2018 and 13 November 2018 (age)

11.2 If so, was that unwanted conduct?

11.3 Did it relate to the Claimant's protected characteristic, namely age and/or disability?

11.4 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

11.5 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

12. Remedy

Unfair dismissal

12.1 What basic award is payable to the Claimant, if any?

12.2 Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

12.3 If there is a compensatory award, how much should it be? The Tribunal will decide:

12.3.1 What financial losses has the dismissal caused the Claimant?

12.3.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

12.3.3 If not, for what period of loss should the Claimant be compensated?

12.3.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

12.3.5 If so, should the Claimant's compensation be reduced? By how much?

12.3.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did the Respondent or the Claimant unreasonably fail to comply with it by [the claimant is unable to articulate what paragraph is relied on]? If so, is it just and equitable to increase or decrease any award payable to the Claimant and, if so, by what proportion up to 25%?

12.3.7 If the Claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce her compensatory award? By what proportion?

12.3.8 Does the statutory cap of fifty-two weeks' pay apply?

Discrimination

12.4 Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

12.5 What financial losses has the discrimination caused the Claimant?

12.6 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

12.7 If not, for what period of loss should the Claimant be compensated for?

12.8 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

12.9 Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?

12.10 Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

12.11 Should interest be awarded? How much?

Schedule 5 Employment Act 2002 cases

12.12 When these proceedings were begun, was the Respondent in breach of its duty to give the Claimant a written statement of employment particulars or of a change to those particulars?

12.13 If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay.

12.14 Would it be just and equitable to award four weeks' pay?

3. Findings of Fact

3.1. These are the primary findings of fact of the Tribunal. Where there is significant conflict in the evidence, the findings are expressed in the Reasons below after evaluation.

3.2. Mrs Roberts was born on 29th August 1956. She was 62 years old when she resigned.

3.3. In 2007, her daughter told her of a vacant role in the place where she worked, CP Plus.

3.4. Mrs Roberts met then manager, Mr Naylor, at Fleet Service Station – there was no local office. They discussed the job, and he offered it to her. The offer was of work from Monday to Friday, from 6 am to 3.30 pm. There was no weekend working. She would be responsible for 32 stations and car parks. She accepted.

3.5. There was no letter from Mr Naylor confirming the terms or start date.

3.6. Her employment started on 14/11/07 as a mobile supervisor, carparks.

3.7. The HR department sent her a contract. It was a draft contract for a post as Area Manager, but with her details on. She did not sign it. No further contract was sent to her.

Physical Disability

3.8. In 2012, Mrs Roberts underwent interspinous spacer surgery (the insertion of a spacer disc between L3-L4) [135] after having been diagnosed with sciatica, sacroiliac joint dysfunction and spinal stenosis. The surgery did not relieve her symptoms of persistent pain in back and hip with leg pain and numbness.

3.9. Mr Gwynn at CP Plus was her manager at that time. He allowed her some adjustments to aid her return to work and knew that she needed to pace herself in working and take breaks.

3.10. In 2015, Mrs Roberts was granted a blue badge. She showed it to Mr Gwynn She was entitled to use the blue badge with her work vehicle and did. It expired and was renewed in 2018.

3.11. By then, she had a wheelchair for longer trips and used sticks, both supplied to her by the NHS. She is described as having an ataxic gait or poor balance in a physiotherapy report. She found it painful to walk for more than a few minutes and has described being stiff after long sitting, including driving.

3.12. Mr Gwynn knew she had mobility difficulties. He saw her struggling at times to get out of the van, if she had been sitting for long and he saw the difficulty she had in walking.

> "If I met up with Mr Gwynn, he would come, he would see me walking, sometimes I would struggle to get out of the van, and he would see that and he knew I took painkillers to ease the pain. ….He agreed I could take regular breaks" (oral evidence)

3.13. She managed the job with those regular breaks and pain killers as required and he knew that was how she managed.

3.14. She was prescribed low dose amitryptelene at night in 2017 to help with sleeping difficulties to do with the pain (148).

3.15. The physiotherapy assessment in 2018 described chronic pain associated with failed back surgery after the insertion of the intravenous spacer in 2012 which never had the effect of relieving her pain. Pain had been a more serious problem since June 2017 including back pain and right leg pain extending from lateral lower leg and into buttock and lateral thigh. Treatments including instrumental fusion and physiotherapy did not help. She experienced weakness and gait disturbance (150).

3.16. In July 2018, Mrs Roberts was prescribed gabapentin for nerve pain, in addition to the amitriptyline for long term pain control (130, 155).

TUPE Transfer

3.17. On 20/08/18, Mrs Roberts was told by Mr Gwynn of the prospective transfer of their employment.

3.18. Mr Jenkins took up his post with APCOA on 12/09/18.

3.19. During the next month there were discussions between Mr Jenkins and Mr Gwynn. In the course of those, Mr Gwynn mentioned that Mrs Roberts had limitations related to her health and that she would not be able to work weekends. Mr Jenkins knew from Mr Gwynn that she looked after her two grandchildren at weekends, and others were unhappy too about weekend working. This is what Mr Jenkins told us:

> "And what did he tell you about Anne?".
> "He said she was good at what she did. She had had limitations through sickness. By then we had faced the contractual discussions about the weekends and he felt she would not be prepared to do weekend work, and the whole team, none of them were keen on doing it
> "Some limitations for sickness?"
> "She had had some time off for sickness. Limitations as a result of being off sick, attendance wise".
> "Did you ask him what those were?"
> "Yes, he felt uncomfortable, he would rather not discuss them and he as sure they would be on the TUPE pack"
> "But you had notice that she had had a number of periods of sickness"
> Yes" (oral evidence)

3.20. On 13/09/18, Mrs Roberts and Mr Jenkins had a one-to-one meeting. Of this, Mr Jenkins tells us that he knew of her limitations and sickness and that he had not got the information he needed from Mr Gwynn so he was relying on the one-to-one meeting for fill in the gaps,

> "And we know from what you told us earlier that Mr Gwynn had told you she had limitations for sickness and that she would be unlikely to be able to work at weekends?"
> "Yes, that is correct"
> "Did he say why?"

> "We talked about the two issues. I think he said that she looked after the two grandchildren at weekends."
> "So when we get the EMI, you know shift pattern and sickness. You know limitations because he told you – you did nothing more.."
> "I was relying on the one -o-one."

3.21. The transfer of employment from CP Plus to APCOA took place on 20/09/18.
3.22. Staff transferring had already been told about the expectation that they would now undertake litter picking in the carparks. Mrs Roberts raised it with Mr Gwynn,

> "We were told we had to litter pick and we were responsible for the machines and everything and I said I could not litter pick because it was carrying big bags of rubbish.
> In September."
> "So that is the last discussion with him about your back problems?"
> "Yes, cos he knew all about my problems."

3.23. On 27/09/18. Ms Smith invited the team to a meeting on 26/10/18 (75).
3.24. On 22/10/18 Mr Gwynn sent Mrs Roberts her rota, with the usual 32 stations.

October Meetings

3.25. Mrs Roberts attended two meetings on 25/10/18. We can be clear about that because she wrote that day to ask for a copy of minutes of "both of today's meetings at Basingstoke (92)". (No minutes have been produced)
3.26. The first meeting is referred to in a letter dated 26/10/18 as a "consultation meeting" (93) The letter, which Mr Jenkins tells us was drafted before the meeting, says,

> "We are informing you today that we are entering into consultation and reasons are explained" and,
> "Please treat the meeting on 25/10/18 as formal consultation that a review is underway."

3.27. The list of reasons given in that letter as to why there is a need to review practices includes that because of the new contract, there will be a need to cover weekends, that the team will be required to provide 7 day coverage across the estate and there will be a change in the number of station visits. Full 7-day working was due to go live by 19/11/18.
3.28. The second meeting on 25/10/18 was with Ms Smith and Mr Jenkins, and Mrs Roberts, on a one-to-one basis. This was the meeting at which he had planned to find out about her limitations, following on Mr Gwynn's comments,

> "Yes, at the meeting we were going to chat to Anne about a range of issues including what potential limitations she had."

3.29. Her understanding is that they knew all about her – her file had been passed to APCOA and Mr Gwynn transferred with her. Her evidence is too that at that meeting, she tried to explain her circumstances –

> "Every time I tried to explain that I wasn't good at computers, my disability, and working weekends, I was told they knew all about me and I did not need to say anything."
> *"*I did say I had a disability
> I tried to explain myself
> I was closed down and I wasn't allowed to speak."

3.30. Mr James tells us that Mrs Roberts was distressed at this meeting, and they terminated it early, so he did not enquire as intended.

> "No we did not get to that second part of the meeting with Anne. We only discussed the weekend working. The meeting ended prior to have that opportunity."
> "You told us this was when you would find out what the limitations on her work were, and you had the meeting and you did not do it?"
> "Correct. I did not feel it appropriate given …she was upset about the weekends, I did not think the conversation would take place in positive way."

3.31. They did not discuss Mrs Roberts' physical limitations.

3.32. Handwritten notes of that meeting were made by Mr James and Ms Smith but they have not been produced. (Ms Smith tells us she makes contemporaneous notes of all meetings).

3.33. It was at that meeting that Ms Smith made the remark that Mrs Roberts was too old for the job and should retire and that she would not get any redundancy money from the Respondent, as discussed below. That was also said in the hearing of Mr Gwynn, who repeated it to Mrs Roberts, amongst others.

3.34. A second consultation meeting was proposed for 13/11/18. That meeting was to be a personal appointment for Mrs Roberts, and she was told she could bring someone with her. She was told it could be a work colleague or union representative but she was not told it could not be anyone else.

Extended Duties

3.35. On 28/10/18, Mr Gwynn sent Mrs Roberts her extended duties, with the list of 50 stations, with a note that says,

> "Hi Anne,
> If you can bash through these please on weekdays. Doesn't matter if visit anywhere more than once a month. Hope you can read my writing …." (95/6)

3.36. Mrs Roberts rang Mr Gwynn the next day to object,

> "The next day when I had the email. I told him. I couldn't do 50 stations, couldn't be done properly, and he said do the best you can.
> The litter picking, you would have a big black bin size, and tongs and some of the car parks are big like the ones at Fleet, and you carry it while working.

> I didn't do the litter picking. I told Mr Gwynn I couldn't carry the bags of litter.
> He wasn't bothered." (oral evidence)

3.37. She was also struggling with the new technology and the quality of training. She had difficulty linking the smart phone to the printer, and met with colleagues to ask for help, first in Salisbury and then Basingstoke.

3.38. On 4/11/108, Mrs Roberts wrote to protest the changes to her working conditions (99).

3.39. In that letter, she says that she objects to the changes because she cannot work weekends. She also says she has accommodated all the changes that have been requested to ensure they met the contract. That included working the revised shift schedule, with an increase from 32 to 50 sites, litter picking, customer services while visiting the site and preparation for ticketing machines. She points out the extensive areas that she must now cover. She does not rely on her disability to object to that. It is the weekend working she objects to and it is on the grounds of her caring responsibilities (100).

3.40. In fact, as she explained in her oral evidence, she was not doing the work she had said she was doing,

> "I couldn't litter pick. I can't carry litter. Some of the stations are all stairs. Some steep. It takes me a while to get up and down. And some of them they had people going round the car park picking up the litter."

3.41. It was put to her that that is not what she had said here,

> "Your own letter says you have already accommodated the changes made.
> "I told BG I couldn't do them properly, and the driving, I had to stop and take painkillers and all as he said was do the best you can. He was not bothered."
> "You were doing all of this stuff by the time of this letter?"
> " Was not doing them properly."
> *"*I cannot litter pick. I cannot carry big bags of litter."

13 November Meeting

3.42. The meeting referred to in the letter of 26/10/18 as the second consultation meeting had been fixed to take place at Guildford, at 11.am on 13/11/18 (93,98). It was moved from Watford at her request. Guildford was not much easier for her. The letter had explained that this meeting was to discuss the outcome of the review and provide feedback on representations received following the initial consultation meetings.

