



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Trevor Farley

**Respondent:** Sunderland City Council

**HELD at Newcastle CFT**

**ON: 17 to 21 October 2022**

**BEFORE:** Employment Judge Johnson  
**Members:** Ms C E Hunter  
Mr S Carter

## REPRESENTATION:

**Claimant:** In person  
**Respondent:** Mr R Stubbs of Counsel

# RESERVED JUDGMENT

1. The claimant's complaints of unlawful disability discrimination are not well-founded and are dismissed.
2. The claimant's complaints of unlawful age discrimination are not well-founded and are dismissed.

# REASONS

1. The claimant conducted these proceedings himself, gave evidence himself and cross-examined the respondent's witnesses. The claimant did not call any other witnesses to give evidence on his behalf. The respondent was represented by Mr Stubbs of counsel, who called to give evidence Ms Nicky Raine (bereavement services manager), Mr Phillip Scott (principal environmental health officer), Ms Marion Dixon (environmental health, trading standards and licensing manager) and Ms Lyn Barnes (senior HRD business

partner). The claimant and the four witnesses for the respondent had all prepared typed witness statements, which statements were taken “as read” by the Tribunal, subject to cross-examination and questions from the Employment Tribunal. There was an agreed bundle of documents comprising three A4 ring binders containing 2476 pages of documents. The bundle was marked R1. At the start of the hearing the claimant submitted a further bundle of documents (marked C1) containing a further 412 pages of documents, again in a single A4 ring binder.

2. By a claim form presented on 21 November 2020, the claimant brought a number of complaints against the respondent, including:-
  - (i) Unlawful disability discrimination;
  - (ii) Unlawful age discrimination;
  - (iii) Unlawful sex discrimination;
  - (iv) Failure to pay equal pay;
  - (v) Unlawful deduction from wages.

The respondent defended the claims.

3. There have been a number of case management hearings in the period of almost two years since the claim form was originally presented. The vast majority of those claims have either been dismissed or struck out. The remaining claims to be heard by this Tribunal at this hearing are of unlawful indirect age discrimination, unlawful indirect disability discrimination and failure to make reasonable adjustments. Those claims all relate to a relatively narrow period of time, between 6 April 2020 and 29 April 2020. The claims relate to 3 specific incidents which may be briefly summarised as follows:-
  - (1) The claimant working in the respondent’s crematorium on 6 and 7 April 2020.
  - (2) The claimant working in the respondent’s office on 7 and 8 April 2020.
  - (3) The claimant being required to undertake inspections of business premises on 29 April 2020.
4. At a case management hearing before Employment Judge Sweeney on 17 January 2022, the following specific claims were identified as the only remaining claims which were to be considered by the Employment Tribunal at this final hearing. The record of that hearing appears at page 155 in the bundle under the heading “The complaints to be considered at the final hearing”.

**Section 19 Equality Act 2010 – Indirect age discrimination alternatively, indirect disability discrimination.**

1. On 7 April 2020 by instructing the claimant to work from the office to perform his role the respondent applied a PCP which it applied or would apply to persons of a younger age group to the claimant (who was in the “over 60s” age group) but which put persons of the claimant’s age group at a particular disadvantage.

Alternatively

2. On 7 April 2020 by instructing the claimant to work from the office to perform his role the respondent applied a PCP which it applied to or would apply to persons who did not have the claimant’s disability

(respiratory condition which was subsequently diagnosed as asthma and bronchitis) but which put persons with the claimant's particular disability at a particular disadvantage.

- The particular disadvantage was the increased risk to the health of those of the claimant's age group and/or persons with the claimant's particular disability, should they contract Covid and the associated worry that goes with that.
  - The PCP put the claimant at that disadvantage.
  - The respondent cannot show the PCP to be a proportionate means of achieving a legitimate aim.
3. On 29 April 2020, by instructing the claimant to visit shops as part of his role, the respondent applied a PCP which it applied or would apply to persons of a younger age group to the claimant (who was in the over 60s age group) but which put persons of the claimant's age group at a particular disadvantage.

Alternatively.

4. On 29 April 2020, by instructing the claimant to visit shops as part of his role, the respondent applied a PCP which it applied or would apply to persons who did not have the claimant's disability (respiratory condition which was subsequently diagnosed as asthma and bronchitis) but which put persons with the claimant's particular disability at a particular disadvantage.
- The particular disadvantage is the increased risk to the health of those of the claimant's age group and/or persons with the claimant's particular disability, should they contract Covid and the associated worry that goes with that.
  - The PCP put the claimant at that disadvantage.
  - The respondent cannot show the PCP to be a proportionate means of achieving a legitimate aim.

