EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Numbers: 4105098/2020; 4105099/2020; 4105100/2020; 4105101; 4105102/2020; 4105103/2020; 4105104/2020; 4105105/2020; 4105106/2020; 4105108/2020; 4105109/2020; 4105110/2020 and 4105111/2019

(Multiple Nos 9530 and 9531 As per attached Schedule)

Hearing held in Glasgow on 12, 13-16 July 2021

Deliberations 22 and 23 July and 11 August 2021

Employment Judge: D Hoey
Tribunal member: N Bakshi
Tribunal member: N Elliot

Mr M Cowie

Mr J Murphy

Mr D Gray

Mr M Cahill

Mr P O'Hare

Mr D Harkins

Mr H Young

Ms S Hodge

Ms L Campbell

Ms M Kirkland

Ms M Cassidy

Ms K A McCrone

Claimants
Represented by:
Mr McHugh (Counsel)
Instructed by Messrs Thompsons

Scottish Fire and Rescue Service **Respondent**
Represented by:
Ms MacSporran
(Solicitor)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Employment Tribunal is:

1. The claim in respect of the claimants who raised a claim under section 15 of the Equality Act 2010 (namely Mr M Cowie, Mr J Murphy, Mr D Gray, Mr M Cahill, Mr P O'Hare, Mr D Harkins, Mr L H Young and Ms S Hodge) is upheld and the Tribunal declares that there was unfavourable treatment (removal of choice and flexibility with regard to TOIL and accrued leave) because of something arising in consequence of a disability which was not objectively justified.

2. From the information before the Tribunal we did not consider it just or equitable to award any compensation to any of the claimants.

3. The claim in respect of indirect sex discrimination is ill founded and is dismissed.

REASONS

1. This case involves 2 sets of claims: a group claiming a breach of section 15 of the Equality Act 2010 and a separate group of claimants alleging breach of section 19 of the Equality Act 2010. Both claims stem from the same situation and action of the respondent which was why at previous case management preliminary hearings the claims had been conjoined.

2. The hearing was conducted remotely via Cloud Video Platform (CVP) with the claimants' agent and the respondent's agent attending the entire hearing, with witnesses attending as necessary, all being able to contribute to the hearing fairly. Breaks were taken during the evidence to ensure the parties were able to put all relevant questions to the witnesses. The Tribunal was satisfied that

the hearing had been conducted in a fair and appropriate manner, with the practice direction on remote hearings being followed, such that a decision could be made on the basis of the evidence led.

Case management

3. The original first day of the hearing had been converted into a case management preliminary hearing for various reasons and the case did not start properly until day 2 of the original hearing.

4. We agreed the relevant productions, some of which had been revised from the original bundle. We also agreed a timetable for the hearing of evidence and the parties worked together to assist the Tribunal in achieving the overriding objective, in dealing with matters justly and fairly taking account of the issues, cost and proportionality.

5. A statement of agreed facts and a list of issues were produced which assisted the Tribunal and the parties in focussing the issues in this case.

Issues to be determined

6. The issues to be determined are as follows (which is based on the agreed list and which has been revised to reflect the specific requirements of the legislation).

Time limits

7. The respondent argues that the claims are out of time on the basis that the decision to utilise the special leave policy in cases such as those which are the subject of the claims was made in March 2020, and this is the act which is in issue.

8. The respondent also argues that any act which occurred prior to 15th April 2020 is time barred and therefore the individual claims are time barred where the act complained of occurred prior to that date.

9. Have the claimants brought their claims in time?

10. If not, is it just and equitable for the Tribunal to extend time in accordance with section 123 Equality Act 2010?

Disability discrimination grouped claim

11. It is common ground between the parties that the claimants in this claim were at all material times disabled persons for the purposes of section 6 Equality Act 2010.

Unfavourable treatment because of something arising in consequence of a disability (section 15 Equality Act 2010)

12. Have the claimants been subjected to unfavourable treatment by the respondent? The claimants rely on the following as unfavourable treatment:

    i. Having to use their accrued TOIL.

    ii. Being compelled to use annual leave at a time when they did not wish to do so.

    iii. Being compelled to take annual leave whilst shielding at home.

    iv. Not being able to utilise reallocated annual leave in the way which would have happened had the claimants been categorised as on periods of sick leave.

13. If so, was that unfavourable treatment because of something arising in consequence of the claimants' disabilities? The claimants say that the 'something' arising in consequence of their disability was their requirement to make use of the special leave policy which in turn only arose because of their disabilities which meant they were unable to attend work due to government advice.

14. Can the respondent justify the treatment as a proportionate means of achieving a legitimate aim? The respondent relies on the following as legitimate aims:

i. Allowing employees vulnerable as a result of their health to remain absent from work for their protection.

ii. Allowing such employees to remain on full pay.

iii. Following a fair and consistent approach for all employees in dealing with issues arising from the pandemic.

iv. Maintaining operational capacity and service delivery in terms of its statutory duties.

v. Complying with its duty of best value, including to reduce the costs associated with arrangements put in place as a publicly funded organisation.

15. It is agreed that the respondents had knowledge of the claimants' disabilities at the material times for the purposes of section 15 Equality Act 2010.

Sex discrimination grouped claim – Indirect sex discrimination (section 19 Equality Act 2010)

16. For the purposes of this claim the claimants all rely on the protected characteristic of sex.

17. Did the respondent apply the following PCP: Requiring employees to take annual leave and TOIL before being granted special leave in the context of COVID 19.

18. If so, does that PCP apply to both the claimants and persons with whom they do not share their protected characteristic?

19. If so, does that PCP place the claimants at a particular disadvantage when compared with persons with whom they do not share their protected characteristic? The claimants rely on the following as substantial disadvantages:

i. Having to use their accrued TOIL .

ii. Preventing the claimants from exercising their accrued TOIL to balance work and family life commitments.

iii. Compelling them from using their annual leave at time(s) when they did not wish to do so.

20. If so, were the claimants placed (or would be placed) at that disadvantage?

21. If so, can the respondent justify the PCP as a proportionate means of achieving a legitimate aim? The respondent relies on the following as legitimate aims:

i. Assisting employees to meet their childcare commitments while maintaining full pay.

ii. Following a fair and consistent approach for all employees in dealing with issues arising from the pandemic.

iii. Maintaining operational capacity and service delivery in terms of its statutory duties.

iv. Complying with its duty of best value, including to reduce the costs associated with arrangements put in place as a publicly funded organisation.

Remedy

22. If the claimants establish discrimination, what is the appropriate remedy?

Evidence

23. The parties had agreed a bundle of 243 pages.

24. The Tribunal heard from 2 of the claimants, namely, Ms McCrone, whole time watch commander and Mr Cowie, Firefighter. We also heard evidence from Ms Christie, the regional secretary for Scotland, Fire Brigade Union (FBU) and Mr Haggart, Depute Chief Officer. The witnesses gave evidence in chief and were cross examined and asked further relevant questions.

Facts

25. The Tribunal is able to make the following findings of fact which it has done from the evidence submitted to it, both orally and in writing. The Tribunal only makes findings that are necessary to determine the issues before it (and not in relation to all disputes that arose nor in relation to all the evidence led before the Tribunal). Where there was a conflict in evidence, the conflict was resolved by considering the entire evidence and making a decision as to what was more likely than not to be the case.

Background

26. The respondent is the fire service in Scotland. It is subject to a number of statutory duties including in dealing with emergency fire and rescue issues and related incidents. It also has a statutory duty, as a public body, to secure best value given public funds were being used. Services were to be delivered in an effective and efficient manner. The best use of public resources was to be achieved.

27. The respondent employs operational (or uniformed) and non-operational staff. In total there are around 8000 employees (with around 818 support staff and over 7000 operational staff). There are 3 categories of operational staff, namely whole time (or full time) firefighters, retained and volunteer staff and control room staff (who operate the control centres and handle emergency calls and direct appropriate support to the incidents). The respondent requires to ensure an appropriate balance of skills is available 24 hours a day to cover all the potential incidents that could arise. The respondent staff is broken down into 86% male and 14% female employees.

28. Whole time fire fighters generally work the 5 watch duty system. That is applied to most fire stations and the operation control rooms. This results in teams of staff covering each shift working the same pattern and being on leave at the same time. The work pattern is to work 2 day shifts then 2 night shifts with 4 rota days and after 7 cycles there are 18 days leave. That ensures an appropriate balance of skills is achieved.

29. The system allows for some flexibility such that staff from another station or shift can potentially be used to cover absence but the system is managed such that there is an optimum number of staff engaged at each time, with a view to securing best value.

30. The claimants were all employees of the respondent, based in different locations with some doing different roles.

31. The trade union that was recognised for collective bargaining purposes in respect of the bargaining unit to which each of the claimants belonged, was the Fire Brigade Union (FBU).

Policy documents

32. The respondent has a number of relevant policy documents applicable to the claimants.

33. The **Special Leave Policy** which was relied upon by the parties was version 4 (dated 1 June 2020). The terms of this policy were applicable at the material times. The Policy begins with a "Policy Statement" as follows: "The [respondent] and the [trade unions] recognise that from time to time family/care responsibilities and work/life balance issues impact on the working lives of a large number of employees and in particular may inhibit their employment opportunities. The [respondent] is committed to developing and applying employment policies which assist employees to assume their work/life balance responsibilities. The special leave procedure contains guidance relating to the circumstances under which paid or unpaid special leave may be granted."

34. The Policy applied to all staff. The Policy stated that special leave was not a contractual entitlement and can be paid or unpaid. The Policy stated that each request would be considered on its own merit and line managers were to apply a common sense approach and use trust, judgement and discretion when considering requests. Managers were to consider the circumstances of each request and the exigencies of the service.

35. Under “Policy Principles” the principal aims were to assist employees to combine their family/care responsibilities with their employment through the provision of appropriate leave facilities. The aim was to assist balance work and home commitments and reflect best employment practice.

36. When considering requests the respondent would ensure fairness and consistency of approach, be sympathetic to the needs of employees, ensure there is no discrimination arising from the Equality Act and consider unpaid leave if paid special leave had been exhausted.

37. There was a section dealing with the procedure for special leave which would ordinarily be dealt with by employees submitting applications for special leave to their line manager via an application form.

38. In a section entitled “Time off for dependants” the policy dealt with “unexpected short term events”. The Policy stated that “all uniformed employees are encouraged to make full use of time off in lieu (TOIL) in the first instance. Where TOIL has been exhausted they may request a reasonable amount of time off during working hours to deal with unforeseen matters and emergencies relating to dependants. That would include dealing with a breakdown in child care or caring arrangements. In such cases paid leave would be provided at a line manager’s discretion up to a maximum of 5 days within any 12 month rolling period.

39. This section of the Policy also dealt with “Long term illness of a dependant” and allowed managers discretion to provide further special leave (paid or unpaid). This policy had been discussed with the trade unions (since it was not a contractual entitlement, it did not require to be negotiated).

40. The respondent also had a “**Uniformed time off in lieu (TOIL) Policy**” which was version 4 dated 11 November 2019. This had been a policy negotiated with the trade unions (since it related to contractual terms and conditions). In the introduction the Policy stated that “[the respondent] recognises that TOIL can assist staff to meet personal needs and therefore support the achievement of a healthy work life balance. The [respondent] must, however,

always ensure the maintenance of service provision and meet its statutory duty of best value." The Policy detailed the means by which TOIL can be accrued and taken and how its use would be managed without adversely impacting upon organisational needs.

41. The Policy applied to all uniformed employees (including whole time, uniformed employees and operations control staff) covering the roles of firefighter to watch manager and day duty station managers.

42. The Key Principles were that TOIL could be accrued though casual overtime, detached duty, pre-arranged overtime, acting up or public holiday enhanced day. TOIL can only be taken with managerial approval where authorised. The Policy was to be cost neutral and avoid generating additional costs.

43. TOIL could be taken in full shifts or in periods of 4 hours or more. Employees can only hold a maximum of 32 hours TOIL at any given time.

44. Employees could elect to accrue TOIL rather than overtime. It was also possible to anticipate TOIL. in certain cases. TOIL is accrued in terms of the additional hours worked and must be approved by a line manager and recorded in the employee's personal TOIL record.

45. It was each employee's responsibility to apply for TOIL with at least 24 hours' notice given.

Pandemic and the respondent's response

46. The pandemic had a significant impact upon how the respondent carried out its functions. Initially the focus was to protect their staff and ensure communities were protected. Bespoke internal groups were created to ensure ongoing issues were dealt with as matters developed and knowledge and guidance was gained. The respondent also considered reasonable worst case scenarios to understand how the pandemic could impact the respondent in various areas. Their arrangements changed depending upon the prevailing situation which was changing rapidly.

47. In order to ensure an appropriate response was available for emergency call outs some changes to crewing appliances and staffing was implemented. All available and trained staff required to be utilised on front line service delivery. The respondent also sought to support staff affected by the pandemic and ensure their workplace was safe.

48. The respondent sought to be as supportive as they could to ensure staff were able to manage personal issues whilst attend work. If staff were able to work from home this was accommodated. If they were not, a sympathetic approach was adopted to seek to assist employees balance work and personal issues such as by agreeing shift or location changes where practicable.

49. In the first few months of the pandemic (around March/April 2020) there were around 52 employees shielding because of household members and 197 shielding because of their own medical condition. There were around 250 shielding in total. 555 staff in total were working from home which was mostly support staff. There were around 150 who were shielding who could not perform any of their duties or a very small part of their duties from home.

50. All staff who required to shield who could not work from home required to use their accrued annual leave and TOIL before being paid special leave to ensure their time spent at home (and not working) was paid.

51. With regard to those with child care issues the respondent sought to be as flexible as possible on an individual basis. It was possible in some cases to alter shifts or start times to achieve flexibility. Managers had been told to be flexible and work with staff to help manage child care issues. If it was not possible to attend work, such staff were required to use their accrued annual leave and TOIL before being paid special leave to ensure their time spent at home (and not working) (dealing with child care) was paid.

Guidance to staff

52. Following the onset of the pandemic the respondent issued guidance to staff. The communication included information about travelling to and from work during the lockdown and staff's key worker status. It confirmed that all the

respondent's staff were key workers and should be entitled to send their children to school that remained open. The document noted that if a worker had underlying health conditions or was pregnant, a discussion was to take place with the line manager who would provide the necessary support, which would consider looking at home working.

53. The document stated that "if you are required to self isolate due to a family member having an underlying health concern, then annual leave, TOIL and flexi should be utilised before special leave will be authorised".

54. The document noted that the respondent encouraged staff to use their annual leave as it enabled them to take paid time off work for the purpose of having regular breaks to rest and re-energise. Staff were to continue to request leave in the usual way. There had been a short period where new leave was not to be authorised but that was for a temporary period.

55. Where staff were unable to take annual leave in 2020, the respondent offered to buy back any leave in excess of 5.6 weeks (but no staff member availed themselves of this offer).

56. With regard to annual leave, the document noted that annual leave should be spread across the year as possible to ensure a steady availability of staff. Even although travel arrangements and locations may have had to change, staff were required to continue with booked and approved leave and continue to take their leave in the usual way.

57. Under the heading "special leave", for those staff with children where schools close, staff may be able to work from home. If that was not possible, a discussion was to take place with the manager to agree what hours could be worked to suit the individual circumstances. A temporary adjustment to the usual core hours could be made to allow weekend or evening working or adjusting shift patterns to allow the individual to continue to work.

58. Where an employee could work fewer hours, the number of hours worked were to be recorded and discussed using TOIL or accrued annual leave if the individual was unable to work their full contracted hours. Regular contact was

to happen with line managers who would assist with support. TOIL would not accrue when working from home.

59. Employees with caring responsibilities whose arrangements were disrupted by COVID 19 could apply for special leave but staff should first exhaust all options to make alternative arrangements and use TOIL, accrued annual leave first. That could also include working alternative shifts.

60. Where an employee was self isolating because of a family member's underlying health condition, the time required and number of days annual leave to be used would be taken into account.

61. All COVID 19 related sickness or absence (including self isolation) would not count towards normal absence triggers.

62. If someone was advised to self isolate and could work from home, they should do so. If they could not work from home they should use accrued annual leave or TOIL before special leave would be granted. Similarly if an employee was self isolating due to a family member, TOIL and accrued leave should be exhausted before special leave would be granted.

63. All staff who were unable to attend work due to the pandemic received full pay.

Each claimant's position

64. When considering the impact of the approach upon its members the union had carried out an informal mapping exercise from information communicated locally. Within the operational control facility there were more women than men employed. Some of these women had partners who were also employed by the respondent. The informal mapping exercise that had been carried out (details of which were not provided to the Tribunal) suggested that the women members would use TOIL for childcaring but the husband or partner would often take the cash alternative (rather than the time).

65. With regard to the specific claimants in this claim the union's document contained the following information.

Disability discrimination claimants

66. **Mr Cowie** received a government letter requiring him to shield for 12 weeks due to a medical condition. He had been told that he had would have his 15 hours removed from his TOIL balance. He was not entitled to any reallocated annual leave.

67. In relation to Mr Cowie's specific situation, having heard evidence the Tribunal can make the specific findings of fact. Mr Cowie was an experienced firefighter who worked the duty shift system. Having been advised to shield he was required to remain at home and not leave the house. As an active person he would spend time away from work, such as when on annual leave, with his family and be active. For him it was "quite upsetting" to have to shield rather than be outside and active which is when he would have taken holidays. With regard to the impact of having to take TOIL before being paid special leave, he felt it was "not very nice".

68. **Mr Murphy** was said to have been required to shield and received a call from his manager to advise that his TOIL balance of 3.5 hours had been removed and he was not entitled to reallocated annual leave.

69. **Mr Gray** was said to have been advised by occupational health to shield. His GP agreed with that advice. He had 28.4 hours removed on 9 April 2020 and was not entitled to reallocated annual leave. The parties had also agreed that he also had holidays removed on 13-16 April, 21-24 April and 22-25 June.

70. **Mr Cahill** was advised by occupational health to shield and his GP agreed. He had his 25 hours TOIL balance removed (on 8 April 2020) and did not get his annual leave back during the time off when he was shielding.

71. **Mr O'Hare** had received a letter from the Government asking him to shield. He lost his 20 hours TOIL balance. He was not entitled to reallocated annual leave. The parties had in fact agreed that he had 21 hours TOIL removed and 36 holidays, 2 periods of 18 days from 9 April to 27 April and from 18 June to July.

72. **Mr Harkins** had been shielding due to a disability. Although his TOIL balance remained intact for the time being (at the time of submission of the document) the respondent had clearly stated all TOIL and annual leave must be taken before any special leave and no reallocation of leave would be permitted. The parties had agreed that he had accrued holidays taken from him for 23 April to 19 May.