3.43. Mrs Roberts thought it was a meeting at which she would know if she was going to be expected to work weekends. She was very anxious, arrived early and had her daughter, Mrs Davies, with her.

3.44. They both arrived at 10.15 for 11.00 Mr Jenkins and Ms Smith arrived significantly late. Mr Jenkins and Ms Roberts agree that Mr Jenkins tried to convince Mrs Roberts that she had got the time wrong, not him. The meeting

started at 11.45. Mr Jenkins had worked on the earlier invitation to Watford, for a meeting starting at 12.30 and had not checked the actual invitation to Guildford.

3.45. Mrs Davies was excluded, on the basis that Mrs Roberts could only be accompanied by a work colleague or union representative.

3.46. Mrs Roberts found the meeting deeply upsetting.

3.47. She told us,

> *"*I wasn't allowed to talk about these things because I was closed down. I wasn't allowed to put my point of view across because I wasn't allowed to speak, I kept getting interrupted. …."
> "At the meeting I had to come out , not once but 4 times because I was being harassed, they would not take my well-being into consideration and they kept closing me down.
> The aggravating questions, I just felt so ill." (oral evidence, day 1)
>
> "What were you expecting from that meeting?
> "The two new employees they could cover the weekend working and I could keep my Monday to Friday working so it wouldn't interfere with my childcare."
> I was hoping that they would come to some arrangement."
> "He said about weekends. I told him I could not work the weekends. Then he said one weekend in four and I told him I couldn't do that. And it was just hostile questioning, all the time, them having a go at me, that is why I had to come out of the meeting, I felt so ill" (oral evidence, day 2)

3.48. There is no record of her distress in the minutes produced. Mr Jenkins however agreed that at both this and the previous meeting he could not cover what he wanted because of the level of her distress and that that level of distress was surprising (oral evidence).

3.49. While her distress is not formally noted, there is this record of the purpose of the meeting

> "This is a different contract and we are contractually obliged to provide 7-day cover. This means that the operational team need to work a 4-week rota which ensures that all the required visits are met. For APCOA to deliver this we require all mobile operatives to cover some weekends." (page 104)

3.50. At the meeting, Mr Jenkins and Ms Smith were insisting that the change was one within Mrs Roberts' contract: that she had signed a contract for 7-day working. She had not.

3.51. At that meeting, Ms Smith repeated her earlier comment that Mrs Roberts was too old for the job.

3.52. On 16/11/18 Ms Davies wrote a letter of complaint about the conduct of the two officers at the meeting and the effect of that meeting on Mrs Roberts (105),

> "I am writing to raise serious concerns due to the conduct of your management team, namely Mr Jay Jenkins and Ms Chelsey Smith that I witnessed on 13th November 2018. …..

> Anne was extremely anxious about what the "outcome" meeting would entail and this was not helped by the excessive lateness and zero communication from your management team Jay and Chelsea.
>
> Jay arrived at 11.30 hrs and I personally witnessed him gaslight Anne into believing she had got the meeting time completely wrong. This was clearly a very embarrassing situation for Anne and further escalated her anxiety.
>
> Chelsey finally arrived at 11.45 with the meeting commencing after her and Jay had purchased and enjoyed a cup of tea and coffee. ….
>
> The overall behaviour and intimidating manner in which both Jay and Chelsey spoke to Anne was completely unprofessional….
>
> Following the meeting, I accompanied Anne to her vehicle. She was struggling to walk as she felt faint and vomited twice prior to leaving. Anne did state to both Jay and Chelsey that the pressure and stress they were subjecting her to was making her feel ill but there was a total disregard for her Health and Safety. Anne then had to drive 60 miles unaccompanied with no check on her wellbeing.
>
> Furthermore, Anne has not been given an outcome of the consultation as per her original invitation letter, instead she was bullied for an hour and has been told she will be summoned to another face to face meeting.
>
> I am providing this witness statement in good faith, the contents of which are a true and accurate account of events which took place on 13th November 2018."

3.53. Mrs Roberts did not know that Mrs Davies had written or sent that letter.

3.54. Mrs Roberts went off sick. Her initial sick note after self-certification is for 'stress after trauma at work' and dated 22/11/18 [106]. . From November 2018, she was prescribed sertraline for anxiety/ depression. (155, impact statement 130)

3.55. She was not ever able to return to work.

3.56. Additional sick certificates, all citing (in various different descriptions) stress, anxiety or depression were provided on 11th December 2018 [140], 10th January 2019 [141], 8th February 2019 [142], 7th March 2019 [143] and 4th April 2019 [144].

3.57. On 17/12/18, Mr Winton wrote to Mrs Roberts by email, telling her to attend a grievance hearing arranged for the next day (107- 108)

> "I write to inform you that you are required to attend a grievance hearing meeting on Tuesday 18 December 2018 at 12.30 pm. ….
> The purpose of this meeting is to ascertain the information in regards to the letter of complaint sent by Kathryn Davies on 1/11/18 regarding the consultation meeting held on 13/11/18 between Jay Jenkins and Chelsey Smith (on behalf of APCOA). This meeting will allow you the opportunity to answer questions in relation to this matter."

3.58. On the same day, 17/12/18, Mrs Roberts replied (110).

3.59. She explains that the invitation to the meeting, at such short notice to discuss a matter she was not aware of had made her very distressed. She had spoken to her daughter, who had explained that she had made a complaint because of the unacceptable conduct that she had witnessed.

3.60. She goes on to confirm that she was signed off work by her GP,

> *"*Currently I would struggle both physically and mentally to attend a meeting. I have sleepless nights, I am stressed and as a result I am suffering with acute anxiety and now I am being further harassed to attend short notice meetings that are being scheduled without any consideration to my overall physical and mental well-being.
>
> Since my illness I have found myself anxious about going to meet with people and I cannot always get my words out, often tripping over my sentences and I end up feeling humiliated and embarrassed. I used to be very confident and have now developed a complex since the harassment and bullying at work. I therefore must consider my own mental and physical well-being and I am unable to physically attend the meeting.
>
> My condition is further exacerbated from the fact that I was under consultation and have not received any correspondence regarding an outcome of the meeting or received a copy of the meeting minutes, even though the meeting was over a month ago. I would like to formally request a copy of the outcome and the meeting minutes.
>
> I would like to request a reasonable adjustment, given the circumstances of my physical and mental health to deal with this matter via written correspondence to try to look to resolve this matter without further delay."

3.61. From that, Mr Winton knew that she was ill, with mental health difficulties, that she had been unaware of the letter of complaint but could not attend a meeting.

3.62. On 4/12/18, Mr Winton sent her the outcome of the grievance. He did not send her the letter from Ms Davies. He did not ask her if she wanted this third party complaint to be dealt with as her grievance. He did not respond to her request to have the matter dealt with in writing. Instead, he refers to her failure to attend the grievance hearing. He did not invite her to submit her comments or tell her the time scale for doing so. He did not speak to Mrs Davies. He did speak to Mr Jenkins and to Ms Smith. He made notes but did not send them to Mrs Roberts for comment and has not produced them.

3.63. He saw minutes from the 13/11/18 meeting, which he included with his reply.

3.64. The grievance was dismissed.

3.65. In respect of lateness, Mrs Roberts was told that the email to her had a typing error, saying 11.00 am instead of the 12.30 pm, which had been the time for the original meeting proposed for Watford. The meeting had in fact therefore been started early, at 11.45. Both Mr Jenkins and Ms Smith had apologised for the misunderstanding.

3.66. Mr Winton found no evidence to support the account of poor handling or an intimidating manner. Instead, Mrs Roberts had been unhelpful in her responses.

3.67. Rather than failing to take account of her health and safety, the company had moved the meeting from Woking to Guildford for her benefit. She had been free to ask for an adjournment if she needed one and one had been granted.

3.68. Ms Davies was criticised for setting out a statement "in good faith" when she was not present at the meeting.

3.69. That email also says that now that the grievance was concluded the consultation process could now be concluded and an outcome should be issued to her shortly.

3.70. In the covering letter, he asks for the return of company property including the van and that Mr Jenkins would be in contact to arrange the handover (111). Mrs Roberts was distressed and anxious at the thought of having to speak to Mr Jenkins after his conduct at the meeting on 13/11/18.

3.71. She was given the right of appeal.

3.72. On 28/12/18, a grievance appeal was raised by Mrs Roberts (114 on). .She points out that she had not "failed to attend". Mr Winton had acknowledged receipt of her email on the day it was sent. He knew she could not attend because she was off sick. He had ignored her request to deal with the grievance in writing. He had not spoken to Mrs Davies or to her. She had only seen the letter from Ms Davies with the outcome letter, although the company had had it for six weeks.

3.73. It appeared to her, from the terms of the grievance letter (presumably the request for the return of the vehicle), that she might now face consequences as a result of her non-attendance at the grievance meeting.

3.74. It was not the case that there had been an apology for lateness at the start of the meeting, and none was recorded.

3.75. She explained, for the first time, what the real difficulties and great sensitivity there was around her caring responsibilities for her grandchildren, disclosing their nature.

3.76. There had been no claim by Mrs Davies that she witnessed the whole meeting.

3.77. Mrs Roberts goes on to set out what she says are serious breaches of her employment contract, including the proposed changing of her job description/duties, working hours and place of work without her agreement, lack of support, bullying and harassment by senior managers including humiliating her and criticisng her in front of others, putting her in excessively difficult work situations, failing to make reasonable adjustments and breaching the duty of trust and confidence.

3.78. She goes on to say,

> "These issues have given me sleepless nights. I am stressed and as a result I am suffering with acute anxiety and depression. I am being further harassed to attend meetings that are being scheduled without any consideration to my overall physical and mental well-being.
> The company culture appears to permit this type of practice to happen. Managers are encouraged to get results, regardless of their style of management or the impact of their actions, either directly or indirectly on employees of the company."

3.79. By then APCOA knew her reasons for not wishing to work at weekends, and that that was based on serious concerns. Mr Jenkins and Mr Winton both saw that letter (115). It did not lead to a concession that she did not have to work weekends.

3.80. Mrs Roberts confirmed on 31/12/18 that the appeal raised new issues and should be dealt with as a new grievance as well as being an appeal. This new grievance was never actioned (117/118).

3.81. In respect of the consultation, no outcome letter was ever sent.

3.82. In respect of the new grievance, no action was taken.

3.83. On 4/02/19,Mr Morris wrote to Mrs Roberts to acknowledge her appeal. He set out that he knew that she is signed off work. He knew that she wanted the matter handled in writing but he would need to arrange a meeting in person once she was fit for work, so that he could ensure her concerns were fully understood. No further action would be taken until she confirmed she was fit to return to work (120).

3.84. While she was off sick, Mrs Roberts did not have calls from her line manager or from HR to check on her well-being. She did have calls from colleagues on her personal phone, who told her that they had been told to ring her to ask when she would be back to work.

3.85. On 6/04/19, Mrs Roberts resigned on notice, with effect from 6/05/19 (121). She said,

> "I believe as an employer you have acted unlawfully and as a result there have been serious breaches of my employment contract, as documented in my grievance letters and other correspondence and I do not find the breaches acceptable.
> I believe that matters are beyond breaking point, the company culture has long been to let this type of practice happen. Managers are encouraged to get results, regardless of their style of management or the impact of their actions, either directly or indirectly on employees of the company.
> This implies that no amounts of individual grievances raised are likely to result in managers changing their practices, I therefore have considered my own mental and physical well-being and I am not prepared to continue to endure the suffering I have been subjected to as an employee of APCOA"

3.86. She relied expressly on : -

- Fundamental breach of contract in the delay in conducting the grievance, failure to make adaptations for her health and the delay in providing an outcome to the consultation begun in September 2018;
- Breach of trust and confidence; "I believe APCOA have acted in a manner which damages my reputation/career prospects and that work tensions have been escalated by senior management following several phone calls I have received to my personal telephone number from key staff on the contract"
- Repeated harassment in fixing meetings at short notice, letters demanding equipment while signed off, and the poor processing of the grievance and consultation

3.87. On 8/04/19, Mr Morris wrote to Mrs Roberts asking her to get in touch with a view to arranging a meeting about her appeal and setting a deadline for her to contact him of 19/04/19 (123).