### **Section 20-21 Equality Act 2010 – Failure to make reasonable adjustments**

- On 6 April 2020, but for the provision of an auxiliary aid (namely appropriate PPE – masks/visors/hand-sanitiser/signage/social distancing instructions/written instructions on safety) the claimant would be put at a substantial disadvantage in relation to employment (specifically in relation to the work he had agreed to do at the crematorium) in comparisons with persons who are not disabled (specifically those who are not disabled by respiratory issues).
- The substantial disadvantage was the increased risk to the claimant's health, should he contract Covid and the associated worry that goes with that risk, leaving the claimant with little option other than to refrain from working at the crematorium.
- The respondent failed to take such steps as were reasonable to provide the PPE and put social distancing measures in place and provide appropriate signage and written instructions for staff.

- On 7 April 2020 the instruction to the claimant to work at the office to perform his role would, but for the provision of an auxiliary aid (namely the appropriate PPE as above) social distancing measures and written instructions on safety to staff put him at a substantial disadvantage in relation to his employment in comparison with persons who are not disabled, (specifically those who are not disabled by a reason of respiratory issues).
- The substantial disadvantage to the claimant was the increased risk to the claimant's health by working in the office, should he contract Covid and the associated worry that goes with that risk.
- The respondent failed to take such steps as were reasonable to provide the PPE and put in place social distancing measures and provide written instructions on safety.
- On 7 April 2020 by instructing the claimant to work in the office to perform his role, the respondent applied a PCP which put the claimant at a substantial disadvantage in relation to his employment in comparison with persons who are not disabled (specifically those who were not disabled by reason of respiratory issues).
- The substantial disadvantage to the claimant was the increased risk to the claimant's health from working in the office, should he contract Covid and the associated worry that goes with that risk.
- The respondent failed to take such steps as were reasonable to take to avoid that disadvantage.
- It would have been a reasonable adjustment to remove the requirement to work in the office and to permit the claimant to continue to work from home.
- On 29 April 2020, the instruction to the claimant to visit Chester Road, Pallion Road, Hilton Road and Shiny Row to check on whether businesses were closed for trading, but for the provision of an auxiliary aid (namely provision of the above appropriate PPE, social distancing measures being in place and the provision of written instructions on safety) put him at a substantial disadvantage in relation to his employment in comparison with persons who were not disabled (specifically those who were not disabled by reason of respiratory issues).
- The respondent failed to take such steps as were reasonable to provide the PPE and to put in place social distancing measures and provide written instructions on safety.
- On 29 April 2020, by instructing the claimant to visit Chester Road, Pallion Road, Hilton Road and Shiny Row to check on whether businesses were closed for trading, the respondent applied a PCP which put the claimant at a substantial disadvantage in relation to his employment in comparison with persons who were not disabled (specifically those who were not disabled by reasons of respiratory issues).
- The substantial disadvantage to the claimant was the increased risk to the claimant's health, should he contract Covid and the associated worry

that goes with that risk, leaving the claimant with little option other than to take sick leave.

- The respondent failed to take such steps as were reasonable to take to avoid that disadvantage.
  - It would have been a reasonable adjustment to remove the requirement to visit shops and to permit the claimant to continue to work from home and/or instruct another employee or colleagues to carry out the work in precincts/shops.
5. At page 158 in the bundle, Employment Judge Sweeney listed the issues which this Tribunal would have to decide at the final hearing. The relevant extracts state as follows

“The issues to be decided at the final hearing”

The above claims are those which will be determined at the final hearing. The issues in those claims are now set out below. Mr Farley should note that one of those issues is whether his complaints have been presented in time and if not, whether it is just and equitable for time to be extended. When he comes to prepare his witness statement he should focus on what evidence is relevant to the claims and issues.

#### Disability

- Was the claimant a disabled person within the means of S.6 of the Equality Act 2010 at the date of the alleged discrimination. This involves considering:-
  - (i) did the claimant have a physical impairment of his lungs (respiratory condition subsequently diagnosed as asthma and/bronchitis)?
  - (ii) did the impairment have a substantial and long term adverse effect on the claimant’s ability to carry out normal day to day activities?

#### Section 19 Equality Act – indirect disability discrimination

- Did the respondent apply to the claimant a provision criterion or practice which it applied or would apply to persons who do not have the claimant’s disability?
- If so did the PCP put or would it put persons with the claimant’s disability at a particular disadvantage when compared with persons who do not have the claimant’s disability?
- Can the respondent show that the PCP was a proportionate means of achieving a legitimate aim?