73. **Mr Young** was shielding and had been told that his 17 days accrued annual leave had been taken from his entitlement (which was removed by 30 June 2020).

74. **Ms Hodge** received a Government letter asking her to shield. She had been informed that her 16 hours TOIL had been taken from her. She had been told this by a colleague but no manager had confirmed it. She was not entitled to any reallocation of annual leave.

75. For the purposes of this claim, it is accepted that each of the claimants in this group had a disability which was known by the respondent at the material time.

76. It was also agreed that for reasons including Government advice regarding shielding, advice from GPs and/or advice from the respondent's occupational health provider, the claimants in the disability discrimination grouped claim were at greater risk of serious illness from COVID 19 and it would be safer for them to remain at home or "shield" during the COVID 19 pandemic lockdown and that due to the nature of their roles the claimants in the disability discrimination grouped claim were unable to work from home.

Sex discrimination claimants

77. **Ms Campbell's** partner is a firefighter and their regular child carer was said to be shielding due to Government guidelines. She had no alternative child care and government guidance prevented her children from going to another household. She had to use TOIL to cover shift changeovers and shift clashes. She had 30 minutes TOIL removed on 7 May 2020.

78. **Ms Kirkland's** husband was employed by another public body and TOIL had to be used to cover childcare when she and her husband were both due to be working. The grandparents were said to be the regular carers but government advice prevented them from doing so and school did not open until 9am. Her husband shift started at 7am with her at 7.45am. She had 12 hours TOIL removed on 22 April and 3 June.

79. **Ms Cassidy's** regular childcare provider required to shield and she had no alternative child care available. Her partner was a firefighter and she requested a temporary move to another watch with a change of hours to work 4 day shifts instead of 2 nights and 2 days which was granted. 8 hours TOIL had been used for shift changeovers on 26 and 27 April, 5 May, 11, 12, 19, 20 and 27 May, and on 6, 13 and 14 July 2020. 160 hours of reallocated annual leave had been used on 1, 2, 10, 17, 18 and 27 April, 6 and 28 May, 5, 13, 21 and 29 June and 7 and 15 July 2020.

80. **Ms McCrone's** main child carers were shielding due to Government advice and her husband was also a firefighter, She had accrued annual leave due to previous absence and required to utilise that leave to cover child care. She had to take reallocated annual leave on 29 and 30 May, 15, 15, 22 and 23 June and on 30 and 31 July 2020. She would require to take further reallocated annual leave on 7 and 15 August if shielding was extended. She was not required to utilise any TOIL for childcaring.

81. In relation to Ms McCrone's specific situation, having heard evidence the Tribunal can make the specific findings of fact. Ms McCrone was a whole time watch commander who worked 42 hours per week. When Ms McCrone took TOIL she would use it for a number of different things, including spending time with family, special occasions and to deal with child care issues. Ms McCone was the primary carer of her child, with her husband assisting. He was also an employee of the respondent.

82. As both Ms McCrone and her husband worked shifts if there was a clash Ms McCrone would try and secure childcare for the period both parents were

working which failing either Ms McCrone or her husband would take time off. Normally Ms McCrone would try and take the time off.

83. Just before the pandemic Ms McCrone's child was in early years education on a part time basis. When the pandemic struck that service closed. While Ms McCrone was a key worker she and her husband had to assume child caring responsibilities. As she and her husband worked cross over shifts she spoke with her station commander who agreed that the respondent would arrange for someone to cover the changeover period with the hours missed by the claimant being taken into account. An alternative option given to the claimant was to use her accrued annual leave which she did.

84. When there was a cross over shift, Ms McCone took off the whole day to cover child care as there was no alternative (as she was watch commander in charge of the shift). As watch commander it was more difficult to cover her shift than it would have been to cover her husband's shift as he was a fire fighter (and there were more firefighters than watch commanders).

85. As Ms McCrone's annual leave period was fixed, requiring her to take her annual leave when the others within her shift did so did not, in her view, affect her. She used the leave that she had accrued from a previous year to cover the periods she required childcare when she would ordinarily have been on shift. The rest of the year fell within the normal annual leave pattern as lockdown had eased. She was able to use the annual leave she had accrued to deal with childcare (and did not require to rely on any TOIL).

86. If Ms McCrone had spare holidays she would ordinarily use it to coincide with periods her husband was on annual leave so they could spend time together as a family (since otherwise being on different shift patterns would mean they would not get time together as a family).

87. It was agreed that the claimants in the sex discrimination claim took TOIL or reallocated leave to facilitate their childcare arrangements and that all the claimants in the sex discrimination grouped claim were at all material times women with childcare responsibilities.

Agreed position

88. It was also agreed that the respondent, in response to the COVID 19 pandemic, provided for employees to use Special Leave if they were unable to attend work because of medical advice and/or caring responsibilities for dependants and that as part of the application of special leave employees were required to use up accrued TOIL and make use of annual leave.

89. For those on the 5 Watch Duty System, leave required to be taken at the times already programmed into the annual rota (which is leave they would have taken if they had been at work).

90. We had no evidence setting out what any of the claimants lost in terms of the value, in monetary terms, of a day's or an hour's work.

Fair Work Statement

91. On 25 March 2020 a joint statement was issued by the Scottish Government, the Scottish Trades Union Congress and others. This was not a legally binding statement but a statement reflecting what the Scottish Government and the signatories expectations during the pandemic with regard to workers. That included some high level principles, such as facilitating effective employee engagement and supporting all workers to follow public health guidance.

92. Under the heading "paying workers while they are off sick, self isolating or absent from work following medical advice relating to COVID 19" the statement said; "No worker should be financially penalised for following medical advice. Any absence relating to COVID 19 should not affect future sick pay entitlement or other entitlements like holiday or accrued time. It should not result in formal attendance related warnings or be accumulated with non-COVID related absences in future absence management figures. This may require flexibility in standard absence/attendance management arrangements."

93. Under the heading "Supporting those with caring responsibilities" the statement said that "Employers should consider temporary arrangements for

paid leave for caring responsibilities that are additional to current leave entitlements".

94. In the closing section of the statement, it said that: "Fundamentally employers should look to maintain job, pay their workers and work with them throughout the crisis; continuing to make use of Scottish and UK Government support to achieve this."

Another Fair Work Statement

95. In July 2020 a further joint statement was issued dealing with "Fair work during the transition out of lockdown". This re-iterated many of the principles from the earlier statement. Under the heading "Paying workers while they are sick, self isolating or absent from work following medical advice relating to COVID 19 it stated that: "No worker should be financially penalised for following medical advice. Any absence relating to COVID 19 should not affect future sick pay entitlement or other entitlements like holiday or accrued time. It should not result in formal attendance related warnings or be accumulated with non-Covid related absence. This may require flexibility in standard absence/attendance management arrangements."

Impact of pandemic on respondent

96. The pandemic created additional pressure on the respondent to maintain service delivery and crews.

97. The respondent had taken steps to minimise the impact of the pandemic on staff. One example was to create "bubbles" whereby those working on the same shifts should stay, so far as possible, within that group and not mix with other staff. The respondent also reduced the number needed for crews for each appliance.

98. If the respondent had not asked staff to utilise their accrued annual leave and TOIL the operation would be adversely affected in a number of ways.

99. Firstly the time that had accrued would require to be taken at another time, and appropriate cover would require to be secured for that person's leave. There would therefore be cost and labour implications of such cover.

100. There was no specific evidence as to the number of hours that would require to be covered or the cost of such hours needing to be covered or what the respondent considered could need to be covered.

101. Secondly there was a risk those affected could potentially be within the same shift or appliance creating a challenge for the respondent in terms of service delivery and whether the appropriate skill set was available at all times.

102. Thirdly there was an impact in terms of other staff who had been able to attend work and were therefore required to attend work. The respondent considered that it could be viewed as unfair and inconsistent if those who were unable to attend work were able to retain their accrued leave and TOIL and receive paid special leave when those who were working had to carry out their duties. There was a desire to seek to treat all staff in the same way which the respondent considered would be fair and consistent. Thus for each group, including those who could attend work, those who could not attend work but work from home and those whose job did not allow them to work from home were all to be treated equally as the respondent considered it important that consistency was achieved which they considered to be a fair approach.

103. There was a concern, for example, that if staff with child care issues could retain their accrued annual leave and TOIL that all childcare issues would essentially be underwritten by the respondent since those with childcare issues would not attend work and ask for paid special leave without using accrued leave or TOIL. The respondent believed that those who had taken TOIL for childcare purposes were able to use it for those purposes during the pandemic.

104. 500 staff affected by the virus amounted to around 6.4% of the respondent's entire staff. Around 9% of wholetime firefighters were affected. When that was layered on top of sickness and absence for other reasons the impact upon the

respondent's organisation could be very substantial. The impact affected skills and had geographical variations. Ordinary sickness levels were around 3% in relation to non-COVID absence. COVID absences created over double that absence alone.

105. The respondent used its central HR function to seek to minimise the impact of the pandemic upon the staffing position. The respondent brought back into operational service all personnel that it could and sought to reduce the potential spread of the virus.

106. While there had been a couple of months where no leave would be approved (from March to May 2020) pre planned leave was allowed and staff were encouraged to take their leave throughout the year in the normal way. Those shifts that had leave programmed required to and did take their leave,

Internal meetings between respondent and FBU

107. During the course of the pandemic the respondent and the FBU met regularly to discuss the impact of the pandemic upon staff and to work together to deal with issues that arose.

108. At the meeting on 1 April 2020 the respondent advised the FBU that there were, at that time, 512 live cases in respect of COVD 19. This comprised 1 support staff, 16 from operations control, 264 wholetime firefighters on the watch duty system, 116 retained firefighters, 33 wholetime firefighter day duty, 6 wholetime flexi duty officers and 77 support staff. There was 2 confirmed cases

109. At the meeting on 7 April 2020 there were 362 live cases with 10 from operations control, 221 wholetime firefighters 5 watch duty system, 98 retained duty firefighters and 33 support staff with 8 confirmed cases. The union believed the policy was unfair and discriminatory for disabled and female members since they had to use TOIL or accrued leave before they would get paid special leave whereas others would get paid special leave immediately.

110. On 15 April by a letter that the Tribunal had not seen, the respondent advised the union that there would be interim changes to manage the effects of the pandemic, including with regard to special leave and that no individual would be in detriment. In that communication it was made clear that to secure paid special leave, staff would require to utilise outstanding accrued annual leave and TOIL.

111. At the meeting on 16 April 2020 the FBU advised the respondent that it was not happy that interim changes had been made to terms and conditions and asked that matters be put on hold pending negotiation with the union. The union argued that requiring toil and annual leave to be used (before paying special leave) contradicted the statement that no worker would face any detriment.

112. On 21 April 2020 the respondent had 212 live cases with 10 in operations control, 114 wholetime firefighters on the 5 watch duty system, 61 retained firefighters, 5 day duty firefighters, 5 FDO and 17 support staff with 14 confirmed cases.

113. This issue was raised again at a meeting on 23 April 2020 as it was believed by the union that removing the ability to accrue TOIL was a change to terms and conditions. The matters were discussed at other meetings, including on 30 April 2020 and 7, 14, 21 and 27 May 2020 and 2 June 2020. At a meeting on 2 July 2020 the trade union advised that it was considering escalating the matter given the discriminatory impact. The matter was to progress as a collective grievance. The respondent had advised the union that special leave would not normally be applicable but this had been extended to deal with COVID related absences and that they believed it was not unreasonable to ask that accrued annual leave or TOIL be utilised before special leave was granted.

Collective grievance

114. On 7th July 2020 the FBU raised a collective grievance on behalf of affected employees. The grievance made allegations of sex and disability discrimination.

115. This letter referred to the fact the respondent had advised the union that "the underlying principle is that staff will not face any detriment as a result of following Government Guidance on dealing with Covid 19… Additionally the respondent is required to maintain its ability to provide a critical emergency response to the public". The letter stated that members were facing a detriment and being discriminated against.

116. The letter noted that despite having raised the matter repeatedly at regular meetings with the respondent it had been mutually agreed to progress matters to a collective grievance.

117. The grievance stated that the issue related to special leave and the section that applies to those where home working is not possible or those with caring requirements. The grievance set out why the union believed requiring those self isolating due to an underlying health condition to utilise accrued annual leave or TOIL before getting special leave was discriminatory.

118. In short the union believed that there this amounted to unlawful disability discrimination and that given those with a disability would require to self isolate forcing them to use their leave and TOIL was unfavourable treatment.

119. The letter argued that the treatment could not be justified because the stated aim was to avoid detriment, the Joint Fair Work statement focused on fairness, those without TOIL or accrued leave would get paid special leave (so those who chose to take TOIL are disadvantaged in not getting the financial benefit). It was also noted that forcing those with a disability to use their toil and annual leave meant they had no outstanding TOIL and annual leave when they returned to work. Shielding was not rest and recuperation and so could not be leave. It was argued a member who was shielding an unable to attend work should be placed on sick leave.

120. The letter also set out why the policy amounted to unlawful sex discrimination. Women members had been unable to attend work due to child care responsibilities. It was generally accepted that women carry the majority of child care responsibilities and they were being put at a disadvantage by being required to use TOIL and annual lave prior to special leave. Men would be less likely to require to take time off for child care responsibilities. Women rely on TOIL to balance work and family life and requiring them to exhaust such leave puts them at a disadvantage.

121. For the similar reasons as above it was argued that the policy could not be justified.

122. The outcome sought was for all accrued annual leave and TOIL that had been utilised for those self isolating and/or shielding to be reinstated and that in future special leave would be granted immediately.

123. The Union had submitted a "statement for collective grievance hearing" to the hearing on 6 August 2020 which included a section entitled "Details of each employee's individual circumstance". The section began by noting that there were at that stage 3 categories affected by the collective grievance: those shielding because of a health condition, a woman who could not attend work due to caring responsibilities and an employee shielding due to disability or pregnancy. The issue underlying each category was the same, the insistence on using toil or annual leave before paying special leave. The document stated that: "The circumstances in which each of the employees that have had their TOIL and/or annual leave removed will differ as detailed below within each category. The collective nature of this grievance is based on the fact that they have had to use TOIL and/or annual leave for adhering to government advice as a result of COVID 19."

Grievance outcome

124. A grievance hearing took place on 6th August 2020. The grievance was heard by Mr John Dickie (Assistant Chief Officer). By letter dated 14th August 2020 the respondent rejected the collective grievance. The letter stated that it was

argued that the TOIL policy was utilised by many women (specifically women working in operations control) to give them flexibility to support caring responsibilities. Many had partners who were also employees for the respondent. The respondent had no control over which parent requires time off to care which is a matter for the couple in question. The gender of the person was irrelevant as both would be treated equally so there had been no discrimination.

125. It was argued that there was no breach of the Fair Work principles since no worker was subject to a financial detriment since all leave was paid. The respondent did not believe it was unreasonable to require accrued leave and TOIL to be utilised before special leave was granted to support them when not working whilst others who were required to shield but able to work from home were required to use annual leave in the usual manner as well as those who continued to attend work. To not apply the rules would place those employees in a more favourable position.

Appeal against grievance

126. The decision was appealed by letter dated 17 September 2020. The appeal argued there were inaccurate statements about discrimination law since there was an impermissible comparative exercise. The question was whether there was unfavourable treatment for each person who raised the grievance, not how others were treated. Further, sometimes positive discrimination is needed in favour of disabled staff. The outcome also appeared to contest a fairly widely accepted statement that women undertake the vast majority of caring responsibilities in the family.

127. It was also argued that the whole point of indirect discrimination involved comparison of groups of workers, which had not happened.

Grievance appeal

128. The appeal meeting took place on 2 October 2020 before Deputy Chief Officer Haggart. On 19 October 2020 Mr Haggart issued his decision rejecting the appeal.

129. With regard to employees shielding due to a health condition who utilised TOIL and/or accrued leave, it was noted that the union argued the comparison should be between those who were not disabled compared to those who were and not comparing those who were shielding but could work from home. The point was that employees shielding because of a disability who could work from home were using annual leave and TOIL in the usual way and so the difference was due to whether they could work from home. The comparison was with another group who were also disabled.

130. The decision was that employees with a disability were not treated less favourably than non disabled employees. The respondent had agreed to place employees shielding due to disability on special leave for a longer period than would generally be agreed and ensured they remained on full pay. In short they were treated more favourably.

131. Annual leave for uniformed employees on the 5 watch duty system is programmed for the whole year in advance and it could not be said leave was removed at a time they would not have chosen to be on leave since they would be on leave when allocated. They took their leave when others took their leave. Throughout the pandemic there was a consistent approach to all personnel on the 5 watch duty system using annual leave when programmed. That applied to all staff, shielding or not, able to work from home or not. While those shielding would be limited in activities they could undertake the purpose of annual leave was time away from work.

132. All staff not on the 5 watch duty system were encouraged to take anneal leave proportionately throughout the year. It was not unreasonable to expect those shielding to take their leave proportionately during the period.

133. The outcome was that there was no disability discrimination. The position was consistent with both disabled staff and those who were not disabled. Ordinarily special leave would be limited in time with annual leave and TOIL being considered. It was not thought unreasonable to require TOIL and accrued leave to supplement special leave.

134. Placing such staff on sick pay was not appropriate. Given the period of time was uncertain and the staff were not incapacitated special leave was more appropriate in the interests of fairness and to maintain operational efficiency. Operation capacity had already been adversely affected and not requiring leave and TOIL to be taken would disrupt the overall scheduling of the duty system and cause further disruption to the duty system which was not operationally sustainable. That would cause additional difficulties with the current aims to avoid unnecessarily mixing crews and stations. Thus the respondent acted proportionately in pursuing the aims of maintaining shielding employees on full pay when balancing the need to maintain operation cover.

135. With regard to female employees using TOIL and accrued leave due to being unable to attend work due to child care responsibilities, the issue was whether the policy was indirectly discriminatory because women were more likely to be the primary carer for children.

136. The TOIL policy made it clear that it was to support a health work/life balance while maintaining service provision and best value. Employees can elect to accrue TOIL rather than paid overtime and it was a matter of personal choice. In some instances employees were granted shift changes and changes in working hours to support child care issues as part of an overall flexible approach to assist employees.

137. While it was accepted as a broad proposition that women tended to be primary carers re child care generally, the Union's position was based on a further proposition that female employees were more likely to accrue TOIL than male employees. There had been no substantive evidence to support that position. Male employees had similar accrued TOIL balances which suggested men used TOIL as well as women. There was no evidence to support the proposition and the policy was not therefore indirectly discriminatory.