3.88. On 9/04/19 Mrs Roberts wrote to Mr Morris, telling him that she had resigned and she remained off sick. She had asked for the matter to be dealt with in writing but at every stage the company had refused.

3.89. On 18/04/19, Mr Morris replied to acknowledge her resignation, her letter having been passed to him. He says that,

> "I must reluctantly accept that you will not agree to a meeting to explore your concerns fully, therefore I have no choice but to conclude my investigation based on your written submissions, together with any other information and documentation available to me" (126)

3.90. He offers her a further chance to attend a meeting but he does not invite any further evidence from her or give a date by which any further evidence must be submitted.

3.91. On 8/05/19, the appeal was dismissed (127). Mr Morris writes saying he has reviewed "all information available" but does not say what it is. He comments that she has not submitted any further evidence in relation to the meeting of 13/11/18. He reports having investigated the claims but does not say what the investigation consisted of. He reported in oral evidence having made telephone calls but no notes have been produced and no account of those calls was given to Mrs Roberts to enable her to respond.

3.92. In the letter, Mr Morris says there had been no further evidence from her of bullying or intimidation at the meeting of 13/11/18. He had not spoken to Mrs Davies and he does not comment on the evidence Mrs Davies had presented in that complaint.

3.93. He refers to the fact that the consultation meeting was arranged to allow Mrs Roberts to raise any objections to the provisional change in her working practices and duties. He does not comment on the objection that she had raised, in relation to her caring responsibilities, or the further and important explanation of it in her appeal letter. He does not comment the fact that there had been no outcome to the consultation. Insofar as there had been delays, he laid them at Mrs Roberts' door, given unwillingness to attend meetings at locations suggested by the Company, to engage in face-to-face meetings and being unavailable due to ill health.

3.94. Mrs Roberts notified ACAS of her intention to claim on 5/07/19 and a certificate was issued that day. The claim was made on the same date.

4. Law

TUPE

4.1. It is a basic principle of employment law that an employer can only change a contract of employment with the agreement of the employee.

4.2. The purposes of the Transfer of Undertakings (Protection of Employment Regulations 2006 is to protect the rights of employees on a relevant transfer. They protect the contract in place, subject to exceptions.

4.3. Any variation of a transferred contract of employment will be void if the sole or principal reason is the transfer (Reg 4(4)). In Meade and Baxendale v British Fuels Ltd [1998] IRLR 706, HL, the House of Lords held that a variation of terms (without

a dismissal) that is due to the transfer is invalid until the causal link with the transfer is broken.

4.4. A variation will not however be void where the sole or principal reason for the variation is an economic, technical or organisational ("ETO") reason entailing changes in the workforce and the variation has been agreed with the employee or the terms of the contract permit it (Reg 4(5). Changes in the workforce is expressly stated to include changes of workplace (Reg 4(5A).

4.5. If a relevant transfer involves a substantial change in working conditions to an employee's material detriment, he or she is entitled to resign on notice and claim breach of contract or unfair dismissal (Reg 4(9))

4.6. The material change need not necessarily amount to a repudiatory breach of contract. It potentially extends to changes to non-contractual terms and conditions.

4.7. In respect of material detriment, it is to be considered from the employee's subjective perspective and whether objectively that change was to the disadvantage of the employee. Material detriment has to be interpreted by analogy with detriment in Shamoon v Chief Constable of the Royal Ulster Constabulary, (HL [2003] IRLR 285) that is, on the guidance of the House of Lords, that it is unnecessary for a complainant to demonstrate that he or she has suffered some physical or economic consequence in order to prove detriment – while excluding an unjustified sense of grievance.

4.8. Regulation 4(11) preserves the right of the employee to terminate his or her employment without notice in acceptance of the employer's repudiatory breach of contract, so preserving the right to bring an "ordinary" constructive dismissal claim.

4.9. A dismissal will be automatically unfair if it is found to be by reason of the transfer unless it is for an ETO reason (Reg 7).

Practical aspects of TUPE transfer

4.10. In taking over businesses, it is usual for there to be a due diligence process in which information about employees is passed over. That would include names, addresses, ages, information about disability, dates of employment and roles, salaries or wages, normal working hours and overtime arrangements, notice entitlements, holidays and holiday pay, sickness absence and sickness pay entitlements, recent history of grievances. The purpose is to determine the entitlements of each employee and to assess the extent to which variation or harmonisation of contractual terms may have to be considered following the transfer.

Constructive Dismissal

4.11. A termination of the contract by the employee will constitute a dismissal within section 95(1)(c) of the Employment Rights Act 1996 ("ERA 1996") if he or she is entitled to so terminate it because of the employer's conduct. That is a constructive dismissal.

4.12. For the employee to be able to claim constructive dismissal, the employee must establish that the following four conditions are met:

i) There must be a breach of contract by the employer.

ii) That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving.

iii) The employee must leave in response to the breach and not for some other, unconnected reason.

iv) The employee must not delay too long in terminating the contract in response to the employer's breach, otherwise he or she may be deemed to have waived the breach and agreed to the variation of the contract or affirmed it.

4.13. A repudiatory breach of contract is a significant breach, going to the root of the contract (Western Excavating (ECC) Ltd v Sharp [1978] ICR 221). That is to be decided objectively by considering its impact on the contractual relationship of the parties (Millbrook Furnishing Industries Ltd v McIntosh (1981) IRLR 309). The fact that the employer may genuinely believe that the breach is not repudiatory is irrelevant.

4.14. It also follows that there will be no breach simply because the employee subjectively feels that such a breach has occurred no matter how genuinely this view is held. If, on an objective approach, there has been no breach, then the employee's claim will fail (see Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493, [2005] IRLR 35).

4.15. Employment contracts contain an implied term of mutual trust and confidence. The parties to the contract will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust which should exist between employer and employee (Malik v BBCI SA (in liq) [1998] AC 20).

4.16. It is not simply about unreasonableness or unfairness. The question is whether the conduct complained of was likely to destroy or seriously damage the relationship of trust and confidence.

4.17. It is not necessary in each case to show a subjective intention on the part of the employee to destroy or damage the relationship, a point reaffirmed by the EAT in Leeds Dental Team Ltd v Rose [2014] IRLR 8, EAT. As Judge Burke put it:

> "The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of…"

4.18. The Court of Appeal in Lewis v Motorworld Garages Ltd *[1986] ICR 157* held that a course of conduct can cumulatively amount to a fundamental breach of contract entitling the employee to resign and claim constructive dismissal following a “last straw” incident, even though that incident by itself does not amount to a breach of contract. In Omilaju v Waltham Forest London Borough Council *[2005] ICR 481,CA,* it was stated that the last straw does not have to be of the same character as the earlier acts in the series, but it must contribute something to the breach of trust and confidence.

4.19. An employee who is the victim of a continuing cumulative breach of contract is entitled to rely on the totality of the employer’s acts, notwithstanding a prior affirmation *(Kaur v Leeds Teaching Hospitals NHS Trust, [2019] ICR 1, CA) (“Kaur”).* In that case guidance is given on the approach for Tribunals:

i) What is the most recent act (or omission) triggering resignation?

ii) Has he or she affirmed the contract since that date?

iii) If not, was that act or omission itself a repudiatory breach of contract?

iv) If not, was it part of a course of conduct which viewed cumulatively amounts to a repudiatory breach of trust and confidence?

v) Did the employee resign in response – or partly so – to that breach?

4.20. The general principles of contract law applicable to a repudiation of contract are that if one party commits a repudiatory breach of the contract, the other party can choose either to affirm the contract and insist on its further performance or he can accept the repudiation, in which case the contract is at an end. The innocent party must at some stage elect between these two possible courses: if he once affirms the contract, his right to accept the repudiation is at an end, but the election to affirm is not required within any specific period.

4.21. Delaying too long or, by conduct, indicating acceptance of the change, can point to affirmation. It is not simply a matter of time, in isolation. In WE Cox Toner (International) Ltd v Crook, [1981] IRLR 443, it is established that mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation. Simply continued working and the receipt of wages points towards affirmation. Nevertheless, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his rights to accept the repudiation or is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation.

Disability as a protected ground under the Equality Act

4.22. Disability is a protected characteristic under the Equality Act 2010, section 4. The Act says that a person has a disability if they have a physical or mental impairment which has a long-term and substantial adverse effect on their ability to carry out normal day-to-day activities.

4.23. Long-term means that the impairment has lasted or is likely to last for at least 12 months or for the rest of the affected person's life. Substantial means more than minor or trivial (Schedule 1, paras 2 and 5).

4.24. There is no need for a medically diagnosed cause for the impairment. What is important is the effect, not the cause (Code of Practice in Employment, 2011, Appendix 1, para 7)

4.25. Whether an impairment has lasted or is likely to last at least 12 months at the time of the discriminatory acts is to be judged by reference to facts and circumstances at the time of those acts and not later (Parnaby v Leicester City Council UKEAT/0025/19)

4.26. The ACAS Guidance on the definition of disability (2011) says, at paragraph C4,

> "In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. Account should also be taken of both the typical length of such

an effect on an individual, and any relevant factors specific to this individual (for example, general state of health and age)."

Direct Discrimination - section 13

4.27. Direct discrimination is provided for under the Equality Act 2010 ("EA 2010") by section 13(1):

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

4.28. By section 39(2) of the EA 2010,

> 'An employer (A) must not discriminate against an employee of A's (B)
> (a) as to B's terms of employment;
> (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
> (c) by dismissing B;
> (d) by subjecting B to any other detriment.'

4.29. The words "because of" mean that the protected characteristic must be a cause of the less favourable treatment, but it does not need to be the only or even the main cause. For it to be a significant influence or an effective cause is enough.

4.30. Motive or intention is not required.

4.31. Detriment does not require a physical or economic consequence; it is sufficient that a reasonable person might take the view that they have been disadvantaged:

> "Detriment exists if a reasonable worker would, or might, take the view that the treatment accorded to her had in all the circumstances been to her detriment. It is not necessary to demonstrate some physical or economic consequence." (Shamoon v Chief Constable of RUC [2003] IRLR 285 HL)

4.32. As the Equality Act Statutory Code of Practice on Employment (the "Code of Practice"), explains, at paragraph 3.5:

> 'It is enough that the worker can reasonably say that they would have preferred not to be treated differently from the way the employer treated – or would have treated – another person.'

The comparator

4.33. Essential to the consideration of less favourable treatment is the question of comparison.

4.34. By section 23 of the EA 2010,

> "On a comparison of cases for the purposes of sections 13, 14 and 19, there must be no material difference between the circumstances relating to each case."

4.35. This is dealt with by the Code of Practice at paragraphs 3.22 onwards.

4.36. The other approach is to say but for the relevant protected characteristic, would the claimant have been treated in this way? That may be helpful in identifying a hypothetical comparator (Code of Practice, 3.27).

Indirect Discrimination - section 19

4.37. Indirect discrimination is defined in section 19 of the Equality Act 2010 in this way:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice ("PCP") which is discriminatory in relation to a relevant protected characteristic of B's.
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if -
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
> (c) it puts, or would put, B at that disadvantage, and
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim."

4.38. Subsection (3) lists the relevant protected characteristics, which include disability.

4.39. All four conditions in subsection (2) must be met before a successful claim for indirect discrimination can be established. In other words, there must be a PCP which the employer applies or would apply to employees who do not share the protected characteristic of the claimant; that PCP must put people who share the claimant's protected characteristic (here, disability) at a particular disadvantage when compared with those who do not share that characteristic; the claimant must experience that particular disadvantage; and the employer must be unable to show that the PCP is justified as a proportionate means of achieving a legitimate aim.