#### Section 19 Equality Act – indirect age discrimination

- Did the respondent apply to the claimant a provision criterion or practice which it applied or would apply to persons in the younger age group to that of the claimant (over 60s)?
- If so did the PCP put or would it put persons in the claimant’s age group at a particular disadvantage when compared with persons in a younger age group?
- Did it put the claimant at that disadvantage?

- Can the respondent show that the PCP was a proportionate means of achieving a legitimate aim?

Sections 20-21 Equality Act – failure to make reasonable adjustments

- But for the provision of an auxiliary aid, would the claimant be put at a substantial disadvantage in relation to his employment in comparison with persons who do not have his disability?
- If so, what if any steps was it reasonable for the respondent to take to provide the auxiliary aid?
- Did the respondent fail to take such steps?
- Did a PCP of the respondents put the claimant at a substantial disadvantage in relation to his employment in comparison with persons who do not have his disability?
- If so what if any steps was it reasonable for the respondent to take to avoid the disadvantage?
- Did the respondent fail to take such steps?

TIME POINTS

- Were the claimant's complaints presented within the period in section 123(1)(a) Equality Act 2010?
- If not, were they brought within such period as the Employment Tribunal thinks just and equitable?

REMEDY

- What, if any, declaration or recommendations should be made in the event that any of the claimant's claims are upheld?
- What compensation should the claimant be awarded in respect of:
  - (i) financial losses;
  - (ii) injury to feelings

6. At the start of and throughout this 5-day Hearing, the claimant was reminded that those were the only claims and issues which would be considered by the Tribunal. Despite those frequent reminders, the claimant on numerous occasions during his own evidence, during his cross-examination of the respondent's witnesses and during his closing submissions, insisted upon referring to claims and issues which had either never been raised previously or which had been dismissed or struck out at earlier hearings. The Tribunal found the claimant to be an intelligent and articulate individual, who continues to perceive that he is the victim of a grave injustice at the hands of the respondent, his employer. That sense of grievance goes back to the respondent's implementation of a job evaluation scheme in 2015-2016, as a result of which the claimant's role was down-graded which resulted in a loss of his income, following a period of pay protection. That sense of injustice flavoured the claimant's pursuit of these remaining claims to the extent that it frequently became a diversion from the claims and issues which have been identified above. Acknowledging that the claimant is a litigant in person, faced with experienced solicitors and counsel, and in accordance with its obligations under

the Overriding Objective (to deal with cases fairly and justly), the Tribunal frequently attempted to direct the claimant towards these remaining claims and issues. Unfortunately, the Tribunal's directions in this regard were either overlooked or completely ignored by the claimant in the manner in which he conducted this hearing. In particular, the Tribunal repeatedly drew the claimant's attention to the requirement for him to prove facts from which the Employment Tribunal could infer that, in the absence of an explanation from them, the respondent had committed any acts of unlawful age or disability discrimination. Such facts would have to relate to the 3 incidents referred to above, namely the claimant's work in the crematorium, the claimant's work in the office or the claimant's work inspecting shops and business premises. Unfortunately, much of what was said by the claimant and many of the questions he asked of the respondent's witnesses related to matters wholly unconnected to those 3 incidents. As is set out below, the facts surrounding those three incidents (ie what exactly happened) were not really disputed. The difference between the claimant's version and that of the respondent's witnesses was, in essence, whether those facts constituted acts of unlawful age or disability discrimination. The Tribunal found the claimant to be a generally unpersuasive and unreliable witness, prone to exaggeration in respect of his own evidence and evasive when answering questions in cross-examination or from the Tribunal. The Tribunal's findings of fact are based upon the claimant's evidence and his answers to questions in cross-examination, the evidence of the respondent's witnesses and their answers to questions in cross-examination and the contents of the documents in the voluminous hearing bundle. Those findings of fact are made on the balance of probabilities.

### **Disability**

7. The claimant alleges that he suffers from a respiratory condition which constitutes a physical impairment which is long term and has a substantial adverse effect on his ability to carry out normal day to day activities. It is for the claimant to prove that his respiratory condition satisfies the definition of "disabled person" in section 6 of the Equality Act 2010.
8. The claimant's evidence in this regard is contained in his disability impact statement dated 6 April 2021 which is at pages 41-62 in the bundle. The claimant also relies upon his witness statement dated 30 September 2022, the medical notes and records which appear in the bundle and the occupational health referrals and reports which are also in the bundle.
9. The claimant states:-