138. Those absent from work for childcare reasons would get paid TOIL or accrued leave which was consistent with the policy. The special leave policy, which was non contractual, stated that each request (which would not automatically

be granted) must meet the exigencies of the service to maintain effective service delivery.

139. It was considered that the service acted proportionately.

140. In conclusion where there had to be temporary adjustments to some basic terms and conditions to maintain service delivery during unprecedented times, those were applied in a fair and consistent manner. Everyone affected by COVID 19 maintained full pay with many afforded paid special leave which in some cases extended over several months. Absence did not impact on absence triggers. Holidays continued to accrue. The respondent balanced the needs of employees with the exigencies of service delivery, achieving the balance in a fair and consistent manner.

141. The appeal was dismissed. It was argued that the respondent had been very flexible in supporting staff. All employees received full pay and no financial detriment existed.

Observations on the evidence

142. We found each of the witnesses generally to be credible and reliable. There were no material factual disputes that we required to resolve on the matters we required to determine.

143. One issue that arose was in respect of the position of the claimants who had not given evidence but whose details was found in the material lodged by the union in support of its grievance. We considered that information to be basic in nature. The information did not assist in assessing the impact of the pandemic or with regard to the legal issues we required to determine, as set out below. For example, there was no evidence as to the impact of the policy on those claimants nor of the reason for reliance on the policy, nor of its impact (given the impact was likely to be felt when the individuals returned to work and was something that was capable of being determined, even on an estimated basis).

144. Another issue we required to resolve was in respect of whether the policy of the respondent affected women more than men. There was no evidence led as to whether or not the policy affected women more than men in general. In other words there was no evidence that women would generally require to rely on the special leave policy (and thereby have to utilise accrued TOIL and annual leave being getting paid special leave) more so than men. This was an important issue and we required to consider whether it was possible to deduce that effect from the very limited evidence led from one claimant and whether it was possible (and permissible) to deduce that effect as a matter of logic without evidence. We considered that it was not possible to do so and set out our reasons for this below.

Law

145. The relevant legal principles can be summarised as follows.

Jurisdiction of discrimination claims

146. The complaints of discrimination were brought under the Equality Act 2010. By section 109(1) an employer is liable for the actions of its employees "in the course of employment".

Burden of proof

147. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides as follows:

> "(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."

148. The section goes on to make it clear that a reference to the Court includes an Employment Tribunal.

149. It is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

150. In **Hewage v Grampian Health Board** 2012 IRLR 870 the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in **Igen Limited v Wong** 2005 ICR 931 and was supplemented in **Madarassy v Nomura International plc** 2007 ICR 867. Although the concept of the shifting burden of proof involves a two stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question.

151. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

152. It was confirmed by Lord Justice Mummery in the Court of Appeal that it is not always necessary to address the two-stage test sequentially (see **Brown v London Borough of Croydon** 2007 ICR 909*)*. Although it would normally be good practice to apply the two-stage test, it is not an error of law for a tribunal to proceed straight to the second stage in cases where this does not prejudice the claimant. In that case, far from prejudicing the claimant, the approach had relieved him of the obligation to establish a *prima facie* case.

153. In this case the Tribunal has been able to make positive findings of fact without resort to the burden of proof provisions.

Time limits

154. The time limit for Equality Act claims appears in section 123 as follows:

> *"(1) Proceedings on a complaint within section 120 may not be brought after the end of –*

(a) the period of three 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 …

(2) …

(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".

155. A continuing course of conduct might amount to conduct extending over a period, in which case time runs from the last act in question. The case law on time limits to which we had regard included **Hendricks –v- Commissioner of Police of the Metropolis** 2003 IRLR 96 which deals with circumstances in which there will be an act extending over a period. In dealing with a case of alleged race and sex discrimination over a period, Mummery LJ said this at paragraph 52: "The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of "an act extending over a period." I agree with the observation made by Sedley LJ, in his decision on the paper application for permission to appeal, that the Appeal Tribunal allowed itself to be side-tracked by focusing on whether a "policy" could be discerned. Instead, the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that 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."

156. The focus in this area is on the substance of the complaints in question — as opposed to the existence of a policy or regime — to determine whether they can be said to be part of one continuing act by the employer.

157. **Robinson v Surrey** 2015 UKEAT 311 is authority for the proposition that separate types of discrimination claims can potentially be considered together as constituting conduct extending over a time.

158. In **Barclays v Kapur** 1991 ICR 208 the then House of Lords held that a discriminatory practice can extend over a period. The key issue is to distinguish between a continuing act and an act with continuing consequences. The court held that where an employer operates a discriminatory regime, rule, practice or principle, then such a practice will amount to an act extending over a period. Where, however, there is no such regime, rule, practice or principle in operation, an act that affects an employee will not be treated as continuing, even though that act has ramifications which extend over a period of time.

159. Since 6 May 2014, anyone wishing to present a claim to the Tribunal must first contact ACAS so that attempts may be made to settle the potential claim, (s18A of the Employment Tribunals Act 1996). In doing so, time stops running for the purposes of calculating time limits within which proceedings must be issued, from, (and including) the date the matter is referred to ACAS to, (and including) the date a certificate issued by ACAS to the effect that settlement was not possible was received, (or was deemed to have been received) by the claimant. Further, (and sequentially) if the certificate is received within one month of the time limit expiring, time expires one month after the date the claimant receives, (or is deemed to receive) the certificate. See section 140B of the Equality Act 2010 and **Luton Borough Council v Haque** 2018 UKEAT/0180/17.

Extending the time limit

160. Section 123 of the Equality Act 2010 requires that any complaint of discrimination within the Act must be brought within three months of the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable.

161. When considering whether it is just and equitable to hear a claim notwithstanding that it has not been brought within the requisite three month time period, the Employment Appeal Tribunal has said in the case of **Chohan v Derby Law Centre** 2004 IRLR 685 that a Tribunal should have regard to the Limitation Act 1980 checklist as modified in the case of **British Coal Corporation v Keeble** 1997 IRLR 336 which is as follows:

- The Tribunal should have regard to the prejudice to each party.
- The Tribunal should have regard to all the circumstances of the case which would include:
    - Length and reason for any delay
    - The extent to which cogency of evidence is likely to be affected
    - The cooperation of the respondent in the provision of information requested
    - The promptness with which the claimant acted once he knew of facts giving rise to the cause of action
    - Steps taken by the claimant to obtain advice once he knew of the possibility of taking action.

162. In **Abertawe v Morgan** 2018 IRLR 1050 the Court of Appeal clarified that there was no requirement to apply this or any other check list under the wide discretion afforded to Tribunals by section 123(1). The only requirement is not to leave a significant factor out of account. Further, there is no requirement that the Tribunal must be satisfied that there was a good reason for any delay; the absence of a reason or the nature of the reason are factors to take into account. A key issue is whether a fair hearing can take place.

163. In the case of **Robertson v Bexley Community Services** 2003 IRLR 434 the Court of Appeal stated that time limits are exercised strictly in employment law and there is no presumption, when exercising discretion on the just and equitable question, that time should be extended. Nevertheless, this is a matter which is in the Tribunal's discretion.

164. That has to be tempered with the comments of the Court of Appeal in **Chief Constable of Lincolnshire v Caston** 2010 IRLR 327 where it was observed that although time limits are to be enforced strictly, Tribunals have wide discretion.

165. Finally we have also taken into account the judgment of Underhill LJ in **Lowri Beck Services v Brophy** 2019 EWCA Civ 2490 and in particular at paragraph 14. Ultimately the Tribunal requires to make a judicial assessment from all the facts to determine whether to allow the claims to proceed.

Discrimination arising from disability

166. Section 15 of the Act reads as follows:-

> "(1) a person (A) discriminates against a disabled person (B) if –
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if (A) shows that (A) did not know, and could not reasonably have been expected to know, that (B) had the disability".

167. Paragraph 5.6 of the Equality and Human Rights Commission Code of Practice ("the Code") provides that when considering discrimination arising from disability there is no need to compare a disabled person's treatment with than of another person. It is only necessary to demonstrate that the

unfavourable treatment is because of something arising in consequence of the disability.

168. In order for the claimant to succeed in his claims under section 15, the following must be made out:

(a) there must be unfavourable treatment (which the Code interprets widely saying it means that the disabled person 'must have been put at a disadvantage' (see paragraph 5.7)).

(b) there must be something that arises in consequence of the claimant's disability;

(c) the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability;

(d) the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim

169. Useful guidance on the proper approach was provided by Mrs Justice Simler in the well-known case of **Pnaiser v NHS England** 2016 IRLR 170: *"A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises. The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it*."

170. Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and the respondent's motive in acting as he or she did is simply irrelevant.

Unfavourable treatment

171. The Supreme Court considered this claim in **Williams v Trustees of Swansea University Pension and Assurance Scheme** 2018 IRLR 306 and confirmed that this claim raises two simple questions of fact: what was the relevant treatment and was it unfavourable to the claimant?' 'Unfavourably' must be given its normal meaning; it does not require comparison, it is not the same as 'detriment'. A claimant cannot succeed by arguing that treatment that is in fact favourable might have been even more favourable. The court confirmed that demonstrating unfavourable treatment is a relatively low hurdle.

172. In **Williams** the claimant was able to access his pension early due to ill health and because of the pension rules. The claimant argued that he ought to be able to access an enhanced element (which was calculated on his final salary level). He said the reduced figure arose because it was calculated by reference to his part time and not full-time salary was unfavourable treatment (because it stemmed from his only being able to work part time, due to his disability). While he succeeded at the Employment Tribunal, this was over-turned by the Employment Appeal Tribunal and Court of Appeal.

173. The Supreme Court said that in dealing with a section 15 claim, the first requirement was to identify the treatment relied upon. In that case it was the award of a pension. There was nothing intrinsically unfavourable or disadvantageous about the pension on the facts of this case. On the facts the pension was only available to disabled employees (since the entitlement only arise upon permanent incapacity). While that could be less favourable than someone with a different disability, who may have worked more hours upon cessation of employment, no comparison was needed for the purposes of

section 15. The claim failed. The Court emphasised that unfavourable treatment meant what it says and was not a high hurdle to surmount.

174. This issue was considered by the Employment Appeal Tribunal in **Chief Constable Gwent v Parsons** UKEAT/143/18 where HHJ Shanks stated, at paragraph 20: *"The Chief Constable relies on the decision in the* Williams *case and says that this case is indistinguishable from it. In* Williams *it was decided that the claimant had not suffered unfavourable treatment because the "relevant treatment" was the award of a pension which he would not have received at all if he had not been disabled and that the award of a pension could not be construed as unfavourable. In this case the "relevant treatment" was identified as the application of a cap to a payment that would otherwise have been substantially larger. It seems to me plain that the two cases are quite different and that the ET was entitled to distinguish* Williams*."*

175. It is therefore necessary firstly to identify the relevant treatment that is said to be unfavourable and a broad view is to be taken when determining what is 'unfavourable', measuring the treatment against an objective sense of that which is adverse as compared with that which is beneficial. Treatment which is advantageous cannot be said to be 'unfavourable' merely because it is thought it could have been more advantageous, or, because it is insufficiently advantageous.

176. In order to achieve the stated purpose, the concept of 'unfavourable treatment' will need to be construed widely, similar to how the concept of 'detriment' has been construed for the purposes of other anti-discrimination provisions. The Code (at paragraph 5.7) indicates that unfavourable treatment should be construed synonymously with 'disadvantage: 'Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably'.

177. It is also clear from the examples given in the Code that unfavourable treatment need not be directed specifically at the disabled person and it may arise in consequence of a policy that applies to everyone. It therefore covers treatment that, although not directed specifically at a disabled person, nonetheless has specific adverse effects on the disabled person.

178. There is no need for a comparator which is seen by the example given in the Code involving a disabled worker with multiple sclerosis who is dismissed on account of having taken three months' sick leave. The Code states: 'In considering whether… [this] amounts to discrimination arising from disability, it is irrelevant whether or not other workers would have been dismissed for having the same or similar length of absence. It is not necessary to compare the treatment of the disabled worker with that of her colleagues or any hypothetical comparator. The decision to dismiss her will be discrimination".

Causation

160. There are two causation issues. Firstly, the unfavourable treatment must be "because of something" which gives rise to the same considerations as in direct discrimination with the focus on the alleged discriminator's reasons for the treatment (**Dunn v Secretary of State** 2019 IRLR 298). The Tribunal must identify what the reason was, the reason being a substantial or effective reason, not necessarily the sole or intended reason.

161. Secondly the "something" must more than trivially influence the treatment but it need not be the sole or principal cause (**Hall v Chief Constable** 2015 IRLR 893 and **Pnaiser** above). It is enough if the unfavourable treatment is the cause of the something (irrespective of whether the respondent knew the something arose as a consequence of the disability – **City of York v Grosset** 2018 EWCA Civ 1105). This is a matter of objective fact decided in light of the evidence (**Sheikholeslami v University of Edinburgh** 2018 IRLR 1090 and **Risby v London Borough of Waltham** UKEAT/0318/15/DM) and there may

be a number of links in the chain and more than one relevant consequence may need consideration.

162. Paragraph 5.8 of the Code notes that "there must be a connection between whatever led to the unfavourable treatment and the disability".

163. The fundamental matter for the tribunal to determine is therefore the reason for the impugned treatment (see **Cummins Ltd v Mohammed** UKEAT/39/20). We have applied the reasoning of HHJ Tayler in this aspect of the claim.

Justification

164. As to justification, in paragraph 4.27, the Code considers the phrase "a proportionate means of achieving a legitimate aim" (albeit in the context of justification of indirect discrimination) and suggested that the question should be approached in two stages:-

- is the aim legal and non-discriminatory, and one that represents a real, objective consideration?
- if so, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?

165. As to that second question, the Code goes on in paragraphs 4.30 to 4.32 to explain that this involves a balancing exercise between the discriminatory effect of the decision as against the reasons for applying it, taking into account all relevant facts. It goes on to say the following at paragraph 4.31:-

> "*although not defined by the Act, the term "proportionate" is taken from EU directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). EU law views treatment as proportionate if it is an "appropriate and necessary" means of achieving a legitimate aim. But "necessary" does not mean that the [unfavourable treatment] is the only possible way of achieving a legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means."*

166. The Code at paragraph 4.26 states that *"it is for the employer to justify the provision, criterion or practice. So it is up to the employer to produce evidence to support their assertion that it is justified. Generalisations will not be sufficient to provide justification. It is not necessary for that justification to have been fully set out at the time the provision criterion or practice was applied. If challenged, the employer can set out the justification to the Employment Tribunal."*

167. In **Chief Constable v Homer** 2012 ICR 704 Baroness Hale stated that to be proportionate a measure has to be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so. She approved earlier authorities which emphasised the objective 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. It is necessary to weigh the need against the seriousness of the detriment.

168. The question is whether the action is, objectively assessed, a proportionate means to achieve a legitimate end. The employer has to show (and the onus is on the employer to show) that the treatment is a proportionate means of achieving a legitimate aim. The Tribunal can take account of the reasonable needs of the respondent's business but the Tribunal must make its own judgment as to whether the measure is reasonably necessary. There is no room for the range of reasonable response test.

169. The Tribunal is required to critically evaluate, in other words intensely analyse, the justification set out by the employer. The assessment is at the time the measure is applied and on the basis of information known at the time (even if the employer did not specifically advert to the justification position at that point). Flaws in the employer's decision-making process are irrelevant since what matters is the outcome and now how the decision is made.

170. There must firstly be a legitimate aim being pursued (which corresponds to a real need of the respondent), the measure must be capable of achieving that aim (ie it needs to be appropriate and reasonably necessary to achieve the aim and actually contribute to pursuit of the aim) and finally it must be

proportionate. The discriminatory effect needs to be balanced against the legitimate aim considering the qualitative and quantitative effect and whether any lesser form of action could achieve the legitimate aim.

171. The Employment Appeal Tribunal considered justification in this area in **Parsons**, supra. At paragraph 25 onwards the Judge noted that the only financial material put before the Tribunal by the Chief Constable in support of his case on justification was that contained in tables in emails. These contained general details and there was no material relating to someone in the claimant's position or any attempt to show the overall financial effect on either of the claimants of giving up their career with the police early under the voluntary exit scheme. On the limited material provided to the Tribunal, the Tribunal rejected the case on justification. The appeal was refused. The Employment Appeal Tribunal said that the mere fact that someone is entitled to immediate receipt of a pension on departure will not by itself be sufficient to establish a justification for capping a payment under a redundancy scheme; in order to reach that conclusion, it would be necessary to analyse the nature of the two relevant schemes and the benefits payable under them. The onus was on the respondent to present to the Tribunal his case for justification and the material on which he relied to support that case. What the respondent did in that case was to produce the figures in emails which was found "clearly not sufficient to raise a justification case based on preventing a windfall or otherwise". The absence of financial information as to what the claimants would have earned if they had remained with the police meant there was no sustainable basis for establishing justification in that case.

172. Chapter 5 of the Code contains useful guidance in applying the law in this area and we have had regard to that guidance.

Indirect discrimination

173. The provisions on discrimination are within the Equality Act 2010, and are construed purposively against the background of the EU Framework Directive. Section 4 of the Equality Act 2010 ("the 2010 Act") provides that sex

and age are protected characteristics. Section 19 of the Equality Act 2010 states:

> **"19 Indirect discrimination**
>
> 1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice 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.
>
> 3) The relevant protected characteristics are—
>
> ……
>
> sex;…."

174. Lady Hale in the Supreme Court gave the following general guidance in **R (On the application of E) v Governing Body of JFS** 2010 IRLR 136

> "Indirect discrimination looks beyond formal equality towards a more substantive equality of results: criteria which appear neutral on their face

> may have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or national origins."

175. The same principle applies for other protected characteristics, one of which is sex.

Provision, criterion or practice

176. The provision, criterion or practice (PCP) applied by the employer requires to be specified. It is not defined in the Act. In case law in relation to the predecessor provisions of the 2010 Act the courts made clear that it should be widely construed. In **Hampson v Department of Education and Science** 1989 ICR 179 it was held that any test or yardstick applied by the employer was included in the definition. Guidance on what was a PCP was given in **Essop v Home Office** 2017 IRLR 558.

177. In **Ishola v Transport for London** 2020 IRLR 368 Lady Justice Simler considered the context of the words PCP and concluded as follows:

> "In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that 'practice' here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or 'practice' to have been applied to anyone else in fact. Something may be a practice or done 'in practice' if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one."