4.40. It is for the claimant to establish that the first three elements apply – that there is a PCP applied to a pool, that it disadvantages those sharing the protected characteristic generally and that creates a particular disadvantage to the claimant. At that point, it is for the respondent to justify the PCP as a proportionate means of achieving a legitimate aim.

4.41. In Essop v Home Office, Supreme Court, [2017] 1 WLR, the difference between direct and indirect discrimination is explained by Lady Hale, as follows.

> "Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment - the PCP is applied

> indiscriminately to all - but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot. – (Essop, para 25)
>
> "…The reasons why one group may find it harder to comply with the PCP than others are many and various (Mr Sean Jones QC for Mr Naeem called them "context factors"). They could be genetic, such as strength or height. They could be social, such as the expectation that women will bear the greater responsibility for caring for the home and family than will men. They could be traditional employment practices, such as the division between "women's jobs" and "men's jobs" or the practice of starting at the bottom of an incremental pay scale."
>
> "These various examples show that the reason for the disadvantage need not be unlawful in itself or be under the control of the employer or provider (although sometimes it will be). They also show that both the PCP and the reason for the disadvantage are "but for" causes of the disadvantage: removing one or the other would solve the problem. (para 26)"
>
> "…There is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage. The later definitions cannot have restricted the original definitions, which referred to the proportion who could, or could not, meet the requirement. Obviously, some women are taller or stronger than some men and can meet a height or strength requirement that many women could not. Some women can work full time without difficulty whereas others cannot. Yet these are paradigm examples of a PCP which may be indirectly discriminatory. (Essop, para 27)

4.42. It is not necessary to show why the PCP puts people sharing a protected characteristic at a disadvantage *(Essop)* The key element is the causal link between the PCP and the particular disadvantage suffered by the group and the individual.

4.43. For the purposes of assessing the impact of the PCP on the group sharing the protected characteristic as against the wider group, the pool of all those affected by the PCP has to be identified. The Statutory Code of Practice (2011), prepared by the Equality and Human Rights Commission under section 14 of the Equality Act 2006, at para 4.18, advises that:

> "In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively and negatively, while excluding workers who are not affected by it, either positively or negatively."

4.44. In other words, all the workers affected by the PCP in question should be considered.

4.45. The comparison must then be made with those sharing the protected characteristic. The Code at paragraph 4.19, says this,

> "Looking at the pool, a comparison must be made between the impact of the provision, criterion or practice on people without the relevant

> protected characteristic and its impact on people with the protected characteristic."

4.46. What is being considered is the particular disadvantage suffered by the group sharing the protected characteristic when the PCP is applied, that is, the disparate impact on that group as against the wider group. The test considers the intrinsic disadvantage to the group with the protected characteristic arising from the general application of the PCP to the wider pool. There is no requirement that the PCP put every member of the group at a disadvantage.

4.47. In the context of disability, it is not straightforward to identify the disadvantaged group. By section 6(3)(b) of the Act, in relation to disability, a reference to persons who share a protected characteristic is a reference to persons who have the same disability. A disabled person can bring a claim even where no other employees share the same disability, but there must be some evidence that the disability and its relevant effects are in fact shared by others, unless the matter is so obvious that Judicial Notice can be taken.

4.48. Indirect discrimination on the grounds of disability does not depend on an employer's knowledge or constructive knowledge of the claimant's disability.

4.49. A PCP is justified if the employer can show that it is a proportionate means of achieving a legitimate aim. In Hampson v Department of Education and Science [1989} in the Court of Appeal, Lord Justice Balcombe said the true test involved striking "an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition".

4.50. As Mummery LJ explained in R (Elias) v Secretary of State for Defence *[2006] EWCA Civ 1293, [2006] 1 WLR 3213, at [151]:*

> ". . . the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group."

4.51. He went on, at [165], to commend the three-stage test for determining proportionality derived from de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, 80: -

- Is the objective sufficiently important to justify limiting a fundamental right?
- Is the measure rationally connected to the objective?
- Are the means chosen no more than is necessary to accomplish the objective?

Failure to make reasonable adjustments - section 20

4.52. The EA 2010, by section 39(5), imposes a duty on employers to make reasonable adjustments.

4.53. The duty is set out at section 20 of the EA 2010.

4.54. The duty comprises three requirements. Here the first is relevant and that applies where a provision, criterion or practice of A's (the employer) puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with

persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

4.55. A failure to comply with those requirements is a failure to make reasonable adjustments. By section 21(1) and (2), "A discriminates against a disabled person if A fails to comply with that duty in relation to that person".

4.56. The duty does not arise where A did not know and could not reasonably be expected to know that B has a disability and is likely to be placed at the disadvantage referred to – that is the effect of schedule 8, paragraph 20, as amended, to the EA 2010.

4.57. In Wilcox v Birmingham CAB Services Ltd [2011] Eq:R.S810, the EAT explained that unless the employer had actual or constructive knowledge of the disability, the question of substantial disadvantage did not arise. An employer will be taken to have the requisite knowledge provided that they are aware of the impairment and its consequences. There is no need for them to be aware of the specific diagnosis (Jennings v Barts and the London NHS Trust [2013] Eq:R 326 EAT). If an agent or employee knows in that capacity of a worker's disability, the employer will not usually be able to claim that they do not know, see para 6.21 of the Code.

4.58. Where a disabled person keeps a disability confidential, no duty arises for the employer "unless the employer could reasonably be expected to know about it anyway." (Code para 6.20)

4.59. And,

> "If a disabled person expects an employer to make a reasonable adjudgment, they will need to provide the employer … with sufficient information to carry out that adjustment."

4.60. However, the employer must do all they can reasonably be expected to do to find out whether a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. So, knowing of a condition such as dyslexia, the employer has a duty to do what it reasonably can to establish the effects of that and so avoid the risk of a substantial disadvantage arising.

4.61. Guidance is given in the ACAS Code of Practice in Employment (2011), at paragraph 6.19,

> What is reasonable to do will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.

4.62. The following example is then given,

> "A worker who deals with customers by phone at a call centre has depression which sometimes causes her to cry at work. She has difficulty dealing with customer enquiries when the symptoms of her depression are severe. It is likely to be reasonable for the employer to discuss with the worker whether her crying is connected to a disability and whether a reasonable adjustment could be made to her working arrangements."

4.63. No like for like comparator is required – the comparison may be between those who could do the job and the disabled person. As explained in Royal Bank of Scotland v Ashton ([2011] ICR 632), the tribunal must identify the non-disabled comparator or comparators. That may be a straightforward exercise,

> "In many cases, the facts will speak for themselves and the identity of the non-disabled comparators will be clearly discernible from the provision, criterion or practice found to be in play." (Fareham College Corporation v Walters ([2009] IRLR 991)

4.64. There is no onus on the disabled worker to suggest what adjustments ought to be made. It is good practice for employers to ask. If the disabled person does make suggestions, the employer should consider whether such adjustments would help overcome the substantial disadvantage and whether they are reasonable. (Code of Practice para 6.24)

4.65. It is a good starting point for an employer to conduct a proper assessment, in consultation with the disabled person concerned, of what reasonable adjustments may be required. … It is advisable to agree any proposed adjustments with the disabled worker in question before they are made. (Code of Practice para 6.32.)

4.66. In considering whether there has been a failure to make reasonable adjustments, the tribunal must identify the nature and extent of the substantial disadvantage relied on by the claimant; make positive findings as to the state of the respondent's knowledge of the nature and extent of that disadvantage and assess the reasonableness of the adjustment that it is said could and should have been taken in that context.

4.67. The process for the Tribunal therefore is to identify:

(a) the employer's provision, criterion or practice which causes the claimant 's disadvantage

(b) the identity of the persons who are not disabled with whom comparison is made

(c) the nature and extent of the substantial disadvantage suffered by the employee

(d) what step or steps it is reasonable for the employer to have to take to avoid the disadvantage (General Dynamics Information Technology Ltd v Carranza [2015] IRLR 43).

4.68. The Tribunal must identify all of those to judge whether the proposed adjustment is reasonable. There is no need to find that the adjustment would have prevented the adverse effects. The Tribunal is entitled to find that the adjustment proposed was a reasonable option with a not unreasonable chance of success (The Environment Agency v Rowan [2008] IRLR 20).

4.69. Assessing the reasonableness of any particular step, relevant factors will be how effective it will be in preventing the substantial disadvantage, how practicable it is, how much it will cost and how disruptive it may be, the size and resources of the employer and the nature of the business. It may also be relevant that external resources are available to help provide adjustments (Code para 6.28).

4.70. Failure to make a reasonable adjustment cannot be justified, but only reasonable steps fall within the duty. Whether or not adjustments were reasonable in the circumstances is to be determined by the employment tribunal objectively, (HM Land Registry v Wakefield [2009] All E R 205 (EAT).

Harassment - section 26

4.71. By section 26(1) of the EA 2010,

"A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of

(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."

4.72. In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must, by section 26(4), be taken into account –

"(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect."

4.73. Harassment is discussed in Chapter 7 of the Code of Practice. Paragraph 7.8 explains that,

> "The word 'unwanted' means essentially the same as 'unwelcome' or 'uninvited'. 'Unwanted' does not mean express objection must be made to the conduct before it is deemed to be unwanted. A serious one-off incident can also amount to harassment."

4.74. Paragraph 7.9 explains that "related to" has a broad meaning, in that the conduct does not have to be "because of" the protected characteristic. So here, where the context is disability discrimination, the question is, "Is the conduct anything to do with the disability."

4.75. Section 26(4) is more fully discussed at paragraph 7.18 of the Code. The perception of the worker is a subjective question and depends on how the worker regards the treatment.

4.76. In paragraph 15 of Richmond Pharmacology v Dhaliwal 2009 [IRLR] 336, the nature of harassment is explored in similar terms:

> "The proscribed consequences are, of their nature, concerned with the feelings of the putative victim; that is, the victim must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created. That can, if you like, be described as introducing a "subjective" element; but overall the criterion is objective because what the tribunal is required to consider is whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so. ….It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence….:"

4.77. The concept of detriment does not include conduct that amounts to harassment (Equality Act 2010, s212(1)). Harassment and direct discrimination claims are

therefore usually mutually exclusive. Victimisation and harassment too are mutually exclusive, given that section 27 of the Act specifically refers to detriment as part of the definition of victimisation. However, unfavourable treatment in section 15 (discrimination arising from disability) is not to be equated with detriment (The Trustees of Swansea University Pension and Assurance Scheme, Swansea University v Mr A Williams (UKEAT/0415/14/DM)

Burden of proof

4.78. By section 136(2) and (3) of the EA 2010, the test in respect of the burden of proof is set out:

> "(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred."
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.'

4.79. The switching of the burden of proof is simply set out in the Code at para 15.34:

> "If a claimant has proved facts from which a tribunal could conclude that there has been an unlawful act, then the burden of proof shifts to the respondent. To successfully defend a claim, the respondent will have to prove, on balance of probability, that they did not act unlawfully. If the respondent's explanation is inadequate or unsatisfactory, the tribunal must find that the act was unlawful."

4.80. For the burden of proof to shift, the claimant must show facts sufficient – without the explanation referred to – to enable the tribunal to find discrimination. The Barton guidelines as amended in the Igen case (Igen v Wong, 2005 IRLR 258 CA), remain the basis for applying the law notwithstanding the re-enactment of discrimination legislation in the 2010 Act. It is those guidelines that establish the two-stage test,

> "The first stage requires the complainant to prove facts from which the Employment Tribunal could, apart from the section, conclude in the absence of an adequate explanation that the respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the complainant. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did not commit or is not to be treated as having committed the unlawful act, if the complaint is not to be upheld (Peter Gibson LJ, para 17, Igen)

4.81. The Tribunal is required to make an assumption at the first stage which may be contrary to reality.

4.82. In Hewage v Grampian Health Board [2012] UKSC 37, the application of the Barton/Igen guidelines to cases under the EA 2010 is approved at the highest level. At paragraph 33, Lord Hope, on the burden of proof provisions, says,

> "They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to

> offer where the tribunal is in a position to make positive findings on the evidence…"

4.83. In Laing and Manchester City Council and others, 2006 IRLR 748, the correct approach in relation to the two-stage test is discussed,

> "No doubt in most cases it will be sensible for a tribunal formally to analyse a case by reference to the two stages. But it is not obligatory on them formally to go through each step in each case…. (para 73)
> The focus of the tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race (or other) discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a tribunal to say, in effect, 'there is a nice question as to whether the burden has shifted, but we are satisfied here that even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race'.