*"I have had respiratory issues for approximately 50 years. I have had chronic daily coughs and sputum production that could be discoloured and large in volume on some days. I suffered from intermittent wheezes at times of physical exertion and in certain conditions. I feel a shortness of breath at times of physical exertion and have the need to take a rest. When in damp, cold, dusty conditions, I suffer a chill or catch a cold or flu, I find that these quickly seem to affect my chest and cause extra amounts of hard to shift sputum and give a general feeling of being unwell and of pain, tightness and irritation in the chest/respiratory system with fatigue. Prolonged coughing is a draining experience that causes me weakness and wanting only rest or sleep and this brings an effect of low mood. I have noticed becoming feverish and with hot sweats when ill. This is depressing for me when there is an occurrence as I cannot*

*function properly. I have lost count of the number of times that I have had assessments at various medical venues. Bronchitis/allergic association has been mentioned to me many times since my teens by medical practitioners, but my diagnosis for asthma was given to me on 9 November 2020. The respiratory episode I experienced over late 2019 and into early 2020 was especially worrying and debilitating. I was fighting to catch every breath, my breathing was very laboured with large production of chest mucus. My own belief is that age is a contributory factor with my illness with a natural decline in lung function occurring as stated to me by clinicians. As with previous infections I was much weakened by my January 2020 respiratory illness and felt that I was still weak and vulnerable upon my return to work on 23 February 2020 and I had lost weight and body tone. Walking upstairs or prolonged walking leaves me breathless as does prolonged physical activity which always seems to make my chest more “productive” of mucus and also leaves me breathing heavily. I avoid shopping when shops are busy and at the height of the pandemic I went to a local convenient store that opened at 6am for milk and basics. Mornings were always times of excessive mucus build up and it remains this way. A need to clear my chest or nose could happen suddenly during the day and this was often very inconvenient during a telephone call or in conversation. Any leisure activity could be interrupted by a symptom – as described at any time without warning. I now avoid public transport and places of large person circulation. Driving was problematic when coughing or requiring a tissue quickly. Properties in disrepair and older properties often associated with tenant/private rent sector are often damp and mould affected and I regularly and quickly feel the effects upon me. I rarely feel like going out, driving, socialising or walking. Colder damper weather seasons are generally the worse for me and I always take the precaution of layering warm clothing, shoes and wear a warm hat. I believe my daily dedication to cardio fitness, breathing exercising including box breathing, healthy living, good dietary habits and positive proactive and reactive mental attitude has greatly helped over time. I understand the benefits of fresh air, the outdoors and walk daily where and whenever possible. I will not give in to any respiratory/physical condition but understand that I have to adjust to them and the constraints that are imposed upon me in daily living and in going to work. I practice calm. “*

10. In his witness statement at paragraph 6 “protected characteristic,” the claimant refers to “Age 65 (relevant to Covid) and disabilities of asthma/bronchitis (especially relevant to Covid). My respiratory medication was changed on 8 March 2022 as the clinician diagnosed a COPD (Chronic Obstructive Pulmonary Disease). Pulmonary embolisms were discovered in both lungs in 2022 following extensive two day health intervention.”
11. The claimant’s description of his symptoms and their impact is not consistent with, or supported, by the medical evidence within the bundle. There has been no formal diagnosis of asthma, other than a note in his records that doctors suspected that he may have asthma. That diagnosis was in November 2020, which is after the dates when the alleged acts of discrimination took place. In March 2020, shortly before the alleged acts of discrimination are said to have taken place, the claimant’s GP recorded that the claimant had undergone spirometry tests which were normal and that other tests relating to the



claimant's lung function did not reveal any underlying condition. From 2015 to 2020 there are references to "chest infection", "flu like illness" and "chronic cough". Those conditions were treated with antibiotics and led to the claimant's recovery.