178. The Code at paragraph 4. 5 states as follows:

> "The first stage in establishing indirect discrimination is to identify the relevant provision, criterion or practice. The phrase 'provision, criterion or

> practice' is not defined by the Act but it should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A provision, criterion or practice may also include decisions to do something in the future – such as a policy or criterion that has not yet been applied – as well as a 'one-off' or discretionary decision."

Disproportionate impact

179. There must be evidence that shows the PCP creates a disproportionate impact upon women (in respect of sex discrimination). That is a matter also referred to in the Equality and Human Rights Commission Code of Practice: Employment ("the Code") at paragraph 4.15 onwards.

Particular disadvantage

180. The wording of section 19 does not require statistical proof. As Baroness Hale put it in **Homer v Chief Constable of West Yorkshire Police** 2012 IRLR 601 the change in the Act over the predecessor provisions

> "was intended to do away with the need for statistical comparison where no statistics might exist… Now all that is needed is a particular disadvantage when compared with other people who do not share the characteristic in question".

181. In **Essop v Home Office** 2017 IRLR 558 the Supreme Court made the following comments:

> "A third salient feature is that the reasons why one group may find it harder to comply with the PCP than others are many and various … 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 …"

182. In the case of **Cumming v British Airways plc** UKEAT/0337/19 that quotation was referred to in relation to sufficiency of evidence as follows:

> "there may be an argument that Lady Hale's general proposition was sufficient to establish the case along with the statistics relating to the whole of the crew or that in any event there was no reason to think that the proportion of men in the crew with childcare responsibilities differed materially from the proportion of females with such responsibilities".

183. There may be some occasions and roles where one cannot proceed on the basis that childcare responsibilities fall more heavily on women than men in general, **Sinclair Roche & Temperley v Heard** 2004 IRLR 763, which involved city solicitors. The EAT held that:

> "'the tribunal was not entitled to conclude that because women have greater responsibility for childcare, a considerably larger proportion of women than men are unable to commit themselves to full-time working, if this was intended to be a relevant finding with regard to men and women solicitors or men and women working in high-powered and highly-paid jobs in the City. Nor did the tribunal address whether a considerably larger proportion of female than male partners in the respondent firm was unable to commit themselves to full-time working'."'

184. In **Dobson v North Cumbria** UKEAT/220/19 this issue was considered by the Employment Appeal Tribunal and at paragraph 46 the President of the Employment Appeal Tribunal, Choudhury P, said: "*Two points emerge from these authorities: a. the fact that women bear the greater burden of childcare responsibilities than men and that this can limit their ability to work certain hours is a matter in respect of which judicial notice has been taken without further inquiry on several occasions. We refer to this fact as "the childcare disparity; b. Whilst the childcare disparity is not a matter directed by statute to be taken into account, it is one that has been noticed by Courts at all levels for many years. As such, it falls into the category of matters that, according to Phipson, a tribunal must take into account if relevant.*"

185. And at paragraph 50 he said: "*However, taking judicial notice of the childcare disparity does not necessarily mean that the group disadvantage is made out. Whether or not it is will depend on the interrelationship between the general*

position that is the result of the childcare disparity and the particular PCP in question. The childcare disparity means that women are more likely to find it difficult to work certain hours (e.g. nights) or changeable hours (where the changes are dictated by the employer) than men because of childcare responsibilities. If the PCP requires working to such arrangements, then the group disadvantage would be highly likely to follow from taking judicial notice of the childcare disparity. However, if the PCP as to flexible working requires working any period of 8 hours within a fixed window or involves some other arrangement that might not necessarily be more difficult for those with childcare responsibilities, then it would be open to the Tribunal to conclude that the group disadvantage is not made out. Judicial notice enables a fact to be established without specific evidence. However, that fact might not be sufficient on its own to establish the cause of action being relied upon. As is so often the case, the specific circumstances will have to be considered and one needs to guard against moving from an "indisputable fact" (of which judicial notice may be taken) to a "disputable gloss" (which may not be apt for judicial notice): see HM Chief Inspector of Education, Children's Services and Skills v Interim Executive Board of Al-Hijrah School [2018] IRLR 334 (CA) at para 108. Taking judicial notice of the childcare disparity does not lead inexorably to the conclusion that any form of flexible working puts or would put women at a particular disadvantage. . However, taking judicial notice of the childcare disparity does not necessarily mean that the group disadvantage is made out. Whether or not it is will depend on the interrelationship between the general position that is the result of the childcare disparity and the particular PCP in question. The childcare disparity means that women are more likely to find it difficult to work certain hours (e.g. nights) or changeable hours (where the changes are dictated by the employer) than men because of childcare responsibilities. If the PCP requires working to such arrangements, then the group disadvantage would be highly likely to follow from taking judicial notice of the childcare disparity. However, if the PCP as to flexible working requires working any period of 8 hours within a fixed window or involves some other arrangement that might not necessarily be more difficult for those with childcare responsibilities, then it would be open to

the Tribunal to conclude that the group disadvantage is not made out. Judicial notice enables a fact to be established without specific evidence. However, that fact might not be sufficient on its own to establish the cause of action being relied upon. As is so often the case, the specific circumstances will have to be considered and one needs to guard against moving from an "indisputable fact" (of which judicial notice may be taken) to a "disputable gloss" (which may not be apt for judicial notice): see HM Chief Inspector of Education, Children's Services and Skills v Interim Executive Board of Al-Hijrah School [2018] IRLR 334 (CA) at para 108. Taking judicial notice of the childcare disparity does not lead inexorably to the conclusion that any form of flexible working puts or would put women at a particular disadvantage."

186. Finally, at paragraph 56 he made the point that: "*In summary, when considering whether there is group disadvantage in a claim of indirect discrimination, tribunals should bear in mind that particular disadvantage can be established in one of several ways, including the following: a. There may be statistical or other tangible evidence of disadvantage. However, the absence of such evidence should not usually result in the claim of indirect discrimination (and of group disadvantage in particular) being rejected in limine; b. Group disadvantage may be inferred from the fact that there is a particular disadvantage in the individual case. Whether or not that is so will depend on the facts, including the nature of the PCP and the disadvantage faced. Clearly, it may be more difficult to extrapolate from the particular to the general in this way when the disadvantage to the individual is because of a unique or highly unusual set of circumstances that may not be the same as those with whom the protected characteristic is shared; c. The disadvantage may be inherent in the PCP in question; and/or d. The disadvantage may be established having regard to matters, such as the childcare disparity, of which judicial notice should be taken. Once again, whether or not that is so will depend on the nature of the PCP and how it relates to the matter in respect of which judicial notice is to be taken*".

187. Assumptions should be avoided and decisions made on the basis of evidence.

Objective justification

188. The test in section 19 is that as set out above and guidance on that issue is also given at paragraphs 4.25 onwards in the Code.

Remedy

189. Section 124 of the Equality Act 2010 provides the following on remedy

> "**124 Remedies: general**
>
> (1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).
>
> (2) The tribunal may—
>
> (a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;
>
> (b) order the respondent to pay compensation to the complainant;
>
> (c) make an appropriate recommendation.
>
> (3) An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect [on the complainant] of any matter to which the proceedings relate ….
>
> (4) Subsection (5) applies if the tribunal—
>
> (a) finds that a contravention is established by virtue of section 19, but

(b is satisfied that the provision, criterion or practice was not applied with the intention of discriminating against the complainant.

(5) It must not make an order under subsection (2)(b) unless it first considers whether to act under subsection (2)(a) or (c).

(6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court or the sheriff under section 119."

186. The first issue is injury to feelings. Three bands were set out for injury to feelings in **Vento v Chief Constable of West Yorkshire Police (No 2**) [2003] IRLR 102 in which the Court of Appeal gave guidance on the level of award that may be made. The three bands were referred to in that authority as being lower, middle and upper, with the following explanation:

"i) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. This case falls within that band. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.

ii) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.

iii) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be In ***Da'Bell v NSPCC 2010 IRLR 19,*** the EAT held that the levels of

award for injury to feelings needed to be increased to reflect inflation. The top of the lower band would go up to £6,000; of the middle to £18,000; and of the upper band to £30,000.

187. In **De Souza v Vinci Construction (UK) Ltd** 2017 IRLR 844, the Court of Appeal suggested that it might be helpful for guidance to be provided by the President of Employment Tribunals (England and Wales) and/or the President of the Employment Appeal Tribunal as to how any inflationary uplift should be calculated in future cases. The Presidents of the Employment Tribunals in England and Wales and in Scotland thereafter issued joint Presidential Guidance updating the Vento bands for awards for injury to feelings, which is regularly updated. In respect of claims presented on or after 6 April 2019, the Vento bands include a lower band of £900 to £8,800, a middle band of £8,800 to £26,300 and a higher band of £26,300 to £44,000.

188. The purpose of such awards are to award compensation for the claimant as a consequence of the impact of the discrimination upon the individual claimant. It is important therefore to assess the evidence to identify the impact of the discrimination.

189. There is no requirement that injury to feelings damages (or damages for personal injury) can only be awarded if the claimant was aware of the unlawful discrimination: **Taylor v XLN Telecom Ltd** 2010 IRLR 499 (where the Employment Appeal Tribunal considered what appeared to be the contrary view by the Court of Appeal in **Skyrail Oceanic Ltd v Coleman** 1981 ICR 864 on the basis that the latter case was considering injury to feelings only (and not injury to health)). The Employment Appeal Tribunal opined that there should be no exception to the rules of awards of damages in discrimination cases to the normal delictual principles and emphasised that the Court of Appeal opinion was essentially that it is not possible to recover compensation for distress that was not attributable to the unlawful act of discrimination.

190. It is also important to distinguish a legitimate and principled sense of grievance from suffering an injury to feelings (see **Moyhing v Barts and**

London NHS Trust 2006 IRLR 860). In other words it is important to assess what the consequence of the treatment is, rather than to assume there must be injury to feelings in every case. The focus should be on the evidence.

191. Consideration may also be given to an award in respect of financial losses sustained as a result of the discrimination. This is addressed in **Abbey National plc and another v Chagger** 2010 ICR 397. The question is "what would have occurred if there had been no discriminatory dismissal."…….If there were a chance that dismissal would have occurred in any event, even if there had been no discrimination, then in the normal way that must be factored into the calculation of loss."

192. It was stated in **Chief Constable of Northumbria Police v Erichsen** 2015 WL 5202327 that what was required was an assessment of realistic changes, not every imaginable possibility however remote and doing so "taking into account any material and plausible evidence it has from any source".

193. There is a duty of mitigation, being to take reasonable steps to keep losses sustained by the dismissal to a reasonable minimum. That is a question of fact and degree. It is for the respondent to discharge the burden of proof – **Ministry of Defence v Hunt and others** [1996] ICR 554.

194. Interest can be awarded in discrimination cases under the Industrial Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. Different provisions apply to different aspects of the award. No interest is due on future losses.

Submissions

195. The parties both produced written submissions upon which the other party had the opportunity to comment.

Claimants' submissions

196. The claimants' submissions can be summarised as follows. In a nutshell they allege that the policy adopted by the respondent to require employees to

exhaust accrued annual leave and TOIL before the use of special leave would be granted in the context of the Covid-19 pandemic and the requirement to take scheduled annual leave whilst shielding amounts to unlawful discrimination which cannot be justified as proportionate means of achieving a legitimate aim.

Discrimination arising from disability

197. With regard to unfavourable treatment, **Williams v. Trustees of Swansea University Pension Scheme** 2018 UKSC 65 provides the following guidance for tribunals when determining whether treatment meets the statutory definition of 'unfavourable treatment' for the purposes of section 15:

    i. Little is likely to be gained by seeking to draw narrow distinctions between the word unfavourably in s.15 and analogous concepts such as disadvantage or detriment found in other provisions, nor between an objective and a subjective/objective approach.

    ii. Whilst the Code cannot replace statutory words it does provide helpful advice in determining the threshold sufficient to trigger the requirement to justify.

    iii. The threshold sufficient to trigger justification is a relatively low one.

196. The Code sets out the following guidance in relation to 'what is unfavourable treatment': For discrimination arising from disability to occur, a disabled person must have been treated unfavourably. This means that he or she must have been put at a disadvantage. Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably.

197. Further guidance in the Code is provided as to the meaning of the term 'disadvantage' (which is equally applicable to claims under section 19): Disadvantage is not defined by the Act. It could include denial of an opportunity or choice, deterrence, rejection or exclusion. The courts have found that detriment, a similar concept, is something that a reasonable person would complain about so an unjustified sense of grievance would not qualify. A disadvantage does not have to be quantifiable and the worker does not have to experience actual loss (economic or otherwise). It is enough that the worker can reasonably say that they would have preferred to be treated differently.

198. It is not in dispute that the claimants were all required to exhaust existing TOIL and/or Annual Leave before being eligible for Special Leave nor is it in dispute that those with scheduled leave were required to take that leave whilst shielding. There was no suggestion that the claimants were unjustified in their sense of grievance about this issue. Nor has it been suggested on behalf of the respondent that there was nothing intrinsically disadvantageous about the treatment. The claimants submit that in this case they cleared the low threshold required to establish unfavourable treatment as being compelled to exhaust toil and accrued annual leave before special leave is unfavourable treatment. There is a financial penalty to those who accrued TOIL compared to those who have not. Those who were shielding cannot use TOIL at a time they can leave the house and are compelled to take it when they must remain at home. They are compelled to use it which is unfavourable.

199. The claimants had received medical advice that they should not attend work. The respondent had a decision to take as to how to deal with this, which could have been to place them on sick leave and not special leave, thereby retaining benefits of accrued TOIL and annual leave. Those who could work from home could do a lot more than those shielding. Compelling individuals who shield to take leave is unfavourable treatment.

Arising in consequence of disability

200. In **iForce Ltd v. Wood** 2019 1 WLUK 508 (EAT) the causal connection required for section 15 purposes between the "something" which gave rise to the unfavourable treatment and the underlying disability allowed for a broader approach. The connection might involve several links; the fact that the disability was not the immediate cause of the "something" did not mean that the requirement was not met. It was something which only needed to arise "in consequence" of the disability, which was a very broad concept. Moreover, provided that the employer was aware of the underlying disability, the fact that it did not accept the link between the disability and the "something" was irrelevant. The test was an objective one. It was submitted that the link between disability and the ‘something’ is plainly made out. The claimants in this case were all required to make use of the Special Leave policy because of the fact they were told they needed to shield, this in turn came about because of their disabilities. The claimants submit that given the broad approach to causation they have made out the connection between ‘something’ and ‘disability’

Justification

201. **Grosset v. York City Council** [2018] EWCA Civ 1105 said that the test for justification is an objective one according to which the Tribunal must make its own assessment and in **Birtenshaw v. Oldfield** 2019 IRLR 946 for conduct to be proportionate it was said that it has to be both an appropriate and reasonably necessary means of achieving the legitimate aim and in **Hardy & Hansons PLC v. Lax** 2005 ICR 1565 (CA) the task of the ET when considering justification is to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter.

202. **Lumsden v. Legal Services Board** [2015] UKSC 41: justification needs to be examined in detail although much may depend on the nature of the justification and the extent to which it requires evidence to support it. For example, justification based on moral or political considerations may not be

capable of being established by evidence. An economic or social justification on the other hand may well be expected to be supported by evidence.

203. **Lord Chancellor v. McCloud** [2018] EWCA Civ 2844 confirms that whilst a reasoned position in relation to justification is permissible, this must amount to more than 'mere generalisations' on the part of the party seeking to justify.

204. Considering the agreed list of issues, the respondent had identified the following five legitimate aims:

i. Allowing employees vulnerable as a result of their health to remain absent from work for their protection.

ii. Allowing such employees to remain on full pay.

iii. Following a fair and consistent approach for all employees in dealing with issues arising from the pandemic.

iv. Maintaining operational capacity and service delivery in terms of its statutory duties.

v. Complying with its duty of best value, including to reduce the costs associated with arrangements put in place as a publicly funded organisation.

205. Dealing with each of these aims in turn. It is submitted that the justification defence in relation to aims (i) & (ii) must fail. The respondent in cross-examination accepted that the approach adopted was not necessary to achieve aims (i) & (ii).

206. Whilst it was accepted that aims (iii), (iv) & (v) are all potentially legitimate aims the burden is on the respondent to demonstrate that the approach taken to special leave was both appropriate and reasonably necessary in order to achieve those aims.

207. It was submitted that in order for the Tribunal to be able to weigh the discriminatory impact of the treatment against the needs of the undertaking

the respondent ought to have produced more than just general assertions about consistency, cost and operational requirements.

208. The respondent has had plenty of time to gather evidence in support of these assertions but has failed to do so. This is particularly significant given that per the Court of Appeal in **Cadman v Health and Safety Executive** [2005] ICR 1546 there is no rule that the justification must have consciously and contemporaneously featured in the decision-making processes of the employer. An employer is permitted to justify after the event, but this respondent has failed to do so.

209. The evidence of Mr Haggart during cross-examination and in response to questions from the Tribunal was clear:

i. Beyond saying that he generally thought there might be issues with other employees had the respondent allowed the claimants to retain their annual leave/TOIL he had not actually sought the views of other employees on this issue.

ii. Whilst he felt generally that allowing the claimants to retain annual leave/TOIL could have an operational impact on the respondent there was no evidence as to what the impact would be nor had the respondent sought to obtain that evidence.

iii. Similarly in relation to the 'duty of best value' he felt generally there could be an impact on that duty but couldn't say what that impact would be. Further the respondent hadn't sought to obtain that evidence.

210. Evidence ought to have been produced to show the impact on operational capacity, best value and consistency of approach instead of relying upon the broadest of generalisations. Without evidence of the operational impact such as the size, additional costs and the burden it is not possible to assess the impact.

211. The claimant also argued that the failure to consult/negotiate with the FBU is significant in this case. Whilst the parties are agreed that there was no strict obligation to consult in this case, the lack of discussion is relevant given the Respondent raised concerns about complaints across the remainder of the workforce. One of the most effective ways to achieve fairness/consistency across the workforce would be to engage with the recognised trade union prior to imposed the policy changes.

212. The Fair Work statements were not contractually binding on the Respondent but were powerful evidence of what the government expected from public sector employers when responding to Covid-19. In particular the statement relating to 'paying workers while they are sick, self-isolating or absent from medical advice relating to Covid-19' where the clear expectation was that absence relating to Covid-19 should not affect '…other entitlements like holiday or accrued time.'

213. The proportion of workers affected by shielding requirements and unable to work from home (estimated to be approximately 150 out of a total workforce of 7,903) is a particularly small subset of the respondent's workforce. It is unrealistic to suggest allowing these individuals to retain their annual leave/TOIL would have had a disproportionate impact on cost/operational ability.