4.84. The nub of the question remains why the claimant was treated as he or she was:

> "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." (Madarassy v Nomura International plc) 2007 IRLR 246).

4.85. In that case, in a judgment later approved by the Supreme Court in Hewage, above, Mummery LJ pointed out that the employer should be able to adduce at stage one evidence to show "that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the complainant; or that the comparators chosen by the complainant or the situations with which comparisons are made are not truly like the complainant or the situation of the complainant."

4.86. The "something more" that may lead a Tribunal to move beyond the difference in status and treatment need not be substantial – it may be derived from the factual context including inconsistent or dishonest explanations (see Base Childrenswear Ltd v Otshudi 2019 EWCA Civ 1648 CA; Veolia Environmental Services UK v Gumbs EAT 0487/12.

4.87. The presence of discrimination is almost always a matter of inference rather than direct proof – even after the change in the burden of proof, it is still for a claimant to establish matters from which the presence of discrimination could be inferred, before any burden passes to his or her employer.

4.88. In drawing inferences, an uncritical belief in credibility is insufficient' as Sedley LJ pointed out in Anya v University of Oxford 2001 IRLR 377 CA (paragraph 25) it may be very difficult to say whether a witness is telling the truth or not. Where there is a conflict of evidence, reference to the objective facts and documents, to the likely motives of a witness and the overall probabilities can give a court very great assistance in ascertaining the truth.

4.89. In Talbot v Costain Oil, Gas and Process Ltd and ors 2017 ICR D11, EAT, His Honour Judge Shanks — having looked at the relevant authorities — summarised the following principles for employment tribunals to consider when deciding what inferences of discrimination may be drawn:

- it is very unusual to find direct evidence of discrimination
- normally an employment tribunal's decision will depend on what inference it is proper to draw from all the relevant surrounding circumstances, which will often include conduct by the alleged discriminator before and after the unfavourable treatment in question
- it is essential that the tribunal makes findings about any 'primary facts' that are in issue so that it can take them into account as part of the relevant circumstances
- the tribunal's assessment of the parties and their witnesses when they give evidence forms an important part of the process of inference
- assessing the evidence of the alleged discriminator when giving an explanation for any treatment involves an assessment not only of credibility but also of reliability, and involves testing the evidence by reference to objective facts and documents, possible motives and the overall probabilities
- where there are a number of allegations of discrimination involving one person, conclusions about that person are obviously going to be relevant in relation to all the allegations
- the tribunal must have regard to the totality of the relevant circumstances and give proper consideration to factors that point towards discrimination in deciding what inference to draw in relation to any particular unfavourable treatment
- if it is necessary to resort to the burden of proof in this context, S.136 EA 2010 provides, in effect, that where it would be proper to draw an inference of discrimination in the absence of 'any other explanation', the burden lies on the alleged discriminator to prove there was no discrimination.

4.90. Unreasonable conduct or poor management does not of itself point to discrimination. There must be indications from the evidence that point to the unreasonable conduct relating to the prohibited ground (Laing v Manchester City Council and anor 2006 ICR 1519, EAT).

4.91. In Glasgow City Council v Zafar 1998 ICR 120, HL, Lord Browne-Wilkinson considered that 'the conduct of a hypothetical reasonable employer is irrelevant. The alleged discriminator may or may not be a reasonable employer. If he is not a reasonable employer he might well have treated another employee in just the same unsatisfactory way as he treated the complainant, in which case he would not have treated the complainant "less favourably".' His Lordship also approved the words of Lord Morison, who delivered the judgment of the Court of Session, that 'it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee, that he would have acted reasonably if he had been dealing with another in the same circumstances'.

4.92. Equally, it cannot be simply inferred that the fact that an employer has acted unreasonably towards one employee means it would have acted the same way towards others. A failure to explain unreasonable conduct by the employer can support an inference of discrimination. If an employer acts in a wholly unreasonable way, it may be inferred that the explanation offered is not the true or full explanation (Rice v McEvoy 2011 NICA 9 NICA). In all cases, the drawing of inferences involves careful consideration of the surrounding facts:.

"Facts will frequently explain, at least in part, why someone has acted as they have" (Elias P in Laing (above).

4.93. However,

'Merely because a tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean the treatment is discriminatory, since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristic.' Simler P, Chief Constable of Kent Constabulary v Bowler EAT 0214/16

4.94. As stated by the House of Lords in Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL, an unjustified sense of grievance does not point to less favourable treatment.

4.95. Where a case consists of several allegations, the Tribunal must consider each separately to determine whether less favourable treatment occurred by comparison with others, so as to shift the burden of proof, rather than taking a broad-brush approach in respect of all the allegations (Essex County Council v Jarrett EAT 0045/15).

Time Limits

4.96. Section 123 of the EA 2010 sets out the period within which proceedings are to be brought.

4.97. Proceedings on a complaint within section 120 may not be brought after the end of:

(a) the period of 3 months starting with the date of the act to which the complaint relates or

b) such other period as the employment tribunal thinks just and equitable.

That means that a claim must be presented before the end of the three-month period beginning when the act complained of was done.

4.98. By section 123(3),

" For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

4.99. By section 123(4)

"In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

4.100. In Hendricks v Metropolitan Police Commissioner [2002) EWCA Civ 1686, in particular paragraphs 51 and 52, continuing acts are explored, concluding simply,

> "The question is whether there is an act extending over a period as distinct from a succession of unconnected or isolated specific acts for which time would begin to run from the date when each specific act was committed."

4.101. The question is whether the employer is responsible for "an ongoing situation or continuing state of affairs" in which the members of the defined group are treated less favourably. It is wrong to pay close attention to words such as 'policy', 'rule', 'practice', 'scheme' or 'regime', as these are but examples of when an act extends over a period.

4.102. In Hale v Brighton and Sussex University Hospitals NHS Trust (EAT 0342/16), it was held that a decision to commence a disciplinary investigation was not to be treated as a one off act where it led to disciplinary procedures and ultimately dismissal. A relevant but not conclusive factor is whether the same or different individuals were involved in the incidents.

4.103. However, citing Hendricks, Choudhary P in South Western Ambulance NHS Foundation Trust v King [2020] IRLR 168 warned '… that reliance cannot be placed on some floating or overarching discriminatory state of affairs without that state of affairs being anchored by specific acts of discrimination occurring over time. The claimant must still establish constituent acts of discrimination or instances of less favourable treatment that evidence that discriminatory state of affairs.' (at [36])

4.104. The time limits for bringing claims are extended by section 140B of the Equality Act to facilitate conciliation before the institution of proceedings.

4.105. Section 140B sets out that extension, as follows.

> "In this section—
>
> (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and
>
> (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.
>
> (3) In working out when the time limit set by section 123(1)(a) or 129(3) or (4) expires the period beginning with the day after Day A and ending with Day B is not to be counted.
>
> (4) If the time limit set by section 123(1)(a) or 129(3) or (4) would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

4.106. The day on which the claimant complies with the requirement to provide information to ACAS is ("Day A"). The period between the day after Day A and ending with the day on which the claimant receives or is treated as having received the conciliation officer's certificate ("Day B") is not counted in computing time for the purposes of time limits.

4.107. Once early conciliation has ended, the claimant has at least one calendar month to present the claim. "One month" means on the 'corresponding date' so where day B is 30 June, the time limit will expire on 30 July (Tanveer v East London Bus & Coach Co Ltd [2016].

4.108. If a time limit would otherwise expire during the period, beginning with Day A and ending one month after Day B, the time limit expires one month after Day B, on the corresponding day.

4.109. If the time limit would otherwise expire after the period of one month after day B, then time is extended by a period equivalent to the early conciliation period – that is, the period from the day after Day A and ending with Day B.

5. Reasons

The Hearing and Issues

5.1. The Tribunal took the first morning to read. In the Case Management Order of Employment Judge Cadney on 12 June 2020, an agreed list of issues had been directed to be produced to him by September, after the further and better particulars and amended response.

5.2. Unfortunately, the bundle supplied by the Respondent did not include the two later case management orders, including the most recent one of 11/05/21. In that Order, Regional Employment Judge Pirani had set out the issues. That list was based on the discussion at that hearing and a version of a list of issues that had not been agreed.

5.3. There was a list of issues in the bundle, but the panel were also sent an undated Amended list of Agreed issues and worked initially on the basis that that was the most recent one.

5.4. Having identified that Orders were missing, at the request of the Tribunal Mr Gidney forwarded the Order of 11/05/21, at which point it became clear that the two (or three) lists of issues then before the Tribunal were very different.

5.5. The Employment Judge went through the lists with the parties at 2.00 pm when the oral evidence was due to start. It then emerged that Mr Gidney had a different version of the Amended Agreed list of Issues from the one that Mr Howson and the panel were looking at, although Mr Howson agreed he had had both. The later version reflected that the indirect age discrimination claim had been withdrawn.

5.6. Working through the lists with the parties, it was agreed that the list of issues was primarily as drawn by Regional Employment Judge Pirani but with instances of the behaviour complained of in the later Amended Agreed list of issues.

5.7. Following those discussions, the Employment Judge produced a further version of the list, to reflect the discussions, and circulated to all parties for comment the following day. That is the list now set out.

5.8. That was something of a compromise, but it enabled a clear list of issues to be set out with minimum loss of time.

5.9. The justification defense in respect of indirect discrimination was clarified for the first time at this hearing.

5.10. The claim of indirect age discrimination was withdrawn and to be dismissed on withdrawal.

5.11. Neither representative at this hearing had been present at the last preliminary hearing. That does not explain the failure to include key documents in the bundle, that is, the Case Management Orders. No explanation has been offered as to the failure to provide the panel with an accurate and agreed list of issues.

Disclosure

5.12. Ms Smith tells us she takes notes of all meetings. We have seen only records of one meeting. We do not have the interview notes for 25/10/18 or any in respect of the interviews undertaken by Mr Winton or Mr Morris. We were not provided with the grievance or absence policy. We know the Respondents had access to the documents from the file of CP Plus. That will have included reference to Mrs Roberts' medical history and probably to the earlier adjustments given on her return to work after absence. Again, nothing has been disclosed.

5.13. There has been significant non-disclosure and little understanding from witnesses of the duty to disclose.

5.14. The minutes that we have seen, those of 13/11/18, were not disclosed to Mrs Roberts at the time and their accuracy has been successfully challenged.

Credibility

5.15. The Tribunal was faced with stark conflicts in the evidence. This is a case relatively light on documents – the Respondent has produced notes of only one meeting. The credibility of the witnesses in their oral evidence was central.

5.16. In respect of the evidence of Ms Smith and Mr Jenkins, we note the following,

5.17. Their witness statements were identical as to 8 paragraphs. This was not limited to setting the scene. It was as to the substantive evidence. Mr Jenkins attributed that to HR or Peninsula, who had taken his draft and reshaped it. Ms Smith said that had been done by Peninsula.

5.18. Mr Jenkins' witness statement set out that he had not attended the meeting on 25/10/18 with the claimant. His oral evidence was that he had. He also told us that at that meeting he had intended to make enquiries about her health and limitations, based on conversations he had had with Mr Gwynn. That contradicts his evidence in the witness statement. Whoever drafted it, Mr Jenkins confirmed the truth of the statement to us as consistent with his affirmation, having also confirmed that he had read it through.