12. There is an occupational health report dated 29 May 2020 at page 913 in the bundle. The OH doctor records that the claimant told him he was "under investigation of respiratory systems and work related stress". It goes on to record how the claimant advised him that he had "longstanding respiratory symptoms since his 20s for which he has undergone multiple tests and investigations in the past. He reports that he continually experiences symptoms like wheezing, sniffles, sneezing and catarrh. He reports that the symptoms are present. He reports that the symptoms are present on a daily basis, the severity may vary. He advised me that he had flu like symptoms at the end of December 2019 which affected his health and respiratory system. I understand that his GP treated this with three courses of antibiotics. He was also given an inhaler which he continued to use on an as needed basis. He continues to report ongoing symptoms of varying severity which he self manages. He advised me that he continued to have symptoms while undergoing his normal work duties, however these have not affected his normal working on a day to day basis as such until this pandemic or unless he became unwell as in December."
13. It is accepted that the claimant was unwell in December 2019/January 2020, as evidenced by his fit notes from his GP which indicated that he had a "flu like illness". That again was treated with antibiotics and the claimant had recovered by March 2020 so that he could return to work. By January 2020 the claimant had returned to fitness work in the gymnasium.
14. In his claim form presented on 21 December 2020, the claimant has ticked the box at section 8.1 to say that he was discriminated against on the grounds of age, and the box to indicate that he was discriminated against on the grounds of sex, but has not ticked the box to indicate he was discriminated on the grounds of disability. In answer to the question at section 12.1, "do you have a disability", the claimant has ticked the box marked "no". Nowhere in the particulars attached to the claim form is there any mention whatsoever of unlawful disability discrimination of any kind.
15. In a further document dated 16 February 2021, which was submitted by the claimant to the Employment Tribunal prior to the first case management hearing on 23 February 2021, the claimant for the first time indicated an intention to pursue a complaint of unlawful disability discrimination. At paragraph 10 (page 32 in the bundle) the claimant states that "management failed to make reasonable adjustments that led to my sickness and also in making a return to work". At page 33 in the bundle, the claimant lists those "reasonable adjustments management/the employer may have provided/could have included". It was on the basis of those particulars that Employment Judge Martin agreed that there was a claim for unlawful disability discrimination, when she conducted the first preliminary hearing on 23 February 2021.
16. In terms of his complaints of unlawful age discrimination, the claimant puts himself in the age group of "over 60s" and seeks to compare himself with persons in the age group of below 60 years of age.

17. At the time of the alleged acts of discrimination, the claimant was employed by the respondent as a Technical Officer. The claimant's duties included dealing with service requests from members of the public who live in rented accommodation. Those service requests are investigated and action taken on them on an informal or formal basis, to ensure that the accommodation is safe to live within, free from significant hazards and compliant with mandatory safety requirements. The claimant's duties also included inspections of empty properties and from time to time dealing with other organisations within the council such as refuse, pest control and drainage services. The claimant principally dealt with service requests concerning disrepair within privately rented properties, dealing with empty properties which are open to access, refuse accumulation and referrals from the Housing Option Team in relation to property inspection. Throughout the relevant period of time, the claimant's line manager was Mr Phillip Scott, principal environmental health officer. Mr Scott's unchallenged evidence to the Tribunal was that, during the period when the claimant reported to him, the claimant had various periods of sickness absence. Those were from 11 November 2019 to 22 November 2019 due to a back related problem; 6 January 2020 to 22 January 2020 due to a chest infection and thereafter continuously from 29 April 2020 up to the date of this hearing. Marion Dixon, the respondent's environmental health, trading standards and licensing manager, also confirmed that she was aware that the claimant had been absent from work in November 2019 when he had "tweaked his back whilst on holiday" and in January 2020 when he suffered a chest infection which "responded well to antibiotics". Neither of those absences exceeded 20 working days and thus did not trigger the council's absence management procedure.
18. By March 2020, the impact of the Coronavirus meant that severe restrictions were imposed by central government upon the way most workers in the country performed their duties. By 12 March 2020 central government advised that anyone with a continuous cough or fever should self-isolate for 7 days. By 16 March the government advised everyone in the UK against non-essential travel and contact with others and that they should work from home if possible and avoid visiting social venues such as pubs, clubs or theatres. On 18 March 2020 central government announced that all schools in the country would close from the afternoon of Friday 20 March, except for those looking after the children of keyworkers and vulnerable children. On 20 March 2020 central government announced that all cafes, pubs and restaurants were to close forthwith and for the first time the government introduced what became known as the "furlough scheme". Local government was charged with carrying out checks to ensure that such closures were adhered to for public safety. However, local government was not included in the furlough scheme, as those employees were considered to be crucial to the fight against the virus. In effect, local government workers became "essential workers" and were expected to continue performing their duties in so far as they could be performed within the Coronavirus restrictions. On 21 March 2020 it was announced that people at the highest risk of complications from the virus would need to shield themselves from society. Those clinically vulnerably people included those with severe respiratory conditions including cystic fibrosis, severe asthma and severe COPD. On 23 March 2020 central government announced that the public must stay at home except for certain very limited purposes such as shopping for essential items, one form of outdoor exercise each day and to travel to and from

work where that was “absolutely necessary” and the work in question could not be done from home.