214. In those circumstances the claimants submitted that the respondent failed to justify the treatment.

Indirect sex discrimination

215. Application of PCP: It was submitted that it did not appear to be in dispute that the Respondent did apply the PCP of requiring employees to take annual leave and TOIL before being granted special leave in the context of Covid-19. Nor does it appear to be in dispute that the PCP applied equally to both male and female employees.

216. Particular Disadvantage: Per **CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia** 2015 IRLR 746 (ECJ) and **McNeil v Revenue**

and Customs Commissioners [2019] EWCA Civ 1112 (CA) the word 'particular' in the phrase 'particular disadvantage' in s.19(2)(b) EqA 2010 was not intended to connote a disadvantage which was 'serious, obvious and particularly significant' but simply to make clear that it was persons with the relevant protected characteristic who were disadvantaged. The claimants rely on the approach to disadvantage as set out in the Code of Practice cited at para 9 above.

217. Per **Homer v. Chief Constable of West Yorkshire Police** [2012] UKSC 15 (SC) statistical proof is no longer essential in order to show a 'particular disadvantage when compared to other people who do not share the characteristic in question'. It is now well established from appellate authority that Tribunal's ought to recognise that significantly more women than men are primarily responsible for the care of their children and accordingly the ability of women to work particular hours is substantially restricted in contrast to that of men. See **Shackletons Garden Centre Ltd v Low**e [2010] EqLR 139, **London Underground v Edwards (No 2)** 1999 IRLR 364 & **The Home Office v Holmes** 1984 IRLR 299.

218. Per **Essop v. Home Office (UK Border Agency)** [2017] UKSC 27 (SC) there is no need to prove the reason why the PCP disadvantaged the particular group in question. Further, there was no requirement that the PCP disadvantaged every group member.

219. In this case the claimants submit the position was straightforward:

    i. The COVID 19 pandemic caused significant disruption to formal and informal childcare arrangements.

    ii. The burden of this disruption is and was always more likely to fall disproportionately on the female employees than their male counterparts.

    iii. The impact of requiring employees to exhaust annual leave/TOIL before accessing special leave meant that female employees were more likely to have exhausted annual leave/TOIL than their male

counterparts as a result of the disruption caused by the Covid-19 pandemic to childcare arrangements.

iv. That is plainly a disadvantage for the purposes of s.19(2)(b) EqA 2010.

v. The evidence is clear that the individual claimants in this claim were placed at that disadvantage. At no point has the respondent sought to challenge the accuracy of the claimants' circumstances as set out in the grievance.

220. The threshold is low and the real question is whether there is something that could reasonably be complained about. Women bear greater child care responsibilities than men and that this can limit their ability to work certain hours.

221. The burden of child care disruption caused by covid was always more likely to fall disproportionately on females than males because of the childcare disparity. This is because (1) by not taking it when the employee wishes, they lose the freedom of choice and (2) while on special leave there is no opportunity to build TOIL back up and so at the end of special leave the employee is manifestly in a worse position with less flexibility.

222. The claimants' agent accepted that Ms McCrone is in a different position given she gave evidence and the Tribunal can assess her position. She was at a disadvantage since her husband worked but she assumed the childcare and took time off. She was at a disadvantage since she had to use her toil and accrued leave.

223. The claimants' agent accepted the other employees did not give evidence but their evidence can be gleaned from the information in the grievance document which sets out how they were affected by pandemic. It was accepted that this had not been agreed as a fact by the respondent but it was argued that the Tribunal could accept it on the balance of probabilities from the evidence before the Tribunal. There was no positive case from the respondent saying it was inaccurate and the respondent would have known the position given

the staff were employed by them and the witness who had compiled the report was not challenged.

224. In short there is a document which is hearsay evidence but is still admissible as evidence particular where a witness of fact says she can confirm the contents as accurate. It was argued that document showed the disadvantage did apply to each of the claimants.

225. The submissions with regard to justification were as above.

Time Limits

226. The formal notification of the way the Special Leave policy would be implemented came by way of a letter to the FBU dated 15th April 2020. All of the Claimants continued to have either TOIL/Annual Leave taken from them past 15th April 2020.

227. The practical implementation of the policy clearly constitutes conduct extending over a period of time for the purposes of section 123(3)(a).

228. The clock started running on 15 April 2020 when the policy was to be adopted and formal communication was given. The union asked for matters to be held in abeyance subject to negotiation but the respondent confirmed on 15 April they would proceed.

229. In any event given toil and annual leave continued to be removed, disadvantage continued be applied over period of time every time they had to apply for special leave.

230. It was submitted that ultimately the key question was whether a “fair trial” was still possible: it was and there was no prejudice.

Remedy

231. It was submitted that the appropriate remedy was an award for injury to feelings and compensation equivalent to the amount of TOIL/Annual Leave used by the claimants as a result of the implementation of the policy because

forcing the claimants to exhaust their TOIL/Annual Leave prior to accessing special leave was discriminatory and those lost hours must be a loss which flows from the act of discrimination.

232. The claimants' agent accepted that there was no specific evidence led in respect of each claimant but this can be assessed from the documents and the middle to the top end of the lower Vento band was appropriate. The claimants' agent accepted that there was no evidence in the productions as to the specific financial loss for each claimant.

Respondent's submissions

Time bar

233. In each case, ACAS Early Conciliation was engaged on 14th July 2020 and ended on 28th August 2020, with the claims being submitted thereafter on 24th September 2020. On this basis, the last date on which an act may be in time is 15th April 2020 – 3 months prior to ACAS Early Conciliation being initiated. Anything occurring prior to that date is out of time.

234. The claimants' position was that the FBU were informed of what they refer to as changes to terms and conditions by letter dated 15th April and therefore the claims are in time based on that premise. It was the respondent's position that the evidence shows the decision was made earlier than that and that this is not an act extending over a period, but a one off decision and time begins to run from the point the respondent took the decision to apply the special leave policy such that it affected the claimants in the ways alleged. It is submitted that anything following that decision was a continuing consequence of that decision, not a separate act.

235. Separately, based on the date of 15th April, some of the individual claims are out of time in relation to the use of accrued TOIL, specifically, individuals are referred to in the bundle as having their TOIL balances reduced on dates in earlier April prior to the 15th April .

236. While the respondent did not have knowledge that the dates given on p190 are specifically correct, in the absence of any evidence from the claimants and the assertion made on behalf of the claimants that this information is accurate, we would suggest this indicates these claims are out of time and would invite the tribunal to conclude the claims are out of time insofar as they relate to TOIL.

237. Per section 123(1)(b), the Tribunal may extend time if it considers it just and equitable, but such an extension is entirely at the tribunal's discretion, and the exercise of this discretion should be the exception, not the rule (**Bexley Community Centre (t/a Leisure Link) v Robertson** [2003] EWCA Civ 576). Factors which the tribunal may consider when exercising this discretion include:

- The length of and reasons for the delay.
- The extent to which the cogency of the evidence is likely to be affected by the delay.
- The promptness with which the claimant acted once they knew of the possibility of taking action.
- The steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

238. Just because evidence was led did not mean the claims should be allowed. No evidence was led as to the reasons for delay or why it is just and equitable to extend time and the fact the claimants were members of a union and had legal advice is relevant.

Discrimination arising from disability

239. **Unfavourable treatment**: Case law tends to indicate that this term is comparable with concepts in discrimination law such as 'detriment' and 'disadvantage'. In **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] UKHL 11, the House of Lords held that a detriment may occur where a reasonable worker would or might take the view that they have

been disadvantaged in the circumstances in which they had to work, but this must be more than an unjustified sense of grievance.

240. In **Williams v The Trustees of Swansea University Pension & Assurance Scheme & Another** [2018] UKSC 65, the Supreme Court considered that the concepts of detriment, disadvantage in terms of the Equality Act are broadly analogous, but indicated that detriment involves consideration of whether a reasonable worker would take the view they have been disadvantaged (noted at paragraph 23, which refers to guidance the Supreme Court considered to helpful, although it cannot replace the statutory wording). It is clear that there is an element of reasonableness to be considered, and while the subjective perspective of the claimant may be relevant in terms of how they would have preferred to be treated, this requires to be reasonable given that the sense of grievance must not be unjustified.

241. In **Williams** it was also held that treatment which is advantageous cannot be said to be unfavourable simply because it could have been more advantageous. The Supreme Court quoted Langstaff LJ at the EAT, who said: "treatment which is advantageous cannot be said to be 'unfavourable' merely because it is thought it could have been more advantageous, or, put the other way round, because it is insufficiently advantageous."

242. The respondent argues that a similar approach applies here and really what is being argued is that the treatment of the claimants was not sufficiently advantageous, rather than unfavourable. The treatment being complained about is actually placing on special leave, because this entailed the expectation of use of TOIL/annual leave. Being placed on special leave is not inherently unfavourable. That the favourable treatment the claimants received could have been even more advantageous by also allowing them to carry over TOIL and reallocating their periods of annual leave to take a later date, does not make the treatment unfavourable.

243. Each of the claimants received full pay when on special leave and it was their choice to accrue toil which was only allowed subject to the respondent's

discretion. There was no disadvantage other than the time when it had to be used, but it was still paid.

244. As to annual leave and shielding sick leave was not appropriate because all employees were limited as to what they could do on holiday given lockdown restrictions. Annual leave is the right not to be at work.

245. The only person who gave evidence in this regard was Mr Cowie and there was no other evidence as to what the claimants could or could not do or whether that was unfavourable and why. It was argued that Mr Cowie did not give the impression of someone significantly aggrieved by the situation in which he found himself as he accepted he was treated favourably in general by maintaining full pay. While it would have been nicer to have leave taken at a time when he could leave the house there was no real disadvantage or unjustified sense of grievance.

246. There was no reason to put the claimants on sick leave other than to allow then to retain accrued holiday and TOIL, ie to make it more advantageous. That is why the unfavourable treatment is the taking of toil or annual lave when they did not want to because placing on special leave than sick leave entailed expectation of use of TOIL and annual leave. The treatment was not inherently unfavourable. It would be more advantageous to be placed on sick leave to carry holidays but that does not make it unfavourable.

247. **Was the treatment because of something arising in consequence of disability:** The respondent argued that the claimants' disabilities put them at higher risk of serious illness from COVID 19, and such it was recommended that they ‘shield’ and stay at home. The need for them to be placed on special leave arose not from the disability but from the operational nature of their role which was such that their work could not be done from home. It was accepted that disability was part of the reason the individual was on special leave.

248. **Objective justification**: When considering whether the respondent acted proportionately, it is for the tribunal to balance the reasonable needs of the business against the discriminatory effect of the employer's actions on the

employee (as set out in **Allonby v Accrington & Rossendale College and Others** [2001] EWCA Civ 529, see paragraphs 23 - 24) To show that its actions were proportionate, a respondent does not need to show that it had no alternative course of action; rather, it must demonstrate that the measures taken were "reasonably necessary" in order to achieve the legitimate aim(s) (**Barry v Midland Bank** 1999 ICR 859 (HL), as quoted in **Allonby** at para 23).

249. It was argued that the respondent was pursuing a number of legitimate aims:

- Allowing employees vulnerable as a result of their health to remain absent from work for their protection;
- Allowing such employees to remain on full pay;
- Following a fair and consistent approach for all employees in dealing with issues arising from the pandemic;
- Maintaining operational capacity and service delivery in terms of its statutory duties;
- Complying with its duty of best value, including to reduce the costs associated with arrangements put in place as a publicly funded organisation.

250. It was submitted that these aims cannot reasonably be argued not to be legitimate. What then has to be considered is whether the unfavourable treatment complained of was justified in light of those aims and whether the respondent acted proportionately. The respondent argued there was evidence led on this, including:

a. As a publicly funded organisation, the respondent had to consider the use of public funds in making decisions and achieve best value.

b. The respondent has a legislative responsibility under the Fire (Scotland) Act 2005 to respond to certain types of incidents and various related duties. Includes adequate personnel trained and calls. This was a 24/7 operation.

c. In providing an operational response absence levels can have a significant impact. There was a limited built in buffer with no pool staff

d. Usual levels of absence within the respondent were around 3% which was approximately 200 people. During the pandemic, the respondent was dealing with absence levels significantly in excess of this. The pandemic led to absence of 6.4% on top of the usual absence.

e. The impact was greater on the operational workforce, with absence levels of around 9% among wholetime firefighters and 8.5% in control room staff. It was accepted that the pandemic caused significant levels of absence in control room.

f. There is significant complexity involved in covering absences of operational staff, including ensuring that any cover provided is available in the right place at the right time, and having the required balance of skills.

g. This complexity was increased by the pandemic as some of the options for covering absence were limited due to the requirement to seek to avoid mixing of crews in order to limit the spread of Covid-19.

h. The consequences of not having operational staff where required are significant in terms of being able to respond to emergencies.

i. The respondent had had to reduce its minimum crewing levels to avoid appliances becoming unavailable, which was not an optimal operating position.

j. At the time in March 2020 when the respondent were taking decisions about how to address various categories of absence, including those shielding, the respondent was having to consider future impacts on its service provision and seek to mitigate those

impacts which were foreseeable. This made it more difficult to arrange cover and had life and death consequences.

k. The respondent had to consider the impact of its decisions not only on individuals, but on broader groups of individuals and the effects on the organisation as a whole.

l. Fairness and consistency was important with regard to a harmonious workforce. There was evidence of the trade union telling the respondent staff at work did not like taking leave during the pandemic. Allowing one group to carry forward could create issues and it was accepted that operational issues would arise if significant numbers carried leave forward.

m. The nature of the respondent's five watch duty system was such that employees generally always took leave are times that are programmed into their rota in advance and therefore do not have a choice about when their annual leave is taken. If an employee carried annual leave which had to be reallocated, it would be taken out of pattern from the rest of their watch, which would require steps to be taken to cover their absence on the shifts they would otherwise have been working (which entails some elements of complexity, as noted above).

n. Absence levels during the pandemic had a significant impact on the respondent. The pandemic was a constantly changing situation which they were having to respond to and absence levels could not be predicted from one day to the next – that still be the case at the present time. Central staffing function massively stretched – whole watch could self isolate and need cover. This was unpredictable.

251. Case law does not require a specific level of evidence. The impact on the respondent was likely to be later on and the nature of the respondent's organisation is important. This was not about business forecasting and profits

but an emergency service providing 24 7 response to the public in an unknown situation with limited resources where not performing is not an option. Loss of life was the ultimate consequence. The worst case situation had to be avoided. It was not possible to provide a retrospective analysis of the impact since it was not clear what was happening and the respondent could not afford to wait and see what the impact would be.

252. While justification requires more than broad brush statements and generalisations, the respondent provided more than that. It is submitted case law does not specifically require any given level of evidence and cases on this issue turn significantly on their own facts. Per **Allonby**, what is required is that the tribunal be able to carry out the balancing exercise required of it, in considering the discriminatory effect against the reasonable business needs of the respondent.

253. In assessing discriminatory effect, **University of Manchester v Jones** 1993 ICR 747 sets out that there must be a quantitative assessment based on the numbers or proportions of people adversely affected, and a qualitative assessment of the amount of damage or disappointment that may result to those persons, and how lasting or final those effects may be. While the claimants assert they feel treated unfavourably or disadvantaged, overall they received full pay and their absence had no effect on their future. Overall the treatment is favourable.

254. When measured, the potential impact on operational capacity and the general public, the business needs outweighs any discriminatory effects.

255. There was no evidence from the majority of the claimants. Mr Cowie said the impact on him was mild, as it was not very nice not have TOIL to use at other times. There was no evidence it had a substantial impact on him nor caused any financial detriment given he was on full pay.

256. The amounts of TOIL and leave for each individual claimant may be on the “low side” but the respondent needs to consider the wider impact. Allowing one could affect many. 150 employees shielding and not working from home

could be significant in terms of the impact on operations. That was particularly so given the impact was significantly above usual absence levels constantly changing.

257. It was accepted that a factor which the tribunal may consider is whether there was a less discriminatory means of achieving the legitimate aim. Per **Barry v Midland Bank** as quoted above, this does not require the respondent to show that it had no alternative course of action, only that the action it took was reasonably necessary.

258. The only reason the claimants argued they should have been placed on sick leave was to allow them carry holidays and toil. The claimants were not unwell; they were just told not to attend work. The effect on them was minimal as they could take annual leave as others did.

259. The Government principles were not specific to the respondent and not relevant to justification since they did not take account of the specific circumstances of the respondent. There was engagement with the trades union given the weekly and other meetings.

Indirect sex discrimination

260. The PCP is alleged by the claimants to be 'the requirement to take annual leave and TOIL before being granted special leave in the context of Covid-19. It was accepted that there was a requirement applied for employees to consider using annual leave or TOIL to cover childcare requirements prior to being placed on special leave and that this applied to all employees equally. The stated PCP significantly oversimplifies the position since the respondent took numerous steps to assist its employees in meeting their childcare responsibilities and it was not simply the case that in order to get time off for childcare related reasons the only option available was to take TOIL and/or special leave. It was accepted, however, that the PCP was applied to all staff.

261. **Disadvantage**: It was denied that this PCP created disadvantage in respect of female employees. While it was accepted by the respondent that women in

society generally tend to bear the brunt of childcare responsibilities, this does not of itself give rise to group disadvantage. In **Dobson v North Cumbria Integrated Care NHS Foundation Trust** UKEAT/0220/19 the EAT considered matters which may be the subject of judicial notice. In that case reference was made to judicial notice of what the EAT referred to as the "childcare disparity" which falls into a category of matters a tribunal must take account of if relevant. What was said was: "First, the fact that women bear the greater burden of childcare responsibilities than men and that this can limit their ability to work certain hours is a matter in respect of which judicial notice has been taken without further inquiry on several occasions. We refer to this fact as "the childcare disparity" (para 46);

262. Ability to use TOIL is generally beneficial and gives flexibility which is favourable. The PCP was applied in context suggesting something that is beneficial become disadvantageous because of the pandemic.

263. There was no evidence showing that it was beneficial to use TOIL for childcare reasons. Why was it suddenly disadvantageous to use it at that time? In any case the TOIL balance can go up and down as accrued and used.

264. The EAT in **Dobson** went on to say (at para 48b) that "it is preferable that all parties and the Tribunal are aware of precisely what it is that should be judicially noticed. Whilst the childcare disparity is uncontroversial and accepted by the Respondent, other related matters are not. For example, it is not accepted that the childcare disparity necessarily means that any requirement to work flexibly will put women at a disadvantage compared to men…A matter in respect of which judicial notice may be taken, by its very nature, ought to be one that is uncontroversial. The fact that it is not might cast doubt on whether it really is so notorious and well-established that it can be accepted without further inquiry."