5.19. He told us is that Mr Gwynn had been reluctant to provide information about Ms Roberts and her health. Mr Gwynn had mentioned,

> "Limitations as a result of being off sick, attendance wise."
> "Did you ask him what those were"
> "Yes, he felt uncomfortable, he would rather not discuss them and he as sure they would be on the TUPE pack."

5.20. That tells us that he had at the least constructive knowledge of Ms Roberts' difficulties, and his oral evidence is that intended to follow it up at that meeting.

5.21. Ms Smith opened her evidence by making corrections to her witness statement which coincided with the corrections made by Mr Jenkins to his while under cross-examination. It was put to her that that was why she was making the corrections – she had heard the previous evidence. She asserted that she had made those corrections earlier, and had sent them to Peninsula in a tracked changes document.

5.22. She repeated that evidence to the Employment Judge –

5.23.

> "Did you send the corrections you gave us to Mr Howson?"
> "Yes I did."
> "When?"
> "It would have been 3 or 4 June."
> "So there is an existence a different witness statement?"
> "I retyped it with tracked changes."

5.24. That document was directed to be produced. Her account was untrue. She had, as she said, sent in a revised statement the week before the hearing but it was the one provided to the Tribunal. It did not include the new corrections. She had told a direct lie in her opening evidence. She then persisted in it under further questioning.

5.25. Both were in difficulty over the contract they said they relied on as being Mrs Roberts'.

5.26. The contract in the bundle is incomplete (2 substantive pages, ending abruptly with no signature clauses) and describes the role as Area Manager. It includes terms about weekend working. Ms Roberts had not been asked to work weekends. She was a mobile supervisor, not an Area Manager. This was the only contract issued to her, it is incorrect and incomplete and she did not sign it.

5.27. In the meeting on 13/11/18, there is this note:

> JJ "Do you have a copy of your contract with you?"
> AR "No, in 11 years I have never worked a weekend"
> JJ "Your contract of employment does not state you can't work weekends. Your CP Plus contract, which transferred with you clearly states you can work weekends and it's important you understand that."
> JJ "Reviewed contract with AR and confirmed: -
>
> *"You will be required to work up to a maximum of 55 hours per week over any seven-day period and this may involve day, night and weekend working."*
>
> AR "Is that a new contract and one that I have signed?"
> JJ "Yes you have signed this, (shows Anne her signature)…"

5.28. The note was taken by Ms Smith, and she says it was contemporary. There is no signed contract in existence. They knew they did not have one. The document Mr Jenkins produced when asked what he had shown Mrs Roberts with her signature on, (something else not in the bundle) was a document confirming a pay increase dated 6/07/16. The contract purported to be one from 2007.

5.29. When first challenged on this by Mr Gidney, Mr Jenkins insisted,

> "I would have been provided a signed copy by HR before the meeting."

5.30. That was not true – hence the opening question to Mrs Roberts cited above.

5.31. He repeated that to the Tribunal on direct questioning before the lunch break,

> "We showed her an operative contract that she had signed with CP Plus that was not the area manager contract."
> "I can recall having a document that I showed her and she confirmed that that was her signature."

5.32. He was required to produce it. On the document itself being produced, there was this exchange between Mr Gidney and Mr Jenkins:

> "I understood you to say that you had a signed copy of the contract at pages 55 and 56"
> "Yes"
> "That is not the case. That is demonstrably incorrect"
> "In the sense of the letter, yes, but I was also referring to the paragraph that refers to Terms and Conditions so that is an implied contract …. "
> "At the time I genuinely believe that the signed letter was confirmation of the previous contract as well"

5.33. He was now relying on the acknowledgement of the pay rise being a reiteration or confirmation of the terms of the earlier contract.

5.34. Mr Jenkins is a contracts manager. He knows the difference between a signature confirming receipt of notification of a pay rise and a contract of employment. He had been caught misleading the Tribunal. He was in a hole and he went on digging.

5.35. Ms Smith was the author of the note of the meeting. The note itself would be evidence to anyone reading it later that a signed contract had been shown to Mrs Roberts. It is misleading.

5.36. She says it was Mr Jenkins who brought the documents to the meeting and it was Mr Jenkins who showed Mrs Roberts the contract, with the signed pay rise letter, as a pile of paper. She tried to distance herself.

5.37. She is an HR manager. She knew what the file contained and that it did not contain a signed contract.

5.38. Mrs Roberts was called back to give evidence on how she was shown the documents and it is her evidence that she was shown them on Ms Smith's laptop. By presenting it on the computer, she would not be able to check what they were showing her – that is, that they had put together two different documents.

5.39. Ms Smith is a participant in this deceit and culpable. She denies that the documents were on her laptop, but she wrote the note that would provide documentary evidence for the future that there was a signed contract in existence which required Mrs Roberts to work weekends. To a later reader, that would be sufficient evidence of such a contract, even if the "signed" copy could not be found. There was no such contract and both knew it.

5.40. Ms Smith and Mr Jenkins tried to trick Mrs Roberts into accepting that there was a contract that she had signed that authorised them to regard her as contractually bound to work weekends. They created a document that would be evidence in future that such a contract existed. That is a cheap and nasty trick and dishonest. They then tried to mislead the Tribunal.

5.41. There were other points on which we were unhappy with the honesty of the evidence that each of them gave, but we need do no more to illustrate how far they

had forfeited their credibility. We have no such concerns about the Claimant's evidence.

5.42. Mr Gidney's submissions are right this was the clearest possible example of frank dishonesty, both in the conduct towards the claimant and in the evidence to this Tribunal.

Findings on points of conflict

1. The contract

5.43. The only contract is the verbal contract entered into in 2007, when Mr Naylor and Mrs Roberts met at Fleet Service station. Monday to Friday, 6.00 am to 3.00 pm. There was no contractual agreement for weekend work.

5.44. Even leaving that aside, Mrs Roberts had a settled pattern of work, Mondays to Fridays, which it was to her substantial detriment to change because she cared for her grandchildren at weekends.

5.45. No written contract or statement of terms and conditions was ever issued.

2. The Transfer of Employment

5.46. This was a TUPE transfer. There is no dispute about that.

5.47. When Mrs Roberts' contract transferred, it did not include a provision that she could be required to work weekends. Furthermore, the transferee was not entitled to make a substantial change in her working conditions, to her material detriment.

5.48. The transfer was because APCOA got the contract with SWR. That contract was a contract for extended services to be provided, over and above what CP Plus had been contracted for. That included 7-day cover and include litter picking. They required staff to cover that contract.

5.49. That is what the initial Consultation letter said,

> "We are required to provide 7-day coverage across the estate."

5.50. It is what Mr Jenkins says at paragraph 14 of his witness statement,

> "We had tendered for the contract so as to provide seven days cover a week at various sites. …This inevitably meant sending employees to locations they hadn't previously been to and working weekends."

5.51. It is what Mrs Roberts was told at the meeting on 13/11/19,

> "This is a different contract and we are contractually obliged to provide 7-day cover. This means that the operational team need to work a 4-week rota which ensures that all the required visits are met. For APCOA to deliver this we require all mobile operatives to cover some weekends." (104)

5.52. All the changes they proposed derived from the new contract and the transfer.

3. The consultation

5.53. There was an introductory meeting on 13/09/18.

5.54. Staff were told in the letter of 26/10/18 that the meeting of 25/10/18 was the opening of a consultation and it explains the new contract terms that required working arrangements to change.

5.55. The approach to consultation was to secure the changes required. That explains the approach taken throughout, and by all managers from whom we heard – it was up to Mrs Roberts to ask for "mitigation" as to why she should not submit to the changes.

5.56. Ms Smith was aware of the TUPE provisions, as would be expected of an HR manager. She told us she knew about the material detriment provisions. She knew of the scope for compensation for employees dismissed because of the transfer, There was no open acknowledgment at the time that Mrs Roberts had arrangements that she was entitled to have respected.

5.57. This was a determined drive to secure the changes the company wanted regardless of Mrs Roberts' protected position.

5.58. That explains the bullying conduct of the meeting of 13/11/18. It explains the deceit over the contract – that could only be borne of determination to impose the changes sought. It explains Mr Jenkins' minuted comment at that meeting, "Is it appropriate for only 1 of the team not to do weekends?" (102). It explains why Mr Jenkins and Ms Smith attached no weight to Mrs Roberts' reasonable explanation that she cared for her grandchildren at the weekend.

5.59. It is also consistent with the comment that is the basis for the successful age discrimination claim, namely that Mrs Roberts was too old for the job and should resign and that she wouldn't get any redundancy money. We accept that such comment was made, twice and to Mr Gwynn as well as to Mrs Roberts and it speaks of a determination to introduce the changes required by the new contract without making any payments to employees who did not accept them.

5.60. The response to her Grievance letter takes the same approach as the company has taken throughout. Mrs Roberts is told she has not provided any additional information as to why she cannot work weekends. The starting point is not her settled pattern of work – whether contractual or not (111). The starting point is that things are changing. The early pressure on her to accept the changes is continued.

5.61. This was not a consultation exercise. There was no meaningful consultation. The approach implies a decision already made to impose the changes.

5.62. The timetable shows how illusory it was – phase one was to be introduced before the consultation finished by 5/11/18, stage two a fortnight later by 19/11/18.

4. The disability

Physical Health

5.63. Mrs Roberts has sciatica, sacroiliac joint dysfunction and spinal stenosis. Her disability is longstanding, with symptoms of pain in her back, hip and leg and numbness arising from compression of a spinal nerve root in her lower back. Surgery in 2012 did not relieve the symptoms. She suffers stiffness, with pain and difficulty walking, standing and sitting for any prolonged time, and with reduced capacity to walk other than short distances, She is a blue badge holder.

5.64. The physical disability is well-established.

Knowledge of disability – physical health

5.65. Mr Gwynn had been Mrs Roberts manager throughout and knew her difficulties well. He knew of her surgery, her gradual return to work with continuing symptoms, the issue of the blue badge in 2015 and the continuing mobility difficulties.

5.66. Constructive knowledge is also established in that Mr Jenkins knew from Mr Gwynn that she had limitations related to sickness. He tells us he did not enquire, intended to, but did not. He is fixed with the consequence. He was on notice of the need to enquire.

5.67. Ms Smith had access to the HR file from the previous company, CP Plus. We know that it included details of her health and absences because Mrs Roberts herself was sent a link to it from the previous employer. There can be no doubt that Ms Smith had the same access. Ms Smith must have explored that file to find the documents out of which the "signed contract" was created. Ms Smith had actual knowledge of the history on the file.

5.68. We find it surprising that neither Mr Jenkins nor Ms Smith, who both met Mrs Roberts, apparently saw anything suggesting limited walking capacity. Mr Jenkins' reluctance to acknowledge the nature of the qualification for a blue badge to us, of which he had the usual general knowledge, puts his denial that he saw anything wrong in some context.

5.69. Mrs Roberts did not complain of her disability. It is said against her that she accepted the new demands of the role, saying "

"I have done everything you have asked me to do."

5.70. That might suggest that she was not as disabled as now claimed.

5.71. We accept that she did not do the litter picking. She physically could not do it and did not.

5.72. We accept too that when she was given details of her extended station inspections, the litter picking and the requirement to cover for those who were absent, that she rang Mr Gwynn and told him that she could not do it.

5.73. She then, in her letter of 4/11/18, expressed herself willing to undertake extended duties, including litter picking, so long as she could avoid having to work at weekends. We accept Mr Gidney's submission on that. It reflects our own assessment. What mattered to her was her ability to care for and support her grandchildren in the arrangement she had that was for personal reasons necessary for them. She did not prioritise her own pain and disability. She played it down, in order to keep her clear weekends.

5.74. That does not mean that she was not disabled or that the Respondents did not know of it or could disregard it.

Mental health

5.75. Mrs Roberts was signed off work from November 2018,

5.76. She has been prescribed anti-depressant medication since November 2018, when she was first signed off, the sick notes referring to "stress following trauma at work", "stress", "anxiety," "depression". She was never able to return to work.