19. On 23 March 2020 the team in which the claimant worked was informed that all staff were to avoid any face to face contact, unless the visit was absolutely necessary and that staff should refer to their manager for specific advice about relevant health and safety matters. The email from Marion Dixon notifying all members of the team (including the claimant) of these matters appears at page 776 in the bundle. Having received that email, the claimant did not raise any concerns with Miss Dixon or anybody else, nor did he identify himself as vulnerable for any reason.
20. The claimant returned to work from a period of annual leave on 30 March 2020. On 2 April, Marion Dixon asked the principal officer to contact the officers in their teams to see if any were willing to volunteer to work at the Crematorium. Mr Scott spoke to the claimant, who did volunteer to work at the crematorium. The claimant raised no issues about his health or the provision of protective equipment, but did request an assurance that his existing contractual terms and conditions would continue to be met and that his existing role would remain for him to return to. That written assurance was given to the claimant by Mr Scott in an email dated 3 April which appears at page 791 in the bundle. The relevant extract on the letter states as follows:-

*“As we discussed, the role will start with training on Monday is to operate the music which is played during a service at the crematorium. Whilst I have not been given any specific of operational hours, I understand from looking on the council website that the chapel for services at the crematorium operates between the hours of 9am to 5pm Monday to Thursday and 9am to 4.30pm on a Friday. In respect of your terms and conditions, they would remain the same and your position at the crematorium would be reviewed on a regular basis in order to give resilience to the service and as the national emergency unfolds. After the period of national emergency linked to the Covid-19 pandemic I would expect you to return to your role within my team. I hope this gives you the reassurances that you are looking for and I am extremely grateful that you have volunteered to help out in this time of emergency.”*

21. The claimant worked at the crematorium on Monday 6 April 2020 for one day. The claimant’s evidence to the Tribunal was that he did not consider working at the crematorium to be safe, as “social distancing was not possible”. The claimant alleged that there was no personal protective equipment provided and that other employees and/or members of public had access to the room from which he operated the music. The claimant telephoned Mr Scott at 9.10am on Tuesday 7 April to say that he would not be returning to the crematorium. Mr Scott accepted the claimant’s position and advised him to report to the office that day.
22. The claimant alleges that he was “required” to work at the crematorium and that this requirement was part of a provision criterion or practice applied to him by the respondent. The Tribunal found that the claimant was not “required” to work at the crematorium. The claimant in fact volunteered to work at the crematorium, did so for one day and as soon as he stated that he was no longer willing to do so, he was allocated other duties. At that time, there was no regulatory requirement for personal protective equipment (particularly face masks) to be worn. The Tribunal accepted Mr. Scott’s evidence that the public

had no access to the music room and that there was no risk to the claimant in working there. The Tribunal did not accept that, but for the provision of any auxiliary aid, the claimant was placed at any substantial disadvantage even if he had been “required” to work at the crematorium. The claimant did not have to work at the crematorium. The claimant did not have to volunteer to work at the crematorium. There was no disadvantage whatsoever in the claimant working in the music room at the crematorium.

23. Having agreed that the claimant did not have to work in the crematorium, the claimant was asked by Mr Scott to report to his normal office, where other duties would be allocated to him. The claimant accepted in cross-examination that when he called to Mr Scott to say he was uneasy about working in the crematorium, Mr Scott “asked him whether he could come into the office to scan some documents”. The claimant again agreed to do so. The claimant did not have to agree to do so, nor did he have to report to the office. At that time, the claimant raised no objection whatsoever about going into the office. The following day, on 8 April 2020, central government informed members of the public that they “must stay at home” but, “can travel to and from work but should work from home if you can”. Upon receipt of that letter, the claimant made it clear to Mr Scott that he was unwilling to come into the office and the claimant did not work from the office after 7 April 2020. The Tribunal accepted Mr Scott’s evidence that he had asked the claimant to come to the office, because the claimant had made it known that he was having “IT issues with his computer” at home. The Tribunal accepted Mr Scott’s evidence that his was a request to the claimant, with which the claimant complied. As soon as the claimant objected to coming back into the office, he was not required to do so. The claimant worked in the office for less than one day on 7 April 2020. Again, there was then no requirement for face masks or other PPE. The Tribunal found that there was no disadvantage to the claimant in working in the office. He was not required to do so and was allowed to work from home as soon as he asked to do so.
24. The claimant continued to work from home from 8 April. It was common ground that the claimant was unable to undertake very much work at all from home, because of the difficulties he was having connecting to the respondent’s computer system. On 29 April, Mr Scott contacted the claimant by telephone and asked the claimant whether he was willing to undertake inspections of various areas of the city to see whether any business were open, in breach of the lockdown rules. Mr Scott explained that the claimant would do a walk-by or drive-by of various streets, but would not be required to enter into any premises. Mr Farley would then have to complete a form which would thereafter be scanned or photographed and sent electronically to another member of staff to log into the respondent’s system. The claimant asked Mr Scott what he should do if he was approached by anyone in the street and was told by Mr Scott that he should always maintain his social distance. Those instructions are clearly set out in an email dated 29 April from Mr Scott to the claimant, which appears at page 817 in the bundle. It clearly states, “You need to walk down the road looking at each business premises and complete the form.”
25. Upon receipt of that email, the claimant telephoned Mr Scott and informed him that he was not prepared to undertake that work as he was “looking after his own health and safety”. The claimant said he would obtain a fit note from his doctor, confirming that he should not be doing this work. The claimant then