265. Further, at paragraph 50: "However, taking judicial notice of the childcare disparity does not necessarily mean that the group disadvantage is made out. Whether or not it is will depend on the interrelationship between the general

position that is the result of the childcare disparity and the particular PCP in question…Taking judicial notice of the childcare disparity does not lead inexorably to the conclusion that any form of flexible working puts or would put women at a particular disadvantage."

266. Para 51 "Where, for example, an arrangement is, on analysis, generally favourable to those with childcare responsibilities, it would be incongruous to treat that arrangement as nevertheless giving rise to group disadvantage falling to be justified."

267. The respondent submitted that it was clear that women tending to be primary child carers does not mean that any given arrangement affecting childcare inevitably puts women at a particular disadvantage. The claimants' case as a whole cannot be accepted as being a matter of judicial notice. Just because women do most of the childcaring does not mean the working arrangement in this case put them at a disadvantage. There was no evidence of group disadvantage.

268. The claimants rely on the following as being the particular disadvantages caused by the PCP:

- Having to use their accrued TOIL
- Preventing the claimants from exercising their accrued TOIL to balance work and family life commitments
- Compelling them to use their annual leave at times they did not wish to do so.

269. These alleged disadvantages were not established to be particular disadvantages impacting women as a group, or the claimants individually. There was no clear explanation why having to use accrued TOIL was disadvantageous other than it meant it could not be used at a different time. None of the claimants whose claim relates to using TOIL in these circumstances actually gave evidence as to why they considered doing so disadvantageous or why they say it prevented them from using it to balance

work and family commitments. In the absence of such evidence, the tribunal cannot draw a conclusion that there was a disadvantage. The evidence does not support the assertion that the claimants were compelled to take annual leave when they did not wish to do so.

270. There are no pleadings in the ET1 which specify how each individual was subject to the alleged particular disadvantages nor was there evidence before the ET in respect of each claimant.

271. It was submitted that even if the pandemic causes more child care issues than one would normally expect which would mean women would need to use the special leave policy, that did not mean it is was disadvantageous.

272. The disadvantage is having to use toil but this would have been used at some point in any event and would tend to have been used for child care reasons which was what it was used for. The only disadvantage was that it had to be used at one time than another. That did not create a particular disadvantage in the context of COVID changes.

273. It was submitted that preventing the use of TOIL for family life was only considered by Ms McCrone who did not in fact use any TOIL as she used accrued holidays. She noted she would have been on leave in any event since it would have been pre-programmed. There was no evidence that it was disadvantageous to use it that way.

274. It was argued that it was not possible to take broad propositions about affecting women generally to apply it to the claimants without evidence.

275. The material within the grievance document was not evidence. It was a brief summary and was not intended to be evidence to a Tribunal. It was not so obvious to the respondent given they had around 8000 employees. The information had been put together by the local union and the individuals had not been cross examined. Even if it is accepted the information does not contain enough information to make relevant findings. The burden was on the claimant to produce evidence as to disadvantage. No evidence has been provided.

276. **Objective justification:** If it is found that the respondent applied a PCP which was indirectly discriminatory, it is the respondent's position that it is justified as a proportionate means of achieving a legitimate aim. The case law above was referred to with the same aims relied upon.

277. The respondent's position is that these aims were not discrete and should be looked at together as part of the overall picture. The following is relevant:

278. The impact on the organisation of staff absence and the impact of carrying forward leave.

    a. The respondent as a publicly funded organisation has to consider the best use of public funds.

    b. While individual costs may seem small, when extrapolated across the organisation can be significant.

279. The context of the organisation is such that it needed to mitigate future impacts and simply could not allow the circumstances to occur. The respondent was already stretched in terms of capacity and allowing further carrying forward would have major operational impacts.

280. It was not reasonable for the respondent to know the precise impact. The demographics of the workforce was such that significant numbers of staff were likely to have children of an age needing childcare. Managers dealt with each case sympathetically and the impact was greater than 4 female employees in this claim.

281. As a publicly funded body best use of funds had to be achieved. It was not proportionate to use public funds to pay for special leave when accrued toil and leave existed and would have been required to be used in circumstances outside pandemic

282. Just because potentially more child care issues affect female employees does not mean they should be entitled to paid time off since the logical conclusion

would be that female employees should always receive paid time off to deal with childcare which was not feasible.

283. The impact of 1 individual with 30 minutes toil might seem small, but the effect extrapolated across the respondent could be very significant. The nature of the respondent and complexities in managing absence meant it was not possible to look at precise future impacts since decisions had to be taken at the time amid the pandemic and maintain operational response at all times despite the unpredictability of life in general and the situation facing the respondent.

284. **Remedy**: No schedules of loss had been produced. In any event no financial compensation should be due since the leave in issue was taken by the claimants and they were paid for it. What is being sought is that leave to be reinstated, which is not something the tribunal has jurisdiction to award.

285. No award can reasonably be made for injury to feelings in the absence of any evidence led by the Claimants to demonstrate injury to feelings. Per **Ministry of Defence v Cannock and others** 1994 ICR 918, such injury must actually be proved. If discrimination is found, the tribunal may make an 'appropriate recommendation" - "a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate" (*section 124(3), EqA 2010*).

286. **Leeds Rhinos Rugby Club and others v Sterling** EAT/267/01 held that it was not proper for a tribunal to make a recommendation which is completely impracticable to carry out for the Respondent. At best it was at the lowest end of the low band.

Claimants' agent's response

287. The claimants were not saying the only reason they should be placed on sick leave was to keep holidays and TOIL as their primary position was sick leave was appropriate as they had been medically advised not to attend work.

288. Finally it was argued that the respondent's agent's suggestion that the aims be considered together was wrong in law as each individual aim must be looked at and assessed in terms of proportionality - **Homer** and **West Yorkshire**. The overall picture cannot be considered.

Decision and discussion

289. The Tribunal spent a considerable period of time considering the evidence that had been led and the submissions made by both parties which were fully taken into account. Having considered the evidence led, the Tribunal was able to reach a unanimous view. We shall deal with each issue in turn, so far as relevant

Time Limits

290. We turn firstly to the time bar issues and shall deal with them in the order in which they appear.

291. The respondent argues that the claims are out of time on the basis that the decision to utilise the special leave policy in cases such as those which are the subject of the claims was made in March 2020, and this is the act which is in issue.

292. The Tribunal did not have specific evidence before it as to when the respondent decided to utilise the policy but it was clear that by 15 April 2020 the respondent had decided to proceed since it was that date when the respondent advised the trade union that it was not prepared to maintain the status quo pending the matter being discussed. If this were a case based upon detriment, clearly the position would have been different since the "clock would have started ticking" from the moment the employer took the decision with regard to the relevant treatment (see for example **McKinney v London Borough of Newham** UKEAT/0501/13/LA) but the position in this case is different because the issue is the implementation of a policy with regard to employees pertaining to specific periods of time. The act complained of is the specific treatment received consequent upon making the relevant application and so the relevant time limit is when the treatment complained of took place.

293. In this regard we prefer the claimants' agent's submission but the issue as to time bar applies to each individual claim and the legal position must be assessed on that basis, rather than generally.

294. The respondent also argues that any act which occurred prior to 15th April 2020 is time barred and therefore the individual claims are time barred where the act complained of occurred prior to that date.

295. We consider there to be some merit in this submission from the respondent's agent since if the act to which the claim relates took place outwith the statutory limitation period (and there was no act extending over a period) this would be correct but again these issues require to be considered with regard to each individual claimant.

Issue 1 : Have the claimants brought their claims in time?

296. We require to consider each individual claimant.

Disability discrimination claimants

297. We had no evidence to suggest the treatment in respect of Mr Cowie, Mr Murphy, Mr O'Hare, Mr Harkins, Mr Young and Ms Hodge was before 15 April 2020. Neither party provided specific evidence as to the times when the individual acts took place (nor made any specific submissions as to the individuals) and on that basis we are unable to say that these claims are time barred.

298. From the evidence before us it appeared that Mr Gray had 28.4 hours TOIL removed on 9 April 2020 and had holidays removed on 13 and 14 April. There were acts relied upon that occurred after 15 April, including holidays having been taken at the end of April and June, Mr Cahill had his TOIL balance removed on 8 April 2020.

Sex discrimination claimants

299. We had no evidence to suggest the treatment of any of the claimants in this category was before 15 April 2020.

300. From the information before us it therefor appears that 2 claimants have claims which are, on the face of it, time barred, namely Mr Gray and Mr Cahill.

Issue 2: If not, is it just and equitable for the Tribunal to extend time in accordance with s.123 Equality Act 2010?

300. Given the parties had agreed that time bar was an issue we had to determine, we were surprised that no specific evidence was led with regard to the normal factors to be considered when dealing with claims that are potentially out of time.

301. We considered the evidence before us.

302. In relation to Mr Gray his TOIL was removed on 9 April 2020 and he had holidays removed on 13 – 16 April, 21 – 24 April and 22 – 25 June. These actions were all as a result of the application of the policy that applied to each of the respondent's staff.

303. Having considered the facts before us we decided that the treatment Mr Gray received was an act extending over a period as understood in terms of section 123(3) of the Equality Act 2010. Applying the authorities above it was clear that the treatment Mr Gray received was as a result of the policy adopted by the respondent. It was not a one off act but rather a series of actions that stemmed from the same policy. Given the last of the acts occurred at the end of June, his claim is not in fact time barred.

304. If we were wrong in that analysis we would have exercised our discretion to extend time as we considered that his claim was raised within a period that was just and equitable to allow his claim to proceed. While he was a member of the trade union, it was clear that the matter was being dealt with at a collective level. Each of the claims were being considered together.

305. While we accept no specific evidence was led as to the reasons for the delayed lodging of the claims, it is clear that his claim was lodged only a few days late, if we are wrong in our assessment of an act extending over a period. There were compelling reasons why it would be in the interests of

justice to allow his claim to proceed, and not penalise him for the delay in lodging his claim. The prejudice to the respondent was considerably lesser than the prejudice to the claimant if we dismissed his claim. The evidence had not been affected, a fair hearing was still possible, and it was important, in our view, for the matter to be properly considered and the merits examined. On that basis his claim should be allowed to proceed.

306. For the same reasons we considered that Mr Cahill's claim should also be allowed to proceed. He had 25 hours wiped on 8 April 2020. His claim was therefore a week out of time. We balanced the impact of the delay from both perspectives and we concluded that it was in the interests of justice to exercise our discretion to allow the claim to proceed. While he was represented and there was a lack of evidence explaining the reason for the delay, it was clear that matters were being dealt with collectively. Denying the consideration of his claim would be far more prejudicial than allowing the matter to be considered on the merits. A fair hearing was still possible and neither party would be prejudiced, given the other claims that are proceeding and the factual matrix in this case. We decided that it was in the interests of justice to allow his claim to proceed.

Disability discrimination grouped claim

307. It is common ground between the parties that the claimants in this claim were at all material times disabled persons for the purposes of section 6 Equality Act 2010.

Unfavourable treatment because of something arising in consequence of a disability (section 15 Equality Act 2010)

Issue 3: Have the claimants been subjected to unfavourable treatment by the Respondent? The claimants rely on the following as unfavourable treatment:

i. Having to use their accrued TOIL.

ii. Being compelled to use annual leave at a time when they did not wish to do so.

iii. Being compelled to take annual leave whilst shielding at home.

iv. Not being able to utilise reallocated annual leave in the way which would have happened had the claimants been categorised as on periods of sick leave.

309. Unfavourable treatment is widely defined and the threshold is low. As the Supreme Court said in **Williams**, we must firstly identify what the treatment was and then decide whether it was unfavourable.

310. We considered the authorities in this area carefully to assess whether the treatment was unfavourable. We appreciate that something some consider to be a benefit could in some cases amount to unfavourable treatment.

311. We consider the treatment relied upon in turn.

312. Upon detailed analysis we find that the claimants in this grouping were treated unfavourably.

313. The treatment relied upon was not, as suggested by the respondent's agent, the granting of special paid leave (paying for a worker to stay at home) *per se*, which was clearly favourable treatment. Rather, the treatment relied upon are the 4 specific acts that are set out above, which are preconditions to obtaining or consequences of paid special leave. We must consider this treatment relied upon and apply the authorities in assessing whether it amounts to unfavourable treatment for the claimants within context.

314. The first act relied upon is having to use accrued TOIL. In other words the treatment relied upon is the insisting that in order to benefit from paid special leave the claimants use up any accrued TOIL that they had. Accrued TOIL was used before special leave was paid thereby depriving the claimants of accrued TOIL upon expiry of the paid special leave. This meant that the claimants who were unable to attend work lost their TOIL which they had earned prior to the pandemic. They lost the opportunity to use that TOIL at a later date (or at least lost the right to ask the respondent to use the TOIL at a later date).

315. Depriving the claimants of their TOIL that they had earned and removing the choice and flexibility the claimants had was in our view unfavourable treatment. This was not something the claimants wanted to do. They lost the flexibility they had and were unable to use their TOIL at a later date. They were therefore disadvantaged.

316. Other staff who had worked the same hours as the claimants who had chosen a sum of money for those hours were given paid special leave immediately (without the need to take into account the additional payment they received for those hours). Those individuals had been paid for the hours they had worked and then received paid special leave.

317. To require individuals to use TOIL which had accrued before paying special leave was unfavourable. It put the claimants at a disadvantage and required them to do something they self evidently did not want to so since clearly they would have wanted to have the benefit of paid special leave and then the benefit of the TOIL they had earned. The utilisation of the TOIL and removal of the choice and flexibility the claimants would otherwise have was unfavourable treatment.

318. Applying the same principle to the second treatment, being compelled to use annual leave at a time when claimants did not wish is unfavourable. Again if the option is taking paid special leave and then using accrued annual leave at a later date as opposed to having to exhaust accrued annual leave first, no claimant would opt for the former since it is disadvantageous or unfavourable. Compared to those who had used their accrued holidays at an earlier date (pre pandemic) it is unfavourable since those individuals would have received the benefit of their accrued annual leave and then paid leave. The claimants, however, had to use their accrued leave before receiving paid special leave. They lost the flexibility and choice. That is unfavourable treatment.

319. The third treatment relied upon was being compelled to take annual leave whilst shielding at home. We considered this carefully. While annual leave is being paid not to be at work, which is what happened in this situation, the treatment relied upon is the loss of the choice in when to take leave. The

claimants were required to use their leave at a time they would not otherwise have taken it. Logically that loss of choice and flexibility was unfavourable treatment.

320. The final treatment was not being able to utilise reallocated annual leave in the way which would have happened if on sick leave. That was no different to the second treatment relied upon and is plainly unfavourable treatment. Being required to use annual leave when directed is unfavourable if it removes the flexibility and freedom otherwise enjoyed.

321. We find the treatment was unfavourable treatment. Requiring accrued holidays and TOIL to be used was something that was unfavourable since it prevented the individuals using their TOIL or accrued leave at a time they wished to use it. It was disadvantageous in the sense that if they were given special leave immediately they would be able to use TOIL and accrued leave at a later date (and be paid not to be at work on greater occasions). The removal of the choice and flexibility and insisting TOIL and accrued leave was used before paying special leave was unfavourable treatment.

322. We found this case to be more like **Parsons** than **Williams**. In **Williams** the treatment was entitlement to a pension which in itself was not disadvantageous. In **Parsons** the issue was the application of a cap to sums individual would otherwise receive. Neither case is precisely on point and we must apply a common sense interpretation of the statutory wording and decide whether the treatment relied upon was unfavourable. Requiring annual leave and TOIL to be used was taking away the benefits the individuals had accrued, removing flexibility and forcing them to do something they might otherwise not have done, was unfavourable treatment when assessed in a common sense way.

323. We carefully considered each of the respondent's agent's submissions in considering this matter. We considered whether it was fair to say that individuals were "being compelled to use annual leave at a time when [the claimants] did not wish to do so". It was argued that there was no evidence that the claimants did not wish to use their annual leave at the particular times

they did. The only evidence presented in this regard was from Mr Cowie who said he was upset at having to self isolate (as he would ordinarily have been active). We considered that treatment to be unfavourable since it did require him to use his annual leave whether or not he wanted to use it and he was required to use it at a time when he could not leave his home.

324. We did not consider that compelling individuals to take annual leave at times when holidays were pre-programmed into a shift pattern was unfavourable treatment since that was the same treatment as others but the issue was about accrued leave and not ongoing leave. Accrued leave was a matter for the individuals ordinarily to use when they wished. Depriving the claimants of the choice and ability to use it when they wished was unfavourable treatment

325. We took account of the fact that the purpose of TOIL was to allow an individual who has worked in excess of their contractual hours, time away from work. Requiring TOIL to be used before being paid special leave allowed those individuals paid time away from work. There was nothing intrinsically disadvantageous about requiring TOIL to be used in these circumstances. The same applies for accrued annual leave since the purpose is to be paid for time not working. However, the disadvantage arises in the fact that the individuals had no choice when to use their TOIL and required to exhaust it before they received paid special leave (while others had their special leave paid immediately and had the benefit of a payment for the time they had worked). The claimants had no payment (since they opted for TOIL) and had no flexibility in taking the TOIL.

326. We considered whether the treatment in question was itself advantageous with the argument being that the treatment ought to have been more advantageous. Those claimants wanted to get TOIL and accrued annual leave *in addition* to receiving paid special leave. The difficulty with that argument is that the claimants had earned TOIL and wished to use it at a time that suited them. They wanted to use it after paid special leave had been exhausted since they had not received any payment for the time and did not want to lose the benefit of it. Those who took the payment did not have to

account for the payment and were given special leave. Those who opted for TOIL required to have that used before paid special leave. That was the unfavourable treatment.

327. We accept that the claimants were paid for their time but they did not get the benefit of TOIL and special leave (whereas others got the benefit of the cash payment and special leave). That was a matter of choice at the time but the insisting that TOIL and accrued leave be used was unfavourable treatment, (which may be capable of being justified).

328. With regard to being compelled to use annual leave, the issue only arose because the claimants wished to ensure they were paid in the circumstances when they could not attend work (and had not presented as sick). We took account of the fact that the claimants did not have the unilateral right to insist upon taking leave or TOIL whenever they wished as the timing of such leave was always a matter ultimately for the respondent to approve but again the removal of choice and flexibility was disadvantageous, detrimental or unfavourable treatment.