5.77. She had started to suffer stress, depression and anxiety. As a result, she suffered panic attacks, has difficulty concentrating, nausea, difficulty with sleeping, early-morning wakefulness and fatigue, with reduced energy.

5.78. Her symptoms reduced from May 2019 but returned in connection with the preparation of the employment claim.

5.79. The Respondent was well aware of her mental health impairment from when she started submitting sickness certificates.

5.80. The company's demand that she comply with the terms of the contract they falsely claimed to have in place, their insistence that she justify not changing the basis on which she worked and the bullying and intimidatory conduct of the meeting of 13/11 led to Mrs Roberts being off sick. She was stressed at the thought of weekend working. She was stressed by the added difficulty of coping with her disability with the significant increase in activity demanded of her. The meeting itself was traumatic. We accept her evidence that she left that meeting four times, in distress, and vomited, needing support to walk to the car, after it.

5.81. That her distress is not minuted, and the company's representatives deny being aware of it at the time hardly helps them in the light of their dishonest conduct elsewhere.

5.82. The company had the benefit of Mrs Davies account immediately after that meeting, which disclosed that that meeting had gone very badly wrong and that the conduct of Mr Jenkins and Ms Smith was at fault.

5.83. Matters were then compounded by the failure to investigate that properly or to address the grievance or appeal in any way that allowed Mrs Roberts to participate.

5 The Grievance and the Appeal

5.84. The "grievance" was actually a third party complaint. It was treated it as a grievance without consulting Mrs Roberts as to her wishes. Mr Winton wrote a peremptory instruction to attend a meeting about it, with one day's notice, while she was off sick. That was unreasonable in itself.

5.85. Mr Winton should have started by asking her how she wished the matter dealt with, sending her a copy of the letter.

5.86. He should have then followed a fair process, including considering adjustments given that she was off sick. When able to proceed, whether by meeting, telephone or in writing, he should have obtained her own account. That had to be part of any fair investigation. He should have spoken to Mrs Davies, particularly since he rejects her account of what she saw. He should have interviewed the staff members complained about, keeping notes of that interview. Those notes should have been sent to Mrs Roberts for her comments: that is, the investigation of the complaint which should have been disclosed to her. The essentials of a fair and transparent process were not followed. And, it was conducted with a lack of courtesy or fairness.

5.87. The outcome was then bizarre. Mr Winton blames Mrs Roberts for failing to attend, disregarding her sickness and her request for matters to be dealt with in writing. With regard to starting the meeting late, he concludes that it started early. He blames a typing error – there was no typing error, there was a mistake by Mr Jenkins and Ms Smith as to the start time. He says there was an apology, though there is no reference to one in the minutes. There is no apology in the letter. With regard to the bullying, he does not mention the allegations and dismisses them, pointing out instead that Mrs Roberts has not provide detailed answers to why her child care arrangements were necessary. With regard to health and safety, he relies on the fact that the location was changed – so Mrs Roberts was only asked to drive 60 miles to it - and again fails to mention the basis of the complaint, that is, that she faced a long drive home alone, when badly affected by the conduct of the meeting.

5.88. It is not the outcome of a fair and transparent process. It is an unquestioning defence of Mr Jenkins and Ms Smith and a rebuff.

5.89. Mr Winton's approach under cross-examination was to the effect that if his process was flawed, it did not matter because Mrs Roberts had the right of appeal. That is neither fair nor professional.

5.90. Mrs Roberts resigned because of the breaches of contract she outlines on page 116, incorporated by reference into the resignation letter on page 121 together with the harassment of phone calls from colleagues, which were not welfare calls.

5.91. She then suffered the continued discrimination from Mr Morris in failing to conduct a fair appeal process. He said he would wait until she was well enough to address matters, but then moved to reach a decision without hearing from her, without inviting her evidence or giving a time-scale within which it must be submitted. He did not disclose the documents or the content of his telephone interviews on the basis of which he reached his judgment. The company had still not established that she wished to adopt the complaint as a grievance or invited her comments, interviewed Mrs Davies or enabled Mrs Roberts to participate in the process.

Findings and Conclusions on Issues

Disability and knowledge

5.92. There can be no doubt that Mrs Roberts has a long-term physical disability and the Respondent did eventually accept that. The central issue here is whether Mrs Roberts had a mental disability at the relevant dates.

5.93. The question is at what point does the mental impairment count as a disability. It was a new condition in November 2018.

5.94. We have to assess disability at the time, not with hindsight. The issue is as at what point could it be said to be likely to last 12 months. That is an objective assessment based on what could have been known at that time.

5.95. The Respondent may have been put on enquiry before that could have been known but cannot be guilty of discrimination before there is a disability.

5.96. We remind ourselves that the initial sick note is for 'stress after trauma at work' [106]. Additional sick notes, all citing stress, anxiety or depression followed monthly.

5.97. This was a new condition in November 2018. It had a significant start, it is fair to say, severe: it is not every employee who is leaves a work meeting needing support in walking and vomiting from distress. Many people suffer stress at work. It is not every GP sickness certificate that specifically identifies trauma at work in recording stress.

5.98. By the end of the period, by the time of her resignation on 6 April 2019, it was clear that that disability was likely to last twelve months, in the sense that after five months of inability to return to work, a period of significant symptoms, with a severe start, it "could well happen" that the symptoms would last twelve months; that was indeed by then likely.

5.99. Was Mrs Roberts disabled within the definition earlier than that?

5.100. We find that she was. By the time there had been three medical certificates, it was reasonably foreseeable that she might be suffering a long-term mental health condition and the Respondent were on notice of that and under an obligation to take it into account.

5.101. That is because although the sickness absence arose from November, the Respondent was on notice of a heightened vulnerability to stress from 25/10/18.

That was the meeting which Mr Jenkins terminated early and without asking about her health because of the level of her distress. Certainly, at the meeting of 13/11, and contrary to their denials, Mr Jenkins and Ms Smith must have known that she was deeply distressed. Mrs Davies letter is very clear,

> "She was struggling to walk as she felt faint and vomited twice prior to leaving. Anne did state to both Jay and Chelsey that the pressure and stress they were subjecting her to was making her feel ill… "

5.102. Mrs Roberts' letter to Mr Winton on 17/12/18 setting out why she could not come to a meeting is graphic in the account of the health difficulties she has,

> "I have sleepless nights. I am stressed and as a result I am suffering with acute anxiety…
> Since my illness I have found myself anxious about going to meet with people and I cannot always get my words out, often tripping over my sentences and I end up feeling humiliated and embarrassed. I used to be very confident and have now developed a complex since the harassment and bullying at work." (110)

5.103. On 28/12/18, in her grievance, Mrs Roberts is again explaining sleeplessness arising from the issues she had faced at work, acute anxiety and depression. On 31/12/18, she again mentions the exacerbation of her condition (118).

5.104. By January, she was on her third sick certificate and again it was issued for a month. The GP was not seeing this as a condition likely to quickly improve. Her absence was regarded as long-term under their policy.

5.105. Nothing in the situation at work that had provoked her illness had changed. The Respondent had had the Grievance appeal by then, with its fuller explanation of the circumstances surrounding the necessity for her to provide child care at weekends. It had not led to any review of their approach.

5.106. We therefore find that at least by February 2019, Mrs Roberts's condition was likely to last twelve months. Given that history and given that Mr Jenkins and Ms Smith had seen for themselves how distressed she was on 13/11/18 and that she was off work sick almost immediately afterwards, together with the later detailed information she and Mrs Davies had sent in, the Respondent was on notice of that and that, for example, the duty to make reasonable adjustments for her had arisen.

Constructive Unfair Dismissal

5.107. We refer to the list of issues without setting them out again here.

5.108. Mrs Roberts had an express contract of employment which did not include working weekends. The Respondent conducted themselves on the basis that she was contracted to work weekends without evidence. Mr Jenkins and Ms Smith tried to cheat her into believing that there was a contract for weekend work, when there wasn't, and in so doing to create evidence of such a contract. There can be few more serious breaches of the implied term of trust and confidence

5.109. Contrary to the provisions of TUPE, they proposed to change her working pattern to her detriment and worked throughout on the basis that she had to show "mitigation", that being the word used by all staff from whom we heard.

5.110. We attach no weight to the suggestion that since no decision had been given, they had not actually subjected her to that detriment. That was clearly the direction of

travel and in our assessment, that decision had been made. That is clear from three things in particular: Mr Jenkins knew of her disability and did not acknowledge it, enquire into it nor make or consider adjustments. When at the meeting of 13/11/18, Mrs Roberts explained her legitimate wish to continue the care of her grandchildren at the weekend, that was rejected as something they could not take into consideration unless she provided further evidence, going so far as to ask whether there was social service involvement (102). When the terms of her grievance were seen, none of the officers involved reconsidered the question of weekend working – she had provided the fuller context for her child care, but it was disregarded.

5.111. The consultation allowed little time before the full range of changes was to be introduced, by 19/11/19. The destination was already settled.

5.112. The meeting of 13/11/18 was conducted in a way that can only be seen as bullying.

5.113. We accept her account of the conduct of that meeting. It started with the late arrival of the two more senior members of staff, and Mr Jenkins' admitted attempt to make her think she was the one who got the time wrong. We accept her account and that of Mrs Davies in the complaint email of the distress that meeting caused her. No reasonable employer would conduct a consultation meeting – any meeting - in such a way that the employee had to take frequent breaks and was left feeling faint and vomiting afterwards.

5.114. It was clearly intrusive and unsympathetic. Ms Smith has noted her own question as to whether social services were involved. Mrs Roberts simply wished as a grandmother to keep to a settled arrangement for the care of her grandchildren. The question is disturbing. Again, it reflects the vigour and determination with which the Respondent's officers were pushing through the desired changes.

5.115. The Respondent failed to handle the grievance in any way that was fair or transparent. There was no proper investigation. She was not able tp contribute. Her illness prevented her from attending a meeting but did not prevent her from commenting, but no comment was invited, nor was she given a time-scale for providing comment.

5.116. The grievance outcome discounted the evidence of Mrs Davies, discounted Mrs Roberts' illness by ignoring her request for a process in writing, saying she had failed to attend and criticises her for her responses during the meeting of 13/10/18. The allegations were not properly investigated or addressed.

5.117. Her December 2018 grievance was never dealt with at all.

5.118. From January to April, while she was off sick, rather than welfare calls from her line manager, she had phone calls from colleagues on her personal asking when she was coming back, that they told her they were told to make. She found that distressing. She felt pressured to return to work but did not feel she could face it. She tells us, "If the telephone rang, I felt sick, thinking it would be the Respondent". That is the harassment she refers to

5.119. There was no formal outcome to the consultation after the meeting of 13/11/18, which Mr Winton had promised would follow shortly after his letter of 24/12/18. Mrs Roberts never heard anything more about it.

5.120. Mrs Roberts had little hope or expectation that the Respondent would not require a significant change to her working pattern or contract. Nothing in the conduct of the Respondent since the start of the October consultation indicated a willingness to respect her settled arrangements or to accommodate her disability. The conduct over the "contract" at the meeting of 13/11/18 amply demonstrates that. She had already been required to take on substantial additional duties without reasonable adjustments for her known physical disability. The Respondent's starting position

was that those changes were required unless substantial "mitigation" could be shown, without accepting her reasons as sufficient.

5.121. An anticipatory breach is capable of amounting to the breach of trust and confidence that justifies resignation in a constructive dismissal. There was a clear intention here to breach her contract terms.

5.122. Those matters alone justified her resignation and we accept Mr Gidney's submission that she was entitled to resign in reliance on regulation 4(9) of TUPE.

5.123. It was the final harassment, with the long silence on the outcome of the consultation, which led her to resign when she did.

5.124. That history shows that the Respondent repeatedly breached the implied term of trust and confidence. The harassment during her period off sick was the culmination of a series of incidents which justify the resignation. Mrs Roberts left for that reason. There was no affirmation.