sent an email (page 820), to which is attached the fit note at page 821 from the claimant's doctor which states, "*Under investigations for respiratory symptoms. Please avoid home visits to clients and observe social distancing rules.*" It is again common ground that the claimant did not undertake any of this work. The claimant did not do any walk-by or drive-by inspections. As soon as the claimant made it clear to Mr Scott that he was unwilling to do so, no further action was taken. There was no "requirement" for the claimant to undertake such work. He was never placed at any disadvantage whatsoever.

26. The claimant has been on continuous sick leave from 29 April 2020 up to the date of this hearing. On 4 June 2020 the claimant raised a formal grievance (page 919). That grievance states as follows:-

*"Please accept this as my complaint and grievance in lieu of a completed council grievance document. I am still on sickness absence and do not have a home printer or suitable home IT equipment to do otherwise. Please find two letters attached which forms part of this complaint in grievance. In addition I will forward you:-*

- (i) Completed occupational health referral form from P Scott.*
- (ii) The work request email from P Scott.*
- (iii) The emails from and to parties on separate individual emails.*

*Hopefully this will provide you all information necessary. It is essential to proceed with this grievance – you will find that I have once again tried at every occasion to discuss with management, however my many attempts appear of little value. Outcome required – to bring a satisfactory resolve to this and all outstanding matters for me and that they are dealt with in a fair and impartial manner."*

The two letters referred to in that grievance appear at pages 920 and 922 in the bundle. Nowhere in those letters is there any mention of work at the crematorium, the work in the office or the work inspecting premises. Furthermore, the only medical condition referred to by the claimant is one of "work related stress".

#### **The law.**

27. The claims brought by the claimant engaged the provisions of the **Equality Act 2010**. The relevant sections are as follows:

#### **4 The protected characteristics**

*The following characteristics are protected characteristics—*

- age;*
- disability;*
- gender reassignment;*
- marriage and civil partnership;*
- pregnancy and maternity;*
- race;*

- *religion or belief;*
- *sex;*
- *sexual orientation.*

## **5 Age**

*(1) In relation to the protected characteristic of age—*

*(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular age group;*

*(b) a reference to persons who share a protected characteristic is a reference to persons of the same age group.*

*(2) A reference to an age group is a reference to a group of persons defined by reference to age, whether by reference to a particular age or to a range of ages.*

## **6 Disability**

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

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

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

*(2) A reference to a disabled person is a reference to a person who has a disability.*

*(3) In relation to the protected characteristic of disability—*

*(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;*

*(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.*

*(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—*

*(a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and*

*(b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.*

*(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).*

(6) Schedule 1 (disability: supplementary provision) has effect.

### **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—

- age;
- disability;
- gender reassignment;
- marriage and civil partnership;
- race;
- religion or belief;
- sex;
- sexual orientation.

### **20 Duty to make adjustments**

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

(2) The duty comprises the following three requirements.

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

(4) *The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

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

(6) *Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.*

(7) *A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.*

(8) *A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.*

(9) *In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—*

*(a) removing the physical feature in question,*

*(b) altering it, or*

*(c) providing a reasonable means of avoiding it.*

(10) *A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—*

*(a) a feature arising from the design or construction of a building,*

*(b) a feature of an approach to, exit from or access to a building,*



*(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or*

*(d) any other physical element or quality.*

*(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.*

*(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.*

*(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.*

### **21 Failure to comply with duty**

*(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.*

*(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.*

*(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.*

### **Disability**

28. The Tribunal was not satisfied that the claimant at all material times suffered from a disability as defined in **S.6 of the Equality Act 2010**. The claimant relied upon an alleged physical impairment, namely a respiratory condition. The Tribunal accepted that the claimant from time to time had respiratory difficulties, but was not satisfied that this amounted to an impairment which was either long term or had a substantial adverse effect in his ability to carry out normal day to day activities. The claimant's description of his symptoms was wholly inconsistent with his medical records and the occupational health report. A "chesty cough" or "flu like symptoms" which were treated with antibiotics and from which the claimant recovered, could not amount to an impairment which was long term and had a substantial adverse effect in his ability to carry out normal day to day activities.