329. Not being able to use annual leave when they would if they had been sick arose because the claimants did not present as sick. Had they done so they would have secured the benefit of the sickness policy. The situation that arose was unique and something in respect of which no precedent existed. The claimants were not sick since although they were instructed to remain at home, they were capable of carrying out their work and did not present a fitness to work certificate or advise the respondent that they were unable to work. Instead they, reasonably, followed Government guidance not to leave their homes, to protect themselves and indeed others. If they wished full pay for the periods when they were unable to attend work, despite being fit to work, they required to use their accrued entitlements first. The purpose of those accrued entitlements was to be paid for time when not at work. If they had been sick, the position would have been different but the provisions in respect of the sickness policy would have applied. In this case the special leave policy applied, such that discretion was exercised, in terms of pay, to

those absent by reason of COVID related matters but in so doing the staff lost the ability to use their accrued entitlements.

330. We also took account of the fact that all staff required to use TOIL and accrued holidays before special leave was paid. We did not consider treating everyone in the same way necessarily meant the treatment was not unfavourable since it was possible for a policy of general application to amount to unfavourable treatment. We considered the position from the facts and concluded the treatment was unfavourable.

331. In assessing whether the treatment was unfavourable we took a broad view, measuring the treatment against an objective sense of what is adverse compared to what is beneficial. Being treated unfavourably is not the same as being treated less favourably. As the courts have emphasised no comparison is needed and the threshold is low.

332. We considered the Code. Having reflected carefully on the treatment we found that when viewed objectively the treatment to be obviously unfavourable. Removing TOIL and accrued leave and then paying full pay is unfavourable when compared to having full pay and retaining the flexibility to use accrued TOIL and leave thereafter.

333. We considered it important that the respondent could determine, in every case, when TOIL and accrued leave was taken and that it was not a matter for a worker to determine. No worker could dictate when TOIL or accrued leave would be taken. The rights in question were not unfettered and such matters were always ultimately subject to the respondent's determination. The respondent always had the right to determine when TOIL or accrued annual leave would be taken. This in itself did not result in the treatment not being unfavourable given the objective consequences of the treatment.

334. Having carefully considered the treatment in question we found that the treatment relied upon was unfavourable treatment.

Issue 4: If so, was that unfavourable treatment because of something arising in consequence of the claimants' disabilities?

335. The claimants say that the 'something' arising in consequence of their disability was their requirement to make use of the special leave policy which in turn only arose because of their disabilities which meant they were unable to attend work due to government advice.

336. We found that the treatment was because of something arising on consequence of disability. We considered it self evident that the reason why the claimants required to make use of the special leave policy was because their disability prevented them from attending work (which could not be done from home). That was not in dispute.

Issue 5: Can the respondent justify the treatment as a proportionate means of achieving a legitimate aim?

337. The respondent relies on the following as legitimate aims:

i. Allowing employees vulnerable as a result of their health to remain absent from work for their protection.

ii. Allowing such employees to remain on full pay.

iii. Following a fair and consistent approach for all employees in dealing with issues arising from the pandemic.

iv. Maintaining operational capacity and service delivery in terms of its statutory duties.

v. Complying with its duty of best value, including to reduce the costs associated with arrangements put in place as a publicly funded organisation.

337. We turned to consider justification.

338. The claimants' agent had accepted in principle that each of the claims was legitimate and we agreed with that conclusion. The aims relied upon were legitimate aims and the issue was whether the measure used was (reasonably) capable of achieving those aims and whether they were

proportionately applied. We require to intensely analyse the discriminatory effect upon the claimants and the impact upon the respondent in respect of each measure relied upon.

339. We agreed with the claimants' agent that the measure in question was not necessary to achieve the first two aims (which had been conceded by the respondent in cross examination). Requiring exhaustion of accrued annual leave and TOIL did not contribute to the aims of allowing vulnerable employees to remain absent from work or allowing employees to remain on full pay. It was clearly possible to allow such employees to remain on full pay without requiring accrued leave or TOIL to be used. On that basis the first two aims relied upon are not upheld.

340. With regard to the third aim, following a fair and consistent approach, on balance we found that requiring TOIL and accrued leave to be used was not an appropriate and reasonably necessary way to achieve this aim. The respondent had placed considerable emphasis upon equality of treatment and treating everyone in precisely the same way. The difficulty with that approach is that it fails to appreciate that treating everyone in precisely the same way can give rise to inequality and discrimination. We understand the importance in an organisation such as the respondent to ensure equality of opportunity and access and why it was important to ensure everyone obtained the same benefits in the same way but in so doing it must be recognised that there was a potential for discrimination since treating everyone in the same way does not recognise that everyone is different and those with a protected characteristic in some cases may require, to avoid discrimination, difference in treatment. This aim was not therefore an appropriate nor reasonably necessary aim on the facts of this case. Consideration ought to have been given to those with protected characteristics and how their position was affected by the aim.

341. Even if the aim had been appropriate and reasonably necessary we were not satisfied that it was proportionately applied from the evidence before us. The impact upon the individual claimants was that they had to use the time or

holidays they had accrued (and were paid for it) and then received paid time off, potentially time considerably in excess of what the special leave policy would ordinarily cover. The evidence the Tribunal heard was that Mr Cowie would have preferred to use his holidays and TOIL at a time when he was able to be active (and enjoy his holiday and TOIL, which he had earned). The impact was therefore to require holidays and TOIL to be used at the same time (or prior to) paid special leave, rather than allow that time to be taken at a time when the individual wanted.

342. The respondent had not formally sought the views of other staff (so as to be able to say that had the measure not been used, and fairness and consistency not achieved, there would have been adverse impacts). The trade union had informally noted that those who were at work were not happy having to take leave during the pandemic given the limitations it placed upon such leave. The respondent considered that it would have been unfair to insist staff who were able to attend work take their holidays when those who were not at work were able to take their holidays at a later date. The respondent considered that inconsistent and unfair but there was nothing other than a belief that showed having inconsistency in treatment would create any issue given the need, on occasion, to make allowances for those with particular characteristics.

343. We took into account that there were regular meetings with the trade union, even if the ultimate position was a matter that the respondent imposed rather than negotiated or even consulted but the measure in question was not a matter upon which any consultation took place; it was imposed upon staff. The respondent understood the opposition by the union and their belief that it was discriminatory but the respondent believed they needed to be consistent and fair to all staff given the pandemic and exigencies of the service and proceeded to introduce the aim without taking the views of the trade union into account (and then dismissing the collective grievance).

344. We also took into account, but to a far lesser extent, the Fair Work Statement that had made it clear from Government, that at least for public sector

employees, it was generally understood that employees would not be disadvantaged as a result of the pandemic (including with reference to accrued entitlements). This was clearly not a contractual matter but a broad statement of principle which the respondent had supported, as a public authority. That had made it clear that accrued rights would not be adversely affected by measures taken during the pandemic. We did not place much weight upon this given the nature of the principles but the Principles were not followed given the respondent's policy did adversely affect accrued entitlements.

345. The impact upon the respondent had the measure not been implemented was potentially considerable. The absence levels were significant. The staffing structure was such as to have a small margin of error but otherwise the respondent required those scheduled to be on shift to be on shift.

346. If staff were allowed to continue to carry forward annual leave and TOIL there were real risks to the operation. The difficulty we had was that there was no specific evidence presented to us as to the magnitude of the impact, despite the evidence being available. The respondent had said it had carried out reasonable worst case scenario planning. It therefore had some idea as to what specific impact the pandemic could have. This evidence was not presented to the Tribunal. We did consider the evidence led, as summarised by the respondent's agent in her submissions.

347. In addition, the respondent knew, even roughly, how many of its staff were disabled and could be affected by the pandemic. Even if not known at the time, by the time of the Hearing, the respondent could have gathered some data to identify the potential impact of requiring all those affected (in this claim) by the measure in question (and potentially the impact upon others, if any exceptions were made). There was no data whatsoever as to the impact of not treating people fairly and consistently presented to the Tribunal. Laudable as the aim is, when challenged it is important to be able to show that the impact was as suggested. We required to assess it objectively and absent

data that allows us to do this, for this particular aim, we cannot say that it was proportionately applied.

348. It was entirely possible that the impact could well have been severe but equally it was possible the impact could be relatively minor. Being able to show, in some way, without reliance on generalisations, whether or not the measure was proportionate is important and absent any data to show the need for fairness and consistency was proportionate, from the information presented to us we are unable to uphold the aim. We are unable to guess what the impact was given the respondent was able to analyse, at least to some extent, the particular impact of this measure.

349. We took account of the fact that anecdotally the respondent knew that other staff may not be happy if exceptions to the policy were applied but that was not the result of detailed engagement with staff. Had it been made clear that due to the need for equality of opportunity (as doubtless the relevant policy documents would make clear) was such that exceptions needed to be made the impact upon staff facing inequality in treatment nay have been different. Equally had there been some basis for making it clear that creating exceptions would result in serious unrest on some empirical basis, that would be relevant.

350. Without more evidence we considered that reliance on an aim that is itself potentially discriminatory had not been justified.

351. From the evidence before us we balanced the discriminatory effect of the measure with the legitimate aim of fairness and consistency and found that it had not been proportionately applied.

352. We carried out a similar exercise with the fourth aim, namely maintaining operational capacity and service delivery. We considered the means to achieve it, the requiring leave and TOIL that had accrued to be taken to achieve the aim in question.

353. We carefully analysed the evidence led before the Tribunal and concluded that the means used were reasonably necessary to achieve the aim. We note from **Homer** that there requires to be some form of basis for justification but

that does not require concrete evidence in every case and provided subjective impressions or stereotypical assumptions and generalisations are avoided reasoned and rational judgment can suffice.

354. In this case, as the respondent's agent submitted, evidence had been led with regard to the operational impact of the pandemic. At the time the measure was put in place it was not possible to ascertain what the precise impact would be – no one know how many people would require to shield (and could not work from home), Obviously their workplace and tasks would not be known and the cost of them so doing could not be known. We examined the evidence that was led and the respondent's submissions in that regard very carefully.

355. While it was possible after the event to calculate the costs (and thereby the impact on operational capacity and service delivery), that would have been something that occurred after the event and not something which was considered at the time the measure was implemented. While it is possible to rely on matters that were not considered at the time of the treatment in question, the respondent in this case considered that it was necessary to require staff to use TOIL and leave to maintain operational capacity and service delivery. The absence of specific figures does not by itself mean that the measure cannot in principle be objectively justified. We must examine the material before us and intensely analyse the impact.

356. To require staff to take leave that had been accrued in addition to potentially very lengthy periods of paid special leave created serious risks for the operational capacity and service delivery of the respondent. It was entirely possible, from the information available at the time, that large numbers of people could have been affected by the pandemic which could have led to large numbers of staff requiring to shield. Had all those staff been able to use TOIL and leave following the expiry of special leave the respondent's ability to carry out its duties was potentially imperilled.

357. We accepted these views of the respondent. However, the foregoing did not show that the measure in question was proportionately applied. We require to intensely analyse the impact of the measure upon the claimants (which we

did above – the effect of having no choice in when to take accrued leave and TOIL) with the impact on the respondent.

358. As we said above, the respondent believed there to be very serious risks at the time the policy was implemented. The respondent did consider reasonable worst case scenarios and carry out some form of analysis. That analysis and data was not presented to the Tribunal, nor was its results. While there were risks to the operation if the relevant staff affected were allowed to carry forward their TOIL and accrued leave, we have no basis of assessing what the impact would be.

359. Even from the numbers of staff affected by the operation known by the respondent at the time we are still unable to assess what the specific impact on the operation would be. The evidence presented was clearly based on speculation and not on any empirical basis, despite the respondent knowing at the time even roughly how many were affected (and what their TOIL and accrued leave position was).

360. There was no specific data presented to show what the particular impact upon the service would be if those staff who were affected were able to take their TOIL or accrued leave. No analysis was presented to the Tribunal to show how much time would be needed and what the impact upon service delivery or operational efficiency could be. We were left with speculation as to what the impact *might* be without any basis upon which to make conclusions.

361. We accept that the respondent was sympathetic to staff and sought local agreements where possible and that absence levels had significantly increased and the operation required to be maintained with an appropriate number of staff with the right balance of skills. Allowing additional time off by way of accrued holidays and toil over and above the paid special leave could potentially have had a far greater impact upon the respondent than the discriminatory impact the measure had on each claimant but it is also possible that the impact may have been relatively minor or indeed something that could easily have been absorbed, given the impact was not when the individuals

were shielding but rather when staff returned to work and wanted to take their TOIL and accrued leave.

362. The pandemic had led to over double the number of absences that would normally be experienced. Normal absence levels were at 3% and COVID absences led to 6.4% absence. The impact had been greater on operational staff with 9% wholetime fire fighters affected and 8.5% control room staff affected. Each witness was clear in accepting that the impact of the pandemic was significant and the effect could be serious. Carrying forward leave and TOIL created considerable uncertainty given the need for the right blend of skills, to ensure the right people were in the right place at the right time. It was not possible for the respondent to know at the time the policy was put in place just how many people would be affected and it was not unreasonable to assume that a significant number would be affected. That resulted in the ability to plan operationally being affected, significantly more so if they were allowed to carry forward leave and TOIL but to justify this measure the respondent required to satisfy us that the measure was proportionately applied on the facts.

363. The respondent required to ensure its response to the pandemic did not adversely affect its ability to operate. There was little room for error in the sense that the respondent had to ensure operationally it remained viable during and after the pandemic. It required to be able to deal with emergency responses at all times. The complexity in planning for operational staff was severely affected by the pandemic. Allowing TOIL and accrued leave to be carried forward in these circumstances placed potentially very serious risk to operational capacity and service delivery. We are unable to say, however, just what, if any, risk it presented without knowing what could have happened if the individuals who might have relied upon the policy did so given their specific accrued leave and TOIL position. The impact was not something that would be felt at the time of the pandemic but rather when the individuals returned to work, bearing in mind taking of TOIL and accrued leave was not solely a matter for staff but required the respondent's agreement.

364. Requiring leave for example to be taken during pre-programmed periods of leave was clearly protecting the operational viability since it avoided the need to deal with leave at a later date, and seek appropriate cover but the issue in question was about requiring accrued leave to be taken not leave that would have happened if at work. The unpredictability of the pandemic did create massive uncertainty with risks to operational viability. From the evidence presented by the respondent, the risk to the organisation had they not used the measure they did was potentially serious but there was no basis for us to assess just how the impact on the respondent was or could be.

365. The effect on each claimant was to require them to use up TOIL and accrued leave before paid special leave applied rather than having the flexibility to use their TOIL and accrued leave after special leave applied.

366. From the information presented to the Tribunal we considered this measure had not been objectively justified. It was not proportionate on the basis of the evidence before us.

367. Finally we considered the final aim, namely seeking to secure best value. We were satisfied that this aim was in principle legitimate and reasonably necessary. The issue was whether it was proportionately achieved. The respondent had a duty to ensure public funds were used in the most efficient and effective way. Allowing staff with accrued leave and TOIL to have paid special leave in addition to such periods of leave was potentially not a judicious use of tax payer's money (since when the staff on special leave subsequently exercised their right to paid annual leave or toil the respondent would require to ensure appropriate cover was in place, at the respondent's cost) but as with the former aims, in order to determine whether the aim had been proportionately achieved we needed to assess the specific impact. Without any evidence as to what the cost might be, even on a rough basis, we are unable to assess whether or not it would have achieved best value.

368. We appreciate that at the time the measure was applied the respondent could not know how the pandemic was going to affect its staff and budget. The respondent sought to adopt an approach which was consistent but

sympathetic. We also accept that given the impact the pandemic had on absence, it was self evident that there would be a potentially significant cost arising if those who may have to rely upon special leave could in addition use their accrued leave and TOIL at a later date. The respondent would require to bear the additional cost of cover for such periods.

369. Again though, to justify such an aim, the respondent required to show what the impact was, even on a rough basis, and provide a proper evidential basis to justify the assertions and generalisations that were made. While some reasonable worst case scenario planning had been undertaken we were given no evidence of this nor of the specific impact in financial terms of the issue in this case. We had no evidence other than the respondent's belief of the impact.

370. We considered the claimants' submission that the numbers involved looked relatively low – with around 150 shielding out of 7903 staff and that there was no evidence of a disproportionate effect on the operation. The respondent's position was that this could well be significant given the potential skills needed and the cost of seeing replacements. At the time the measure was implemented the respondent could not know just how many would be affected. They had to approach the matter cautiously. The position was not as simple as looking at the actual numbers, after the event, to assess if the measure was proportionate. At the time the measure was implemented the respondent did not know how many could be affected nor where. They reasonably believed that even small numbers, such as 150, could potentially be costly given the need for alternative cover with the right blend of skills in the right places.

371. We considered this carefully and determined that without specific evidence as to the cost or impact upon best value we are unable to say that it was proportionately achieved. It was possible that the numbers were small, as alleged by the claimant, such that the impact on best value would be minimal and the measure disproportionate. It was equally possible that the data the respondent had, and projections and analysis, could show that the specific

impact, in terms of cost and numbers, could have a dramatic effect but there was no information at all to consider this issue. It was not possible to say whether or not the aim was proportionate on the evidence before us. We did not consider it appropriate to make assumptions given the seriousness of the issues facing us.

372. We must therefore make our decision based on the evidence presented to the Tribunal. We recognise that the circumstances facing the respondent were unprecedented and the respondent had to take action to protect its staff and its operation. Equally, this claim had been ongoing for a period of time and it was open to the respondent to make some effort to produce information as to the impact of the measure from information within the respondent's possession, which was information that could have been gathered in preparation for the Tribunal. The respondent obviously had information about its staff, those affected in terms of those disabled or with child caring responsibilities (or even those who were men and women) and what TOIL the individuals had and accrued leave. Even if the records kept were local and manual and not easy to retrieve it would have been possible to work out on a worst case basis the impact of maximum TOIL (given the policy placed a cap on TOIL that can be accrued) and maximum holiday accrual given the period of the leave year that had passed. No evidence was presented to show the impact of the measure and the general evidence presented was in our view in sufficient.

373. The respondent provided evidence of the aims but not of the actual impact of the measure on the operation specifically. Reliance was placed on broad generalisations and beliefs but with no information to allow those beliefs or generalisations to be tested, and to allow a qualitative and quantitative assessment to be undertaken, which is what we require to undertake.

374. The impact that was likely to result from the measure in question was likely to arise post pandemic when the accrued leave and TOIL would have been utilised by the individuals in question. The issue was not just about the impact of their absence during the pandemic but how the measure in question would

impact when it was engaged. Regrettably there was an absence of any information as to the impact of the accrued TOIL and leave being taken.