5.125. This was an unfair constructive dismissal.

5.126. The claim was lodged in time.

Harassment related to Age

5.127. The issue here is about the meeting of 25/10/18. There are no notes produced. Mrs Roberts has said throughout that at this meeting, Ms Smith made a comment about her retiring, "She said I was too old and should retire and that I would not receive any redundancy money from the Respondent." Mrs Roberts tells us that that comment was repeated at the meeting on 13/11/18. When challenged on it in cross-examination, she said

> "She did say it. Because on 25/10 Mr Gwynn came into the car park where all my colleagues was and he said about it , and it made me very upset. He told me, he said you were told you were too old and you should retire and you would not get any redundancy from APCOA."

5.128. Unfortunately, that remark is, as referred to above, entirely consistent with a drive to secure the contract and working pattern changes without anyone leaving and making claims against the company. We are clear that that was the intention behind the approach taken to this consultation. That approach too is consistent with a reluctance to keep an older worker with health difficulties. That makes it more likely that this was said.

5.129. Ms Smith denies it. We have no faith in her honesty. Mrs Roberts is wholly consistent in her account.

5.130. We accept that the remark was made, it was made on the grounds of Mrs Robert's age. It was shocking and hurtful.

5.131. It was unwanted conduct related to the relevant protected characteristic of age.

5.132. It had the effect of violating Mrs Robert's dignity and of creating an intimidating, hostile degrading and humiliating environment for her. It belittled her, made her feel unvalued and worthless, degraded and humiliated. It was reasonable for it to have that effect.

5.133. It was also direct discrimination in that it was less favourable treatment than a younger hypothetical comparator, not in Mrs Robert's age group, would have received. Justification is not pleaded.

5.134. We find harassment because detriment does not include conduct that amounts to harassment although the claim could otherwise also have succeeded on the grounds of direct discrimination.

5.135. The claim is made late. Time limits are considered below.

Indirect Disability discrimination

5.136. These are the proposed PCPs:

Requiring employees to work across an increased operational area;

d. Locating meetings at various different places across said operational area;
e. Increase the number of additional unscheduled jobs in the operational area;
f. Changed the job description and or duties;
Changed the working hours and days;

5.137. We accept that those were PCPs that the Respondent had in place. Specifically, they were requiring their mobile supervisors to work across an increased area and to undertake additional unscheduled duties. They required 7-day working when the previous arrangements had been Monday to Friday. Meetings were held across the area.

5.138. The most recent Amended Agreed List of Issues includes two other complaints, which are added here by way of illustration of the above:

(iii) Requiring employees to carry out litter picking at the carparks
(iv) Requiring meetings to take place face-to-face

5.139. The extra duties required included litter picking. They also included additional customer service duties and cover for colleagues who were absent.

5.140. The PCPs were applied to Mrs Roberts and more widely to the mobile supervisors generally. They had been introduced while the consultation over the weekend working was ongoing.

5.141. Mrs Roberts is physically disabled. Her difficulties include back pain, stiffness, difficulty with walking, standing or sitting particularly on a prolonged basis, and carrying.

5.142. We have to consider whether there a group of people who share those characteristics with the Claimant by reason of similar disabilities. We accept the submission made by Mr Gidney that the group is fairly identified as those with similar physical impairments imposing such restrictions. That is a recognisable group, given how common back pain and restriction is, albeit that Mrs Roberts is more severely affected than many people.

5.143. The disadvantage pleaded includes the difficulties of extended travel with associated pain, the difficulty of taking the breaks and of pacing herself in order to manage her condition faced with an extended workload, prolonging her driving, causing pain and stiffness, and the difficulty of litter picking given the impact on her pain both of carrying and of undertaking extra walking and stairs.

5.144. Those are accepted, well supported by the evidence. She has explained cogently how those things affected her pain and that some were beyond her to do.

5.145. That also describes the group disadvantage: those with a similar physical impairment and associated pain and stiffness would suffer the same disadvantages.

5.146. Justification was clarified for the first time at the hearing and amounted to no more than that that the changes were necessary to comply with the tendering contract.

5.147. The Respondent had a legitimate contractual aim, to meet the terms of the SWR contract. That aim does not require them to change the contractual terms of their

staff or impose a substantial and detrimental change to their working conditions without consent. The Respondent has not adduced evidence to show that the means chosen were necessary to accomplish that objective and it is self-evident that other means were available, employing more staff and varying rotas, for example. Justification cannot be based on simply on a preference for arrangements that breach the rights that TUPE provisions protect.

5.148. In respect of the requirement that staff attend meetings face-to-face, we accept that was their practice. The impact is rightly pleaded as being to disadvantage those with mental health impairments. This aspect was not however pursued by Mr Gidney in submissions but considered more fully in relation to reasonable adjustments, and we take the same course.

Reasonable Adjustments

5.149. Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

5.150. The Respondent was well aware of the physical disability, through the history, through Mr Gwynn who was, and still is, working for them, from Mr Jenkins who knew from Mr Gwynn and from Ms Smith who, we find, knew from the file. She had managed the job hitherto in spite of marked disability with the help of her line manager who recognised that she needed regular breaks.

5.151. By February 2019, the Respondent were well aware of the mental impairment and on notice, for the reasons given, that it was long-term and by then likely to last 12 months.

5.152. A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs: in relation to physical impairments:

g. Requiring employees to work across an increased operational area;
h. Locating meetings at various different places across said operational area;
i. Increasing the number of additional unscheduled jobs in the operational area.

5.153. These were all provisions that the Respondent was applying. Mobile supervisors were having their field of work, the number of stations they covered, extended, involving additional travel; meetings were held across the operational area, imposing a requirement for additional travel and sometimes long journeys; a series of unscheduled jobs including litter picking, cover for absent colleagues and customer services and ticketing functions had been added to the roles.

5.154. Did the Respondent have the following PCPs in relation to mental impairments,

a. Requiring employees to attend meetings at short notice.
b. requiring employees to attend meetings in person (rather than in writing)

5.155. The Respondent did have those PCPs. The Respondent had a practice of requiring employees to attend meetings in person. Both Mr Winton and Mr Morris expected that. Mr Winton regarded her inability to attend as a failure to attend and Mr Morris was clear that he expected her to attend. It was on the basis that Mrs Roberts did not attend in person that both the grievance based on Mrs Davies letter and the appeal were dismissed without her being able to comment or participate.

5.156. The Respondent's policy required meetings at short notice. They are to be held "as soon as possible" with scope to vary only to within five days.

5.157. Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that the claimant had difficulties making long

journeys or litter picking due to her physical disabilities and coping with meetings at short notice or in person due to her mental disabilities?

5.158. Those things are established. Mrs Roberts had difficulty in prolonged sitting and driving, was often stiff and in pain after long journeys. She was not able to litter pick, carrying the bags, dealing with any attendant bending, or walking around carparks and up and down stairs doing that additional duty on top of the regular duties of a mobile supervisor. On many fronts, she was being faced with an extended workload, meaning more work, more taxing work and necessarily fewer breaks to enable her to cope. Both her physical and mental health made it difficult for her to attend in person and her mental health in particular made it difficult for her to attend at short notice.

5.159. What steps (the 'adjustments') could have been taken to avoid the disadvantage? For the Claimant, it is suggested that these were appropriate,

a. To allow the Claimant to take regular breaks from driving as needed;
b. To provide additional cover if the Claimant was unable to complete all the stations she was allocated on a said shift.
c. Providing meetings closer to the Claimant's home location.
j. Providing alternative cover for absent staff
k. Allowing a longer period of notice of meetings
l. Authorising a written process instead of the requirement to attend, for example, grievance and appeal hearings in person.

5.160. All those would have been appropriate steps, steps that would have been readily possible to provide, practicable and relatively low cost, with, in some cases, no additional cost. There was a history of the previous company allowing Mrs Roberts to take things at her own pace, with reasonable breaks and with satisfactory and reliable performance. Even with some additional workload projected, therefore, the costs of allowing her to pace herself would not have been substantial. There was the flexibility to provide additional cover and make adjustments, in that the Respondent was recruiting additional staff, as Mrs Roberts pointed out in her appeal. Adjustments could have been made to the rota to accommodate her limitations.

5.161. It was unreasonable to insist on short notice of meetings for someone with her mental and physical disabilities and no loss to the Respondent by giving more notice. Mr Morris in particular, dealing with her grievance appeal in April after an absence for nearly six months should have addressed specifically what adjustments might enable her to contribute to and participate in the appeal.

5.162. Did the Respondent fail to take those steps?

5.163. No adjustments were made.

5.164. In our judgment, the duty to make reasonable adjustments had arisen; the adjustments considered here were reasonable options. The Respondent failed to make reasonable adjustments.

1. Time Limits

5.165. There is no time limit issue over resignation and constructive dismissal.

5.166. The claim of harassment related to age is based on a comment first made on 25/10/18. Although we accept that it was repeated in November 2018, that is the only pleaded claim.

5.167. The claim was made on 5/07/19 and the ACAS dates are both the same day.

5.168. That claim is made late.

5.169. At the time of both comments, Mrs Roberts was in a very vulnerable position. She was prioritising the care of her grandchildren, seeking to retain her working pattern, weekdays only, even over her disability, as seen above. This was not a time when she could raise a challenge the HR manager who was to be party to the decision about her future.

5.170. By the time the time limit for bringing this claim was close to expiry, Mrs Roberts was off sick, struggling mentally and emotionally. She remained anxious about the outcome of the consultation that would govern her future working pattern and still dependent on the decisions of the manager who had made that remark. She was aware that there was a quality of ruthlessness in the way the Respondent's officers were approaching decision-making.

5.171. In all the circumstances, it is just and equitable to extend time for her to bring the age discrimination claim.

5.172. The question then arises as to when time starts to run in respect of the indirect discrimination claim and the reasonable adjustments claims.

5.173. Staff were told of the weekend working and extended duties between September and October 2018.

5.174. Full details of the changes in duties are not given in any documents we have seen. Mr Jenkins' email of 26/10/18 does not cover them.

5.175. Mrs Roberts was told by Mr Gwynn of the extended station visits in email 28/10/18 (95), the one where he says, "Bash through these"

5.176. She says herself that she is doing the litter picking in her letter of 4/11/18 (99), so she was well aware of the requirement by then.

5.177. We conclude that the change in duties was imposed on staff in October.

5.178. There was a failure to offer reasonable adjustments at the one-to-one meeting of 26/10/18 and the issue of the increased rota on 28/10/18, and again from the meeting of 13/11/18. There had been recognition by Mr Gwynn of the need for Mrs Roberts to pace herself with breaks. Mr Jenkins and Ms Smith were aware of the physical disability, made no enquiry and did not consider adjustments.

5.179. On that basis, the time for bringing a claim expired in January or February.

5.180. Mrs Roberts was ill from mid-November. She was vulnerable and struggling emotionally.

5.181. The bullying conduct of the meeting on 13/11/18 had triggered her long period off sick, with no previous history of mental health problems affecting her work.

5.182. She was balancing the need to manage her own physical disability against the needs of her grandchildren, in a way that she should not have had to do. That limited her ability to challenge the changes imposed.

5.183. She went on pressing for the outcome of the consultation. Given that, she would not have been aware that time might have started to run against her.

5.184. There is however little room for doubt that the decision had been made not to explore or offer any adjustments or to respect either her actual contract or her working pattern.

5.185. In our judgment, it is just and equitable to extend time.

5.186. Viewed another way, given this history of deceit and bullying and her attendant illness, it would not be just and equitable not to extend time.

Conclusion

5.187. The Claimant's claims in respect of constructive unfair dismissal, failure to make reasonable adjustments for disability, indirect disability discrimination and harassment related to age succeed.

5.188. The remaining harassment claims were not dealt with, given Mr Gidney's indication that they may be withdrawn.

Employment Judge Street
Date: 16 July 2021

Reasons sent to the Parties: 20 July 2021

FOR THE TRIBUNAL OFFICE