### **Knowledge of disability**

29. The Tribunal found that none of the managers who had any line management responsibility for the claimant had the necessary knowledge of the claimant's disability. None of them were in possession of the necessary facts which should have led them to conclude that the claimant may be suffering from a condition which amounted to a disability, or that it may be necessary to carry out any further investigation. All they had were the fit notes supplied on the occasions when the claimant was absent from work and the contents of the occupational health

reports. None of those could lead any reasonable manager to conclude that the claimant may be suffering from a condition which could amount to an impairment which was long term and had a substantial adverse effect on his ability to carry out normal day to day activities.

### **Indirect age/disability discrimination**

30. **S.19 of the Equality Act 2010** requires the claimant to establish that there had been applied to him a provision criterion or practice which is discriminatory in relation to his disability. The claimant must establish that he was put at a disadvantage because of the application of any such PCP. The claimant alleges that the following were applied to him as PCP`s:-

- (i) a requirement that he work in the crematorium;
- (ii) a requirement that he work from the office;
- (iii) a requirement that he undertake street inspection.

The Tribunal found that the respondent did not “require” the claimant to work in the crematorium, did not “require” the claimant to work in the office and did not “require” the claimant to undertake street inspections. The claimant was asked to consider whether he would work at a crematorium and volunteered to do so. He did so for one day and then withdrew his consent. No PCP was applied to him. The claimant was asked to report to the office to undertake scanning duties. The claimant had the right to refuse to do so. Indeed he did refuse to do so after working there for less than one day. No such PCP was applied to him. The claimant was not required to undertake street inspection duties. He was asked to do so, but declined. That refusal was accepted by the respondent. No PCP was applied to him. The phrase “provision, criterion or practice” is acknowledged as one which ought to be construed widely and to include formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. It is effectively anything relating to the essential functions of the disabled employee`s employment. (**Archibald v Fife Council – 2004 ICR 954**). The Tribunal found that in all 3 situations, there was no PCP applied to the claimant, such that the provisions of Ss 19 or 20-21 of the Equality Act would be engaged.

The claimant has not provided any statistical evidence to support his contention (had any such PCP been applied to him) that he would have been placed at any disadvantage because of his age. The claimant`s case to the Tribunal was simply that, “Those in age group of 60 and above are more vulnerable because they are more susceptible to suffer from the symptoms of Coronavirus”. In effect, the claimant was inviting the Employment Tribunal to take judicial notice of that contention. The Tribunal was not satisfied that it was appropriate in these circumstances to do so. The Tribunal could see no difference between the vulnerability of persons over 60 when compared to those who are under 60. The claimant had not shown that there was any disadvantage caused to persons over the age of 60.

For those reasons, the complaints of indirect discrimination on the grounds of either age or disability, contrary to **S.19 of the Equality Act 2010**, are not well-founded.

### **Failure to make reasonable adjustments**

31. **Ss. 20-21** require the claimant to establish a provision criterion or practice (PCP) which places him at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. For the reasons set out in the immediate paragraphs above, the Tribunal was not satisfied that the claimant had established that the respondent applied to him a PCP of any kind. The claimant was not required to work in the crematorium (he volunteered to do so and withdrew his consent after one day), he was not required to work in the office and he withdrew his consent to do so after less than one day. He was not

required to undertake any street inspection work and in fact did not do so. In the absence of any PCP which placed him at any disadvantage, the claims under sections 20-21 cannot and do not succeed.

32. The claimant has not established that, but for the provision of an auxiliary aid, he would have been put to any disadvantage. If any danger was due to the nature of the work requested of him, that danger was removed when he was not required to do the work. This claim is simply not made out.

### 33 Time Point

The claimant's last day at work was 29<sup>th</sup> April 2020. He entered ACAS Early Conciliation on 17<sup>th</sup> September 2020 and obtained the EC Certificate on 31<sup>st</sup> October 2020. He presented his claim form ET1 on 21<sup>st</sup> November 2020. **S.123 Equality Act 2010** requires such claims to be presented to the Tribunal within 3 months of the last alleged act of discrimination. That was 29<sup>th</sup> April 2020. All these claims are substantially out of time. The claimant has not provided, or attempted to provide, any explanation for that delay. He never alleged any disability discrimination claims at the outset. Only in February and October 2021 did the claimant advance claims of unlawful disability or age discrimination. The claimant has been a Trade Union representative for 2 different unions. He is well acquainted with the Employment Tribunal system. In the absence of any explanation for that delay, the Tribunal was not satisfied that it would be just and equitable to extend time for these claims to be considered. The Tribunal does not have jurisdiction to consider them.

34. For those reasons, all the claims of unlawful age and disability discrimination are dismissed.

Employment Judge Johnson

Date 29 December 2022

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