375. Having intensely analysed the measure we are satisfied that the treatment was not objectively justified from the evidence presented to the Tribunal.

376. In short, we critically evaluated the respondent's position from the facts. We are not satisfied the aims relied upon were proportionate having balanced the discriminatory effect against the aims both in terms of its qualitative and quantitative effects (and whether any lesser form of action could achieve the aim).We were satisfied in all the circumstances that had we required to consider justification, the legitimate aims had not been proportionately achieved by the respondent on the facts before us.

377. The disability discrimination claims are upheld. We consider remedy below.

Sex discrimination grouped claim – Indirect sex discrimination (section 19 Equality Act 2010)

378. For the purposes of this claim the claimants all rely on the protected characteristic of sex.

Issue 6: Did the respondent apply the following PCP: Requiring employees to take annual leave and TOIL before being granted special leave in the context of COVID19.

379. This was not disputed by the respondent.

Issue 7: If so, does that PCP apply to both the claimants and persons with whom they do not share their protected characteristic?

380. There was no doubt that the PCP applied to all staff, which included men and women.

Issue 8: If so, does that PCP place the claimants at a particular disadvantage when compared with persons with whom they do not share their protected characteristic?

381. The claimants rely on the following as particular disadvantages:

i. Having their accrued TOIL removed.

ii. Preventing the Claimants from exercising their accrued TOIL to balance work and family life commitments.

iii. Compelling them from using their annual leave at time(s) when they did not wish to do so.

Disadvantage in principle

385. The first issue to consider in relation to this claim is whether, in principle, the matters relied upon could amount to a particular disadvantage. That was disputed by the respondent as they said the entitlement to special leave was inherently advantageous which was essentially what the claimants were relying upon.. We must apply the statutory wording and consider whether there was a "disadvantage" to the 3 specific things the claimants rely upon, there being no additional or more onerous requirement that it be a "particular" disadvantage.

386. We require to consider whether or not there was a disadvantage from the facts we have found in relation to the specific treatment relied upon. We did not consider it fair simply to focus on the special leave policy since that was not per se what was relied upon but rather the 3 specific things that were said to have occurred. The claimants were not saying that paying them special leave was disadvantageous. They were saying that the conditions that required to be satisfied in order to obtain special leave were disadvantageous.

387. We considered the **Dobson** case carefully in considering this issue. At paragraph 53 it was noted that the threshold is not high and in that case the fact it was difficult to achieve something or additional arrangements had to be made could result in there being a disadvantage.

388. Wirth regard to the **first disadvantage** relied upon, there was no doubt in our view that having accrued TOIL removed was in principle a disadvantage. While the respondent's agent argued there was no explanation why having to

use TOIL created a disadvantage, the disadvantage arose because the claimants had to use it before being paid special leave (rather than having the benefit of both paid special leave and the ability to use TOIL at a later date). That is clearly, in principle, a disadvantage.

389. The **second disadvantage** relied upon was that the claimants were prevented from exercising accrued TOIL to balance work and family life commitments. There was no evidence before the Tribunal that this was the case. The only evidence in relation to this grouping of claimants before the Tribunal was from Ms McCrone but she did not require to use accrued TOIL at all (as she was able to use accrued leave). In the absence of any evidence that any employee was prevented from exercising accrued TOIL to balance work and family life commitments, the second disadvantage cannot be upheld in principle or on the facts. There was no evidence or basis to find that the claimants (or women in general) were put at this disadvantage.

390. The **third disadvantage** was compelling annual leave to be used when the claimants did not wish to do so. The only evidence before the Tribunal in this regard was from Ms McCrone whose position was that her ability to take accrued holidays had been curtailed since she was unable to take them at a time when she might otherwise have wanted. There was no evidence as to whether or not women in general would consider that to be a disadvantage since they may wish to use such holidays for the purposes of childcare (and not see it as a disadvantage). We regard it as self evident that employees would not want to take their accrued leave if it were possible to have paid special leave instead (retaining accrued leave for a later date).

391. The respondent's agent argued that there was no evidence that claimants were compelled to take leave when they did not wish to do so but we did not consider that to fairly reflect the position. All employees were required to take accrued leave before paid special leave was given. If the option was to have paid special leave and accrued holidays as opposed to having to take holidays first, it would be obvious that staff would wish the former in preference to the latter and the latter must therefore amount to a disadvantage.

392. We therefore focus our reasoning in respect of the disadvantage that could in principle arise.

Group disadvantage on the facts

393. We then required to consider whether women in general were placed at those particular disadvantages, namely having accrued TOIL removed and compelling them to take accrued leave when they did not wish to do so.

394. There was no evidence led with regard to this issue but we considered whether, as with **Dobson**, it was possible to infer the disadvantage from the evidence we did hear (namely from Ms McCrone) or indeed whether it is possible to infer it as a matter of logic. We took great care in considering the position from the information before us in light of the legal position set out above. We decided that we could not find that women generally were put at a particular disadvantage compared to men from the information before us.

395. The claimants' agent argued that it was a matter of logic. He argued that women were more likely to have child caring responsibilities (which was not in dispute). Thus, he reasoned, when the pandemic hit and child caring responsibilities became more tricky (with nursery closures and other carers being unable to undertake their duties) "female employees were more likely to have exhausted TOIL and accrued leave then male employees" and thereby required to rely upon paid special leave.

396. We do not consider that, fairly, to be the case. As was found in the grievance appeal outcome there was no evidence that female employees had been more likely to accrue TOIL than male employees around this time and both male and female employees had accrued similar TOIL balances. That suggested that men had used TOIL as much as women and there was no basis to find, without evidence, that women used TOIL more than men. It was entirely possible that TOIL was used by men for child care or other purposes and there was no basis to infer that women would rely upon it more than men from the material before us.

397. Just because women ordinarily carry greater child care responsibilities does not necessarily mean that more women than men would require to rely upon the special leave provisions when childcare breaks down since the special leave provisions were relied upon not just by those with childcare responsibilities.

398. Those who used the special leave policy were not just women. For example, as seen above, those who were disabled or caring for a disabled person, did require to utilise the special leave policy. The majority of the claimants in that claim were male but there was no data showing that men or women were more likely to use the policy for those reasons, but we cannot say, without evidence, that it is axiomatic (and not requiring evidence) that women more than men suffered the disadvantage relied upon in this claim.

399. We considered that it was possible that the position set out by the claimants' agent was the case but we considered that it was equally possible the impact of the measure affected men just as much as women, given the measure was relied upon not just by those with child care responsibilities but for a whole host of other reasons (ie not just child care which was borne more by women than by men).

400. It was also relevant to bear in mind that the impact occurred during a pandemic. It was entirely possible that during the pandemic the partner of the main carer could well have been available to take responsibility for childcaring (which could potentially have resulted in more men than women or perhaps the same numbers of men as women being able to deal with childcare). We can make no finding on that but it presents another example as to why we considered it would be unsafe to assume, without any evidence, that the measure in question necessarily led to women more than men being subject to the disadvantage relied upon.

401. We considered that there needed to be an evidential basis, given the specific circumstances of this case, notably the impact of the pandemic and how it affected women and men in the workplace. The conclusion we reached in this case was due to the specific circumstances prevailing at the time it was not

possible to make the leap from women generally having more child care responsibilities than men to finding that women more than men would require to rely on the special leave policy or use TOIL or accrued leave in the sense relied upon.

402. We did not consider that we could infer the PCP created the particular disadvantages by women relied upon in this case.

403. We did not consider that the PCP in this case was more likely to result in group disadvantage in the sense set out in **Dobson**. We did not consider it inherently more likely to produce a detrimental effect that more women than men would be disproportionally affected.

404. We uphold the respondent's agent's submissions in this regard. Women more than men are likely to have child care responsibilities but that does not mean that women more than men are likely to require to have to rely upon the special leave policy during the pandemic (such as to need to utilise their accrued leave and TOIL before being paid special leave). In the absence of any evidence allowing us to make that finding, we are unable to uphold the claim for that reason.

405. On that basis the indirect sex discrimination claims are ill founded.

Issue 9: If so, were the claimants placed (or would be placed) at that disadvantage?

406. If we were wrong in the foregoing, we considered whether or not individual disadvantage had been established.

407. While the respondent argued that there was no evidence before the Tribunal to make specific findings, aside from the position set out by Ms McCrone, we considered that it was self evident that for those claimants whose TOIL was removed and for those claimants whose accrued annual leave was used, the particular disadvantage had been established.

408. While there was no specific explanation or evidence as to why taking TOIL or using accrued leave at the time required was disadvantageous from each

individual claimant, the point was that these claimants wanted to have their paid special leave first and thereafter enjoy their TOIL and accrued leave. That was the whole point of their grievance and these proceedings. It was accepted by the respondent that each of the claimants in this group had their TOIL or accrued leave exhausted and by definition were disadvantaged in the sense relied upon.

409. We considered that the need to use TOIL was, generally, a precondition for paid special leave but that did not mean the individuals were not at a disadvantage by being required to take TOIL and accrued leave when the respondent wished (irrespective of the wishes of the claimants) given how disadvantage has been interpreted.

410. Preventing claimants from exercising TOIL when they wished was, it was argued, not a disadvantage given the purpose of TOIL was, in part, for child care. It was argued that requiring staff to use TOIL for childcare (when they needed child care) prior to paying special leave was not disadvantageous. The disadvantage arose in the timing of the leave. The special leave policy was not created to deal with the situation facing the respondent who required to adjust the policy to the particular circumstances. There was no unfettered right to take TOIL when an employee wishes and the respondent had the right to determine when TOIL would be taken but insisting TOIL and annual leave be used before paying special leave created a disadvantage by removing the flexibility.

411. Compelling annual leave to be used when staff did not wish to use annual leave was disadvantageous since all staff required to use holidays proportionately during the year and could choose when to do so. The staff affected in this group had no option when to take their leave (or TOIL).

412. We found that there was disadvantage as a result of having to take accrued annual leave and TOIL before paid special leave was paid.

Issue 10: If so, can the respondent justify the PCP as a proportionate means of achieving a legitimate aim?

413. The respondent relies on the following as legitimate aims:

i. Assisting employees to meet their childcare commitments while maintaining full pay.

ii. Following a fair and consistent approach for all employees in dealing with issues arising from the pandemic.

iii. Maintaining operational capacity and service delivery in terms of its statutory duties.

iv. Complying with its duty of best value, including to reduce the costs associated with arrangements put in place as a publicly funded organisation.

415. We did not consider the first aim relied upon here to be rationally connected to the measure in question. Assisting employees to meet childcare commitments while maintaining full pay did not require the respondent to insist upon exhaustion of accrued TOIL/holidays. On that basis the first aim fails.

416. We found that for the reasons set out above with regard to the section 15 claim, the second, third and fourth aims relied upon here were not shown on the evidence before us to be proportionate in all the circumstances.

417. We considered the evidence presented, as set out by the respondent in her submissions, but this evidence did not assist us greatly in assessing the impact of the measure and allow us to carry out the intense analysis we required to undertake to assess whether or not the measure was proportionate.

418. The policy with regard to special leave set out the position in relation to childcare (such as under the heading “time off for dependants”) where it “encouraged” employees to make full use of TOIL in the first instance and then request a reasonable amount of time off. In addition the policy specifically recognised under “policy principles” the need to avoid discrimination arising. In other words there was a residual discretion, bearing in mind the need to protect the service and maintain operations. We also took into account that

the policy was extended since leave for which payment was made exceeded the leave that would ordinarily be given in these cases. We placed the provisions of the policy and how it was applied in this case within the balance we undertook.

419. We considered the evidence that was presented to the Tribunal and the respondent's submissions but we considered that the aim was not achieved in a proportionate way. The evidence presented to us did not assist us greatly in analysing the relevant impacts and assessing proportionality.

420. In short, we critically evaluated the respondent's position from the facts. We were not satisfied from the evidence presented to us in all the circumstances that, had we required to consider justification, the legitimate aims had been proportionately achieved by the respondent on the facts had we been required to consider this matter.

Issue 11: Remedy

421. We considered this carefully on the basis of the evidence presented to the Tribunal. We clarified with both agents that the hearing that remedy was a matter we were determining. Remedy had been included in the list of issues and the claimants' agent indicated that he was prepared to deal with remedy in his submissions (rather than adjourning to a different hearing to deal with remedy). We required to consider remedy on the basis of the evidence that had been led.

422. The claimants' agent accepted that there was no material before the Tribunal which dealt with the financial position in relation to each claimant. We had no wage information or financial information that would allow us to calculate the value of the time, for example, that the claimants had to use, or what a day's holiday would amount to.

423. We considered firstly the position in relation to Mr Cowie who gave evidence. He was the only claimant within the disability discrimination group of claimants to give evidence. He was clearly upset with the loss of flexibility arising as a consequence of the pandemic and in particular the Government requirement

upon him to shield which was upsetting for him as he was an active person but that was not something arising from the discriminatory treatment. With regard to the discriminatory treatment relied upon, however, he said it was "not very nice" to have to take his TOIL first. We analysed all the evidence we heard carefully in considering what impact the discriminatory treatment had upon Mr Cowie and in the context of his evidence generally. We took great care in examining the evidence we heard in this regard and took into account what he said and the full factual matrix at the time.

424. We found that there was no evidence that Mr Cowie was upset as a result of the treatment (which we found to be discriminatory). He believed it was "not very nice" but that was not in our view evidence that supported an award of compensation for injury to feelings. "Not very nice" for example is different from "not nice". It is an objective assessment of the requirement to take TOIL and then get paid special leave compared to getting both in turn. We recognised this was an important point and took time to consider the evidence and authorities in this area carefully. The purpose of injury to feelings is to compensate loss arising from the treatment found to amount to unlawful discrimination. Having considered the evidence before us there was no evidence of such a loss on the facts. We did not consider it appropriate from the evidence before us to make any award in respect of injury to feelings. It was not just to do so. We upheld the respondent's submissions in that regard. From the evidence we heard we did not consider it just to award a sum in respect of injury to feelings.

425. From the evidence before us the upset Mr Cowie felt was not attributable to the unlawful act of discrimination (in the sense explained by the Employment Appeal Tribunal in **Taylor v XLN Telecom Ltd** 2010 IRLR 499*).* Mr Cowie was upset because of the consequences of the pandemic (not the treatment relied upon as discrimination) and finding something to be "not very nice" was more akin to having a sense of (justified) grievance than suffering injury to feelings (see **Moyhing v Barts and London NHS Trust** 2006 IRLR 860*).* In any event having heard the evidence we did not consider it just to make an award for injury to feelings in this case.

426. We took account of the fact that injury to feelings awards are compensatory and should be just to both parties – compensating the claimant without punishing the respondent. We understood that awards should not be too low to diminish respect for the discrimination provisions and the need for public respect for the level of awards. Such awards require to be based upon evidence of injury to feelings in relation to unlawful discrimination. We considered all the evidence before us and did not find there to be any injury to feelings in the sense required by the authorities in this area from the facts, that would make it just to make any financial award.

427. In relation to the remaining claimants, we considered whether, as the claimants' agent submitted, it was possible to identify a suitable award for injury to feelings from the material provided to the Tribunal, without hearing any evidence from those claimants. Having considered matters we decided that it was not appropriate for us to do so. We heard no evidence from these claimants and are unable to assess what, if any, injury to their feelings arose as a result of the discrimination we have found. The award should be compensatory in nature and is not intended to be punitive. It reflects the specific loss or injury of the particular claimant arising from the act of discrimination. Without any evidence that would allow us to make any specific financial award we are unable to make such an award. Compensation requires to be based upon evidence and in the absence of evidence showing what was lost it would not be appropriate to make such awards. We accepted that in principle it could be possible to make an award if there was some evidence supporting an award but we were not satisfied that there was any evidence before us in relation to the remaining claimants of any injury to feelings that the remaining claimants had sustained that would make it just to make any such award.

428. We considered whether it was possible to award even a nominal sum given the discriminatory act was the removal of the flexibility but it was possible that, even although a collective grievance was raised, some or all (or none) of these claimants might not have been aggrieved at all as a result of the act in question such that it would not have been appropriate to make any award for

injury to feelings. Given the lack of any evidence from these claimants it was in our view not appropriate to make any awards. We were unable to say what, if any, impact the discrimination had upon each claimant without hearing evidence from them in some way. It was possible the issue that there was no injury to feelings by any of the claimants, if, for example, the issue had been raised by the union rather than individuals (and the individuals themselves were not concerned about the impact upon them personally). Equally it is possible each of the claimants were very upset and concerned at the treatment. It is not possible to assume or infer how any particular claimant felt in this case from all the evidence before us given it may be that there was no injury to the remaining claimants' feelings.

429. To award injury to feelings without hearing from the individual as to how the discrimination impacted on the individual would, we think from the evidence before us, be an error of law. We did not consider from the information before us that it was appropriate to award any award to those who had not given evidence to the Tribunal as there was no evidence of any injury to feelings on the part of those claimants.

430. We also considered whether it would be appropriate to fix another hearing to hear what loss, if any, arose as a result of the discriminatory acts but we concluded that it would not be in the interests of justice to do so. The parties were aware that the hearing was dealing with both liability and remedy and both parties were ably represented.

431. A lengthy hearing had already taken place and it was not in the interests of justice to fix another hearing particularly where the claimants were given the option of another hearing but indicated that they were content to proceed to deal with remedy at this hearing (and make submissions in relation to it). We took into account that both parties were legally represented. The interests of justice would not be served by fixing another hearing to address remedy.

432. With regard to remedy, therefore, we do not consider it just or equitable to award Mr Cowie nor any of the claimants any sums.

Summary

433. The claim in respect of the claimants who raised a claim under section 15 of the Equality Act 2010 is upheld and the Tribunal declares that there was unfavourable treatment (removal of choice and flexibility with regard to TOIL and accrued leave) because of something arising in consequence of a disability which was not objectively justified. From the evidence before the Tribunal we award no compensation to any of the claimants as it is not just and equitable to do so.

434. The claim of indirect sex discrimination is ill founded and is dismissed.

435. Finally, in this Judgment reference has been made to authorities not addressed by the parties in their submissions. The Tribunal considers it in accordance with the overriding objective to issue the Judgment notwithstanding that, and if either party considers that they have been unfairly prejudiced by that they may apply for a reconsideration of the Judgment under Rule 71, making submissions by reference to the authorities not addressed in their respective submissions.

436. Finally the Tribunal wishes to thank the parties for working together in pursuit of the overriding objective and their professionalism in this case.

Employment Judge: David Hoey
Date of Judgment: 13 August 2021
Entered in register: 01 September 2021
and copied to